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IN THE

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

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A TABLE OF STATUTES CONSTRUED IS GIVEN IN THE INDEX.

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JUDGES

OF THE

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

FIRST CIRCUIT.

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Hon. LE BARON B. COLT, Circuit Judge.
Hon. WILLIAM L. PUTNAM, Circuit Judge.
Hon. NATHAN WEBB, District Judge, Maine.
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Hon. ADDISON BROWN, District Judge, S. D. New York.
Hon. CHARLES L. BENEDICT, District Judge, E. D. New York.[3]
Hon. ASA W. TENNEY, District Judge, E. D. New York.[4]
Hon. HOYT H. WHEELER, District Judge, Vermont.

THIRD CIRCUIT.

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Hon. GEORGE M. DALLAS, Circuit Judge.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.[5]
Hon. ANDREW KIRKPATRICK, District Judge, New Jersey.
Hon. WILLIAM BUTLER, District Judge, E. D. Pennsylvania.
Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania.

[1]Deceased November 21, 1897.
[2]Commissioned January 10, 1898.
[3]Resigned June 5, 1897, to take effect on appointment of successor.
[4]Confirmed July 8, 1897. Deceased December 10, 1897.
[5]Confirmed May 11, 1897.

FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice.
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Hon. CHARLES H. SIMONTON, Circuit Judge.
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Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.[2]
Hon. ROBERT P. DICK, District Judge, W. D. North Carolina.[3]
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.

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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.
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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.
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Hon. JOHN B. RECTOR, District Judge, W. D. Texas.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.

SIXTH CIRCUIT.

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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.
Hon. ELI S. HAMMOND, District Judge. W. D. Tennessee.

[1] Deceased February 19, 1897. [2] Confirmed May 5, 1897.
[3] Resigned January 12, 1898, to take effect on appointment of successor.

SEVENTH CIRCUIT.

Hon. HENRY B. BROWN, Circuit Justice.
Hon. WILLIAM A. WOODS, Circuit Judge.
Hon. JAMES G. JENKINS, Circuit Judge.
Hon. JOHN W. SHOWALTER, Circuit Judge.
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.

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Hon. HENRY C. CALDWELL, Circuit Judge.
Hon. WALTER H. SANBORN, Circuit Judge.
Hon. AMOS M. THAYER, Circuit Judge.
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Hon. ISAAC C. PARKER, District Judge, W. D. Arkansas.[1]
Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.[2]
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.[3]
Hon. WM. LOCHREN, District Judge, Minnesota.[4]
Hon. ELMER B. ADAMS, District Judge, E. D. Missouri.
Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri.
Hon. ELMER S. DUNDY, District Judge, Nebraska.[5]
Hon. WILLIAM D. McHUGH, District Judge, Nebraska.[6]
Hon. W. H. MUNGER, District Judge, Nebraska.
Hon. ALFRED D. THOMAS, District Judge, North Dakota.[7]
Hon. CHARLES F. AMIDON, District Judge, North Dakota.[8]
Hon. ALONZO J. EDGERTON, District Judge, South Dakota.[9]
Hon. JOHN E. CARLAND, District Judge, South Dakota.[10]
Hon. JOHN A. MARSHALL, District Judge, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.

[1] Deceased November 17, 1896.
[2] Commissioned December 15, 1896.
[3] Resigned May 16, 1896.
[4] Commissioned May 18, 1896. Confirmed same date.
[5] Deceased October 28, 1896.
[6] Resigned.
[7] Deceased August 8, 1896.
[8] Commissioned August 31, 1896. Confirmed February 18, 1897.
[9] Deceased August 9, 1896.
[10] Commissioned December 15, 1896.

NINTH CIRCUIT.

Hon. STEPHEN J. FIELD, Circuit Justice.[1]
Hon. JOSEPH McKENNA, Circuit Justice.[2]
Hon. JOSEPH McKENNA, Circuit Judge.[3]
Hon. WM. W. MORROW, Circuit Judge.[4]
Hon. WILLIAM B. GILBERT, Circuit Judge.
Hon. ERSKINE M. ROSS, Circuit Judge.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.[5]
Hon. OLIN WELLBORN, District Judge, S. D. California.
Hon. HIRAM KNOWLES, District Judge, Montana.
Hon. CORNELIUS H. HANFORD, District Judge, Washington.
Hon. THOMAS P. HAWLEY, District Judge, Nevada.
Hon. CHARLES B. BELLINGER, District Judge, Oregon.
Hon. JAMES H. BEATTY, District Judge, Idaho.
Hon. ARTHUR K. DELANEY, District Judge, Alaska.[6]
Hon. CHARLES S. JOHNSON, District Judge, Alaska.[7]

[1] Resigned December 1, 1897.
[2] Commissioned January 21, 1898.
[3] Resigned.
[4] Commissioned May 20, 1897.
[5] Commissioned June 8, 1897.
[6] Removed.
[7] Commissioned July 28, 1897.

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CASES

ARGUED AND DETERMINED

IN THE

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

PULLMAN'S PALACE-CAR CO. v. CENTRAL TRANSP. CO.

(Circuit Court of Appeals, Third Circuit. October 1, 1897.)

No. 37.

CONCURRENT APPEALS TO SUPREME COURT AND TO CIRCUIT COURT OF APPEALS.

Where an appeal is taken to the supreme court direct, on the ground that the case involves the construction or application of the constitution of the United States, and an appeal is also taken to the circuit court of appeals, the latter court will stay its hand until the appeal in the supreme court is disposed of, and will not in the meantime certify to the supreme court the question whether it has jurisdiction to hear and determine the cause.

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

This was a bill in equity by the Pullman's Palace-Car Company against the Central Transportation Company. In the circuit court a decree was rendered in favor of the latter company on a cross bill, and the cause referred to a master to ascertain the value of the property in question. 65 Fed. 158. On the coming in of the master's report, the circuit court approved his findings and conclusions of law, and decreed accordingly. 72 Fed. 211. From this decree the Pullman's Palace-Car Company took an appeal to the supreme court under the fifth section of the judiciary act of March 3, 1891, on the ground that the case involved the construction or application of the constitution of the United States; and it subsequently took an appeal to this court also, under the sixth section of that act. Heretofore a motion was made to dismiss this appeal, on the ground that it was void because taken while the appeal to the supreme court was still pending and undetermined, which motion was denied. 76 Fed. 401. The appeal to the supreme court is still undetermined, and a motion is now made that this court certify to the supreme court the question whether this court has jurisdiction to hear and determine the cause.

Joseph H. Choate and Edward S. Isham, for the motion.
Frank P. Prichard, opposed.

Before SHIRAS, Circuit Justice, and KIRKPATRICK, District Judge.

SHIRAS, Circuit Justice. This is a motion asking us to certify to the supreme court the question whether this court has jurisdiction to hear and determine the cause. Upon a former occasion we felt constrained to refrain from passing on the merits of the case while it was pending on an appeal to that court. 76 Fed. 401. Nor do we now perceive that any useful result would be promoted by granting the present motion. Until the supreme court shall have determined the questions there pending, on the appeal and on the motion to dismiss the appeal, this court thinks it would not be proper to deal with the case on its merits, and it may be that the action of the supreme court may relieve this court from any further duty in the case.

NORTH BLOOMFIELD GRAVEL MIN. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1897.)

CIRCUIT COURT OF APPEALS—JURISDICTION—ORIGINAL ORDERS.

A circuit court having ordered an injunction to issue, an appeal was taken, and thereupon it directed that the injunction should not issue until further order. Application was then made to the circuit court of appeals for an original order directing the court to vacate this latter order. *Held*, that the appellate court could give no such directions, as its jurisdiction is only appellate, and it can act upon the court below only by mandate.

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

C. W. Cross, for appellant.

Samuel Krugh, Asst. U. S. Atty.

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

GILBERT, Circuit Judge (orally). In the case of North Bloomfield Gravel Mining Company v. U. S., an application was made to this court to direct that the court below vacate an order that had been made suspending the operation of an order of injunction. The lower court, in reaching its conclusion, ordered an injunction to issue. 81 Fed. 243. Upon an appeal being taken, it directed that the injunction should not issue until the further order of the court. On appeal to this court an application is made for an original order. We think we have no jurisdiction to issue an order concerning any matter pending in the court below. That court made an order denying the injunction. An appeal might have been taken to this court from that order. On final hearing of this case the matter can be reviewed, but in the meantime we see no way by which the action of the circuit court can be directed from this court. We can issue no injunction from this court, and can only act on the lower court by a mandate. Our jurisdiction is appellate. The motion will be denied.

BAKER v. WALTER BAKER & CO., Limited.

(Circuit Court of Appeals, Fourth Circuit. November 10, 1897.)

No. 245.

APPEALABLE DECREES—REFUSAL TO DISSOLVE INJUNCTION.

When the circuit court, after final hearing, has made an interlocutory order for a perpetual injunction, it has concluded the matter so far as it is concerned; and, if the defendant fail to appeal within the 30 days allowed by the statute, his only remedy is by appeal after final decree. He cannot thereafter move the court to dissolve the injunction, and then take an appeal from its order denying his motion.

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

This was a suit in equity by Walter Baker & Co., Limited, against W. H. Baker, for infringement of a trade-mark. The circuit court, after a final hearing, granted a perpetual injunction. 77 Fed. 181. The present appeal is taken by the defendant from an order refusing to modify the decree in certain respects, and also refusing to dissolve the injunction.

W. L. Putnam and George G. Grattan, for the motion.

R. T. Barton, opposed.

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

SIMONTON, Circuit Judge. This case is here on appeal from the circuit court of the United States for the Western district of Virginia. The appellees now move to dismiss the appeal on the ground that this court is without jurisdiction to entertain it. The cause in which the appeal is taken was instituted for the infringement of a trade-mark. The pleadings having been completed, and all the evidence closed, the case came to a hearing on the merits; whereupon the court below, on the 11th of September, 1896, ordered an injunction to issue, perpetually restraining the defendant, his servants and agents, from using the trade-mark in controversy. In the decretal order the court reserves for the present the question of directing an account of profits or damages. No appeal was taken from this decree by the defendant. It appears from the record that there was also pending in the circuit court of the United States for the Southern district of New York another suit involving the same question brought by the same complainants, Walter Baker & Co., Limited, against James Elwood Sanders, who was the agent of the defendant in the Virginia case. This cause having been carried by an appeal to the circuit court of appeals of the Second circuit, that court, on the 29th of April, 1897, modified the decree of the court below, and entered a decree in effect the same as that entered in the Western district of Virginia, but differing somewhat in detail. Thereupon the defendant in the last-named case filed his petition in the circuit court of the United States for the Western district of Virginia, praying that the decree of the 11th of September, 1896, be modified and reheard in certain particulars, and for a decision of the question of an account of profits

or damages which had been reserved in said decree. This petition came on to be heard on the 20th of July, 1897, and at that hearing the defendant also entered a motion to dissolve the injunction granted on the 11th of September, 1896. The court, hearing the petition, refused the prayer thereof, and declined to modify the decree, except in certain particulars, to which the complainants had signified their consent. It also ordered a reference to a master to take an account of the profits or damages, and, passing upon the motion to dissolve the injunction, refused so to do. Thereupon the defendant obtained leave for an appeal upon the assignments of error in the record. Is this appeal within the jurisdiction of this court?

The appellant rests his case upon the act of congress of February 18, 1895 (28 Stat. 666), amending the seventh section of the act of March 3, 1891 (26 Stat. 826). This act is in these words:

"Where, upon a hearing in equity in a district court or a circuit court an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals: provided, that the appeal must be taken within thirty days from the entry of such order or decree," etc.

It will be seen from an inspection of this act that there are but three qualifications to the right to appeal therein provided for. The action of the court complained of must be by interlocutory order or decree. The case must be one in which an appeal from a final decree can be taken to the circuit court of appeals. The appeal must be taken within 30 days from the entry of the order or decree. There can be no doubt that the decree of September 11, 1896, granting the perpetual injunction, and reserving the question of a reference, is an interlocutory decree, under the statutes we have been construing. See Worden v. Searls, 121 U. S. 14, 7 Sup. Ct. 814; Richmond v. Atwood, 2 C. C. A. 596, 52 Fed. 17; Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., 43 U. S. App. 47, 19 C. C. A. 25, and 72 Fed. 545. So, also, the decree of the 20th of July, 1897, in which a reference for an accounting is ordered, is, for the same reason, an interlocutory decree.

The appellant insists that, his motion to dissolve the injunction having been refused by this interlocutory decree, he comes within the terms of the act of 1895. It is true that, contradistinguished from a final decree from which an appeal is usually allowed, this decree of July, 1897, is an interlocutory decree; that is to say, some questions in the cause remained undecided, the decision of which is necessary before the opinion of the appellate tribunal can be had on the case. But this does not conclude the question, nor does it mean that every question in the cause remains open and within the reach of controversy in the circuit court. In its decree of the 11th of September, 1896, the court below, after a full hearing on the merits, passed finally upon the question as to the perpetuity of the injunction, and ordered it to issue. Thenceforward its action in this respect was final, and ceased to be within its control, certainly after the expira-

tion of the term at which the order was entered. The only mode of reaching the decree upon this point in the court below was upon a motion for a rehearing. Coupling the motion to dissolve the injunction with the petition for a rehearing of the case was, in effect, a motion to rehear the decree upon the issuance of the perpetual injunction. The refusal of the court to reconsider and rescind its action in this regard was conclusive of the matter, and is not appealable. Boston & A. R. Co. v. Pullman's Palace-Car Co., 2 C. C. A. 172, 51 Fed. 305; Henley v. Hastings, 3 Cal. 342.

Where an injunction has been granted to continue in force until the further order of the court, the court retains its control of the matter; and, if a motion is made to dissolve the injunction, the refusal of that motion is appealable under the act of 1895. But when a court, after a final hearing, has made an order for the issuance of a perpetual injunction, it has concluded the matter so far as it is concerned. If the defendant is dissatisfied, he can carry the case to the circuit court of appeals, provided he makes his appeal within 30 days from the entry of the order. If he suffers this period to elapse, his only remedy is by an appeal after final decree. See Chicago Dollar Directory Co. v. Chicago Directory Co., 13 C. C. A. 8, 65 Fed. 463; Boston & A. R. Co. v. Pullman's Palace-Car Co., 2 C. C. A. 172, 51 Fed. 305. Were this not true, a party against whom a perpetual injunction has been issued after a full hearing on the merits can interrupt the references taken under the decree by a motion to dissolve, and bring the case up into this court at any time it suits his convenience. This would violate the spirit and purpose of the acts of 1891 and 1895, and is contrary to the proviso which requires an error in that respect to be corrected by an appeal within 30 days from the entry of the decree. We are of opinion that failing to perfect his appeal from the decree of the 11th of September, 1896, which ordered the issuance of a perpetual injunction after a final hearing on the merits, the defendant below has lost his right to appeal, in the present condition of the cause, to this court. The appeal is dismissed, with costs.

INDEPENDENT DISTRICT OF PELLA v. BEARD.

(Circuit Court, S. D. Iowa, C. D. September 17, 1897.)

FEDERAL AND STATE COURTS—RULES OF PROPERTY—INSOLVENT BANK—RIGHTS OF DEPOSITORS.

It has been established by the supreme court of Iowa that, in order to fasten a special trust upon funds held by the receiver of an insolvent bank in that state, it is not necessary to trace the deposit into any specific property in his hands, but that it is sufficient to show that the estate in his hands has been augmented by the trust fund in question. *Held*, that this constitutes such a rule of property as to be binding on the federal courts.

This was a suit by the Independent District of Pella against R. R. Beard, receiver of the First National Bank of Pella, to establish a preferred claim against the funds in the hands of the receiver.

Earle & Prouty and P. H. Bosquet, for plaintiff.
Cummins, Hewitt & Wright, for defendant.

WOOLSON, District Judge. The bill herein in substance avers that the treasurer of the plaintiff district from time to time deposited in the First National Bank of Pella funds belonging to plaintiff, and that on the 1st day of June, 1895, the said funds so deposited amounted to $4,676.25, said funds being taxes duly collected for plaintiff, and by said treasurer paid into said bank, which funds were credited on the books of said bank to said district treasurer; that on said June 1st said bank was declared insolvent, and taken possession of by the government; that defendant, Beard, was duly appointed receiver, and took possession of the assets of said bank, including the said funds so paid in by said district treasurer; that, under the laws of the state of Iowa, said district treasurer had no authority to so deposit said funds with said bank, as the officers of said bank at the time well knew, and said officers also knew said funds to be public funds, the property of plaintiff, at the time said funds were so received and paid into said bank; that it was the duty of said officers of said bank, under said recited facts, not to mix said funds with the general funds of said bank, but said bank, by its said officers, did unlawfully convert said funds to its own use, and did unlawfully increase its assets by mixing said funds therewith; that ever since said funds were so left with said bank by said district treasurer the amount thereof was in the possession of said bank up to the time said bank was so closed and taken possession of by the government; that at said closing there was on hand in said bank the sum of $8,000, which was composed in part of said $4,676.25, to wit, said funds so deposited by said district treasurer; that the whole of said cash came into the hands of the defendant receiver; that said funds, so deposited by said district treasurer, became and were, in the hands of said bank, a trust fund, and, as such, passed into the hands of said receiver; that said trust funds are the property of plaintiff, and never became the property of the said bank, and plaintiff has a preferential claim thereto, and is entitled to, and prays, decree establishing same, and ordering said receiver to pay same as such. The receiver, in his answer, substantially admits all the facts pleaded in the bill,—that is: The deposit by the treasurer of plaintiff of funds belonging to plaintiff. That the officers of said bank knew such funds to be public funds, belonging to plaintiff. That on June 1, 1895, and at the date when the receiver took possession, said bank was indebted to plaintiff in the said sum of $4,676.25, as balance due on deposit account. The alleged insolvency and closing of said bank on said June 1st, and the appointment of, and taking possession by, said receiver. But said receiver denies any unlawful conversion of said funds; denies said balance is a trust fund in his hands; denies said funds so deposited by said district treasurer were in said bank at its said closing, or that any part thereof came into his hands as receiver; avers the methods of depositing in said bank, by said treasurer, of plaintiff's funds, had, for many years prior to said June 1, 1895, been continuously the same, and the account of said funds had by said bank been entitled "Treasurer of Independent School District," and said funds had been so deposited generally, and not specially, and had been continuously mingled with the general funds of said bank, and checked therefrom by said treasurer as a general account. That all the funds

so paid in and deposited by said treasurer had, at time of said closing, been checked out, and the cash then on hand contained no part of the funds which had been so deposited by said treasurer.

The issues of fact herein are very few. The main contentions arise on the law applicable, and its application. The following facts appear, either in the agreed statement of facts, or the evidence supplementing the same: The First National Bank of Pella was duly organized and acting under the statutes providing for such banks, with its place of business at Pella. Said bank was insolvent for more than a year prior to June 1, 1895. On said June 1st said bank was closed, and possession thereof duly taken by the government. Defendant, Beard, was duly appointed receiver thereof, and took possession of its assets. On said June 1st, the cash assets of the bank were $8,729.93, which passed into said receiver's hands. The Independent District of Pella is a duly-organized school district, and, under the laws of the state of Iowa, competent to sue. For years prior to said June 1st, the treasurer of said district was accustomed to deposit in said bank the funds of said district, as the same came into his hands. Such deposits were not made as special deposits, but were paid into said bank as general deposits, and intermingled with the bank's general funds. The account of said deposits was kept in the books of said bank under the heading of "Treasurer of Independent School District." The treasurer from time to time checked against this account, as is the custom of depositors generally, and at times, by an arrangement between said treasurer and the bank officials, funds were paid from the bank on warrants of the district signed by the president and secretary, addressed to the district treasurer; these warrants, by such agreement, being regarded, when presented to the bank, as checks by the treasurer, and being accepted by him as vouchers for payment by the bank. No interest was paid on the account of said funds so deposited or remaining on hand. No request was ever made that any of such deposits be held as special deposits or funds. No resolution or action of the board of directors of plaintiff authorized or directed said deposits to be made by said treasurer. The officers of said bank knew, at the time said deposits were being made, that the same were the funds of plaintiff. Said deposits were not always made in money, but some portion—how much is not shown—was made in checks or drafts, which were received by said bank, and credited in the treasurer's said account as cash. During the entire period covered by said deposits by said district treasurer, and up to the closing of said bank, there was in said bank in cash more than the said sum of $4,676.25, and the daily balance of cash on hand in said bank, as shown by the cash register of the bank for each day, exceeded the balance so shown as due the district treasurer on that day. The balance, as shown by the books of the bank, owing by said bank on said June 1st, on the said account of "Treasurer of Independent School District," and when said receiver took charge, was $4,676.25, which sum is due from said bank to plaintiff. On May 11, 1895, the balance due from said bank on said account was $707.45. On May 13, 1895, a deposit was made by said treasurer of $4,340.30, which was carried on the books of the bank, and credited to him, in the said account

whose heading is given above. At the trial it was agreed by the parties that no part of this deposit of $4,340.30 was made in cash, but that the same was made by the deposit of a check or order of the county treasurer, whereby a charge of said sum was made to such county treasurer's account, wherein the bank was owing him, and a corresponding credit placed in the account of the district treasurer. Evidence was offered showing that the two deposits (May 6, 1895, $614.-40, and Feb. 14, 1895, $310.11) next preceding the said deposit of May 13th were not made in cash, but were also made by transfer of credits, through check, etc. The bank was open and doing business each week day from said May 13th up to its said closing, on June 1st. The treasurer drew against this account, viz.: on May 15th, $58.70; May 17tn, $51.50; May 18th, $37.70; May 20th, $8.50; and on June 1st, $215. The balance of cash assets on hand in the bank on said May 15th was $8,838.82. Between that day and the closing of the bank, the largest daily balance of cash assets in the bank was, on May 28th, $10,967.46, and the smallest daily balance June 1st, $8,729.93. On said May 13th, according to the daily cash register of the bank, there was deposited in said bank $8,297.43, which includes the treasurer's deposit of $4,340.43. Other transactions of that day are entered in said cash register, amounting to $977.05,—a total cash assets or receipts of $9,274.48. Said cash register shows on said May 13th, as paid out to depositors, $7,987.92, and other transactions charged as $800, making a total of, apparently, cash paid out on said May 13th of $8,787.92. The next day, May 14th, said cash register shows, received from depositors, $5,565.40, and from other sources, $1,920.36,—a total of $7,485.76; and, on same day, paid out to depositors, $3,066.20, and to others, $5,027.42,—a total paid out of $8,-093.62. From said May 13th to the following June 1st, inclusive, the largest total shown on the cash register as paid out to depositors is on May 13th, as above given, while the smallest amount as shown is on May 21st, where such amount is $468.50. The next smallest is May 28th, $1,065.90. The daily receipts from depositors shown during that entire period aggregate $41,580.18, or average daily receipts of $2,445.89. During the same period, the payments so shown to depositors aggregate $43,123.39, or average daily payments of $2,536.67. The cash receipts, as shown by said cash register, from other sources than depositors, aggregate, during said period, $32,895.18, being a daily average of $1,935.01; while the cash payments to others than depositors aggregate, as so shown, $30.569.51. being a daily average of $1,857.03. Taking the entire cash receipts for said period, as so shown, we have an aggregate of $74,475.36, or a daily average of $4,-380.90; while the entire cash payments so shown for such period aggregate $73,692.90,—a daily average of $4,334.88. What part of these apparently "cash" receipts and payments were actually made in cash the evidence does not disclose.

I have stated thus fully the facts as they appear in the evidence, for the purpose of enabling counsel, and at their request, to present their views fully thereon should the case be reviewed on appeal, as I doubt not it will be. On these facts, the question whose solution must determine the decree to be rendered is whether the balance

shown to be due the plaintiff is to be regarded as so traced into the cash in defendant's hands as a trust fund, as that plaintiff is entitled to have the same paid in preference to the general creditors of the bank. If, under the law to be applied thereto, the deposits made by the district treasurer are so traced into the cash assets received by defendant, as assets of the bank, as that plaintiff is taken out of the class of general creditors, and given a special and superior right or claim on such cash assets, decree must pass for plaintiff for the full balance due it from the bank; otherwise, the bill must be dismissed, and plaintiff remitted to share with the other general creditors.

This question is not easily decided. Counsel upon either side have referred the court to many cases sustaining the contention of counsel citing them. This conflict of decision is marked and irreconcilable. In many of the cases, the court delivering the decision has attempted to distinguish the case then under consideration from other cases wherein a contrary view of the law was held. Generally such attempts have not been satisfactory. Not only have the highest courts of the states arrayed themselves on one side or the other of the law as decisive of the cases before them, but the circuit courts of the United States are found with antagonistic views on the general proposition as to what is necessary to enable trust funds to be so successfully traced as that a preferential claim therefor can be maintained. In many of the cases, notably those to which counsel have referred as decided by the supreme court of the United States, the decision has turned, or been largely affected, by the existing relations of principal and agent, and by the fact that property in the draft, account, or the like, out of which the trust relation sprang, remained in the one claiming the trust funds, and never passed to the party against whom this claim was made. While the reasoning underlying such decisions is instructive, and may assist in determining what the law decisive of this suit is, as between conflicting decisions cited from different jurisdictions, they do not seem to settle the question here to be decided, since the facts on which these decisions passed differ so radically from those in the case at bar.

In Frelinghuysen v. Nugent (1888) 36 Fed. 229, 239, Justice Bradley, sitting in the circuit court of the district of New Jersey, had occasion to consider the general question with respect to the facts then before him. That case presented a complicated array of facts. The receiver of a national bank was seeking to follow into certain property (certain material and finished stock) moneys abstracted from the bank. In considering the matter, the learned justice says:

"Another difficulty in the complainant's case is the want of identity of the property claimed with the proceeds of the money abstracted from the bank. Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended on the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale; but if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the

party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried."

Passing to the application of these views to the facts before him, he says:

"The difficulty of sustaining the claim in the present case is that it does not appear that the goods claimed—that is to say, the stock on hand, finished and unfinished—were, either in whole or in part, the proceeds of any money unlawfully abstracted from the bank. On the contrary, the goods and stock on hand were purchased of the other creditors of Nugent & Co., almost entirely, if not wholly, on credit, and really stand in place of, and represent the debts of, the firm due and owing to said creditors. This is true with regard to all the raw stock on hand, and with regard to all the stock and materials from which the manufactured or partially manufactured goods were produced. If any moneys derived from the bank entered into the latter, they were those moneys which were regularly drawn by checks of the firm weekly for the payment of their hands. It seems impossible, therefore, to sustain any general charge or trust upon the goods or property of Nugent & Co. as that which has been set up and claimed by the complainant."

National Bank v. Insurance Co. (1881) 104 U. S. 54, is cited by counsel upon each side. The facts in that case distinguish it from the case at bar. There one Dillon, the general agent of an insurance company, opened an account as general agent with the bank, and his account was entitled as with him as general agent. While he from time to time deposited some of his private funds in this account, such deposits were of comparatively minor amounts. His current deposits included checks, etc., for premiums, which he indorsed as general agent. His checks on the account were signed as general agent. In closing his account, the bank charged against it an amount which substantially wiped out the credit then due him. This charge consisted of a private debt due the bank from Dillon. He was then owing the company, as its general agent, an amount equal to that wiped out by the bank. The insurance company sued the bank, claiming the deposit as general agent constituted a trust fund, against which the bank could not charge Dillon's private debt. The supreme court sustain this claim, distinguishing the right of the bank to pay out on Dillon's check (even though the funds thus obtained were used by him for his private business) from the right of the bank to set against the funds, of whose trust character the court found the bank had notice, a private debt due from Dillon to it. The argument of the court in reaching the decision must be considered as applied to the facts before it. Thus applied, the case fails to supply us with decisive authority for the case at bar.

Peters v. Bain (1890) 133 U. S. 670, 694, 10 Sup. Ct. 354, refers to National Bank v. Insurance Co., supra, as recognizing and applying the rule laid down by Justice Bradley in Frelinghuysen v. Nugent, supra; and, applying the same principle in that case, the court, through Chief Justice Fuller, finds the claim that trust funds then under consideration had been successfully traced to certain property was not sustained by the proof. That branch of the general question which must decide this case at bar is not stated or considered.

Bank v. Armstrong (1893) 148 U. S. 50, 13 Sup. Ct. 533, and Evansville Bank v. German-American Nat. Bank (1895) 155 U. S. 556, 15 Sup. Ct. 221, relate to matters of collection, with consideration of the

relations of principal and agent, and do not touch on the special question to be herein decided.

Turning to the other cases cited by counsel, we find no decision of the circuit court of appeals of this circuit on the point under consideration. While Justice Brewer (then circuit judge of this circuit) in Schuler v. Bank (1886) 27 Fed. 424, 427, refers to the principle involved, he does not amplify his views, but merely remarks:

"So, also, I think there is some room for the application of the principle that, where a fund can be traced, equity will follow it. I do not mean to say that there is the fullest room for the application of that principle."

And he then proceeds to trace, under the facts before him, the proceeds of a note, through checks, remittances, etc.

A careful reading of the cases decided by the circuit courts of appeal and the circuit courts in the different circuits emphasizes the suggestion heretofore made as to diversity of views and irreconcilable decisions with reference to the extent and particularity with which funds must be traced before equity will decree a preferential claim. So far as this tracing relates to the purchase of property, the federal and state courts appear to hold consistently to what has long been the established rule, and to require satisfactory proof that the trust funds went into the property, so that such property may equitably be regarded as standing in place of the trust funds. The divergence of opinion arises where money held in trust, or properly to be considered as trust funds, has been confused with other funds, mixed in a general mass of funds.

Counsel for the receiver has called the attention of the court to a large array of cases wherein is stated, with more or less directness, the principle which he claims must decide this case for defendant. Among these are the following from the state courts: McClure v. Commissioners (Colo. Sup.) 34 Pac. 763; Holden v. Piper (Colo. App.) 37 Pac. 34; Silk Co. v. Flanders (Wis.) 58 N. W. 383; Gianella v. Momsen (Wis.) 63 N. W. 1018; Burnham v. Barth (Wis.) 62 N. W. 96; Sherwood v. Bank (1892; Mich.) 53 N. W. 923; Sherwood v. Bank (1894; Mich.) 61 N. W. 352; Lebanon Trust & Safe-Deposit Bank's Assigned Estate, 166 Pa. St. 622, 31 Atl. 334; Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005; Slater v. Oriental Mills (R. I.) 27 Atl. 443; Shields v. Thomas (Miss.) 14 South. 85; Goldthwaite v. Ellison (Ala.) 12 South. 812. Counsel for receiver also cites from the federal courts the following: National Bank v. Insurance Co., 104 U. S. 54; Illinois Trust & Savings Bank v. First Nat. Bank (1883; Wallace, J.) 15 Fed. 858; Bank v. Armstrong (1888; Jackson, J.) 36 Fed. 59; Bank v. Dowd (1889; Seymour, J.) 38 Fed. 172; Bank v. Armstrong (1889; Jackson, J.) 39 Fed. 684, affirmed in 148 U. S. 50, 13 Sup. Ct. 533; Bank v. Austin (1891; Bruce, J.) 48 Fed. 25; Wasson v. Hawkins (1894; Baker, J.) 59 Fed. 233; Multnomah Co. v. Oregon Nat. Bank (1894; Bellinger, J.) 61 Fed. 912; Spokane Co. v. First Nat. Bank (1895) 16 C. C. A. 81, 68 Fed. 979, affirming decree below; City of Spokane v. First Nat. Bank (1895) 16 C. C. A. 85, 68 Fed. 982, reversing decree below; Association v. Clayton (1893) 6 C. C. A. 108, 56 Fed. 759, affirming decree below. Some of the de-

cisions cited sustain, in the strongest language, the position of counsel for receiver. It must be conceded that the proof as to the continued receipts and disbursements by the Pella bank during the period following the deposit by plaintiff's treasurer, on May 13th, and to the closing of the bank, is of great force as applied to the reasoning presented by counsel for receiver. In that period the aggregate receipts by the bank of cash assets are shown to have been $74,475.36, and disbursements, $73,692.90; while on said May 13th the cash assets of the bank, after receipt of said deposit by plaintiff's treasurer, were but $8,436.27. The presumption, indulged in by some of the cases cited for plaintiff, that in paying out money the officers of the bank did not pay out any trust funds, but, keeping those funds, paid out the other funds, takes on the hue of fiction, rather than presumption, under the proof that all the cash received on deposit was mingled into one general mass in the bank, and thus increased or lessened as deposits or disbursements compelled the moving of cash.

Among the cases cited by counsel for plaintiff are the following from the courts of different states: McLeod v. Evans, 66 Wis. 401, 28 N. W. 173 (but this appears to be overruled by Silk Co. v. Flanders [Wis.] 58 N. W. 383); Peak v. Ellicott, 30 Kan. 161, 1 Pac. 499; Bank v. King, 57 Pa. St. 202; Harrison v. Smith, 83 Mo. 210; Bank v. Weems, 69 Tex. 489, 6 S. W. 802; Stoller v. Coates, 88 Mo. 514; People v. City Bank of Rochester, 96 N. Y. 32; Yarnell v. Los Angeles, 87 Cal. 603, 25 Pac. 767; Shields v. Thomas (Miss.) 14 South. 84; Association v. Austin (Ala.) 13 South. 908; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; State v. Foster (Wyo.) 38 Pac. 926; Independent Dist. v. King, 80 Iowa, 498, 45 N. W. 908; District Tp. of Eureka v. Farmers' Bank of Fontanelle (Iowa) 55 N. W. 343. Also the following decisions by the federal bench: National Bank v. Insurance Co. (1881) 104 U. S. 54, 71; Frelinghuysen v. Nugent (1888) 36 Fed. 229, 241 (being portion extracted, supra); San Diego Co. v. California Nat. Bank (1892; Ross, J.) 52 Fed. 59; Knight v. Fisher (1893; Butler, J.) 58 Fed. 991 (decision affirmed in 9 C. C. A. 582, 61 Fed. 491; but the point now under consideration does not appear to have been discussed); Massey v. Fisher (1894; Butler, J.) 62 Fed. 958; Wasson v. Hawkins (1894; Baker, J.) 59 Fed. 233; Oil Co. v. Hawkins (1896) 20 C. C. A. 468, 74 Fed. 395, reversing decree below.

An examination of the cases cited readily shows their irreconcilable character. Counsel readily agree this far: That if the cash assets, with which were mingled the deposits (assuming them to be cash) made by plaintiff's treasurer, had been paid out or dissipated, and the funds entirely exhausted, that plaintiff could not recover. But plaintiff claims that, since there was continuously on hand, as cash assets, an amount exceeding such deposits, there is a sufficient tracing of such deposited funds to sustain, under the modern rules of equity, plaintiff's right to recover; while defendant, denying the existence of such rules to the extent thus asserted by plaintiff, insists that the transactions of the bank from day to day, after such deposits were made, refute the claim of plaintiff that there is any

such tracing into the receiver's hands, but, on the contrary, sustain defendant's claim that such daily transactions destroy whatever tracing might otherwise exist,—in other words, defendant's attitude apparently concedes that, had the bank closed on the day the deposit of May 13th was made, and the receiver then taken possession, such tracing might be sufficient; but defendant strenuously maintains that the daily transactions thereafter at the bank, and up to its closing, on June 1st, destroy such tracing. Defendant concedes, further, that if the rule announced by the supreme court of Iowa in Independent Dist. v. King, 80 Iowa, 498, 45 N. W. 908, and reaffirmed in District Tp. of Eureka v. Farmers' Bank of Fontanelle, 55 N. W. 343, is to control, decree herein must pass for plaintiff. In the latter case, the court summarize what was held in the former:

"In Independent Dist. v. King, 80 Iowa, 498, 45 N. W. 908, the identical money deposited was not shown to have been delivered to the assignee, and it was said that, if a trust for the amounts deposited were established, 'it must be on the ground that the deposits must be held to have increased the estate of the insolvents, and that the balance due is represented by an increase now in the hands of the assignee.' It was further held that, the money having been traced into the estate of the insolvents, impressed with the character of a trust fund, the burden was upon the assignee to show that it contributed nothing to the estate which he acquired by virtue of the assignment."

Proceeding to apply these principles to the Bank of Fontanelle Case, the court say:

"We do not think it is necessary to trace the deposit into any specific property in the hands of the assignee in order to establish a trust, but it should be shown, presumptively, at least, that the estate in his hands has been augmented by the trust fund."

If this rule is to be applied to the case at bar, decree must be for plaintiff.

Defendant contends that this court is not required to follow the decisions of the supreme court of Iowa as given in the cases above cited; in other words, that there is no statute law, no local custom or usage, and no rule of property therein involved, which is binding on this court in the present action. It is undoubtedly true that the United States courts sitting as courts of equity have a freedom of action in this respect which they do not possess as courts of common law, and that, as a general proposition, the equity jurisdiction of the federal courts cannot be limited or restrained by a state. Green v. Creighton, 23 How. 90; Payne v. Hook, 7 Wall. 430; Ridings v. Johnson, 128 U. S. 212, 9 Sup. Ct. 72; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75. But these decisions relate to the practice, the impairing of jurisdiction, rather than to the determination of the rights of parties after jurisdiction has been acquired.

In Brine v. Insurance Co., 96 U. S. 627, Mr. Justice Miller, in delivering the opinion of the court, considered, as applied to the facts of that case, substantially the views on this point as urged by counsel in case at bar. The main question therein involved was the extent to which the statutory right of redemption, as construed by the state court, was binding on the federal courts. It was contended that:

"Not only do the manner of conducting the sale under decree of foreclosure, and all the incidents of the sale, come within the rules of practice of this court, but that the effects of such sale on the rights acquired by the purchaser, and those of the mortgagor and his subsequent grantees, are also mere matters of practice, to be regulated by the rules of the court," etc.

The court declare adversely to this contention, and state, in substance, that if the converse of this contention is "in conflict with the general doctrine of the exemption from state control of the chancery practice of the federal courts, as regards mere forms of procedure, they are of paramount force, and the latter must, to that extent, give way." Proceeding to inquire "if the statutes of Illinois on the subject do confer positive and substantial rights in this matter," the opinion finds such rights to exist, and the decree of the court below is reversed.

In the course of the opinion, it is said:

"We are not insensible to the fact that the industry of counsel has been rewarded by finding cases even in this court in which the proposition that the rules of practice in the federal courts in suits at equity cannot be controlled by the laws of the states is expressed in terms so emphatic and so general as to seem to justify the inference here urged upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those courts substantial rights conferred by the statutes of a state, or to add to, or take from, a contract that which is made a part of it by the law of the state, except where the law impairs the obligations of a contract previously made."

To the claim that this refers only to statutory provisions, reference may be had to Chicago v. Robbins, 2 Black, 418, 428, wherein it is said:

"Where rules of property in a state are fully settled by a series of adjudications, this court adopts the decisions of the state courts; but, where private rights are to be determined by the application of common-law rules alone, this court, although entertaining for state tribunals the highest respect, does not feel bound by their decisions."

In Suydam v. Williamson, 24 How. 427, 433, the court say:

"The power to establish federal courts, and to endow them with a jurisdiction to determine controversies between certain parties, affords no pretext for abrogating any established rule of property, or for removing any obligation of her citizens to submit to the rule of the local sovereign. * * * It behooves every other state to enforce or maintain rights which have thus originated in laws operating within their legitimate sphere, and which defeat no policy of their own; and the jurisprudence of this court attests the care with which this court has observed the general obligation in its administration throughout the Union."

With approval, the court quote from Jackson v. Chew, 12 Wheat. 162, the following:

"The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that, where any principle of law establishing a rule of real property has been settled in the state courts, the same rule will be applied by this court that would be applied by the state tribunals."

The judicial interpretation by the state courts of the state statutes, and their application in cases involving statute of frauds, is followed by the federal courts. De Wolf v. Rabaud, 1 Pet. 476; Caldwell v. Carrington, 9 Pet. 86. So as to assignments for creditors and deeds of assignment. Allen v. Massey, 17 Wall. 351; Jaffray v. McGehee, 107

U. S. 361, 365, 2 Sup. Ct. 367; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655; May v. Tenney, 148 U. S. 60, 64, 13 Sup. Ct. 491; Chicago Union Bank v. Kansas City Bank, 136 U. S. 223, 10 Sup. Ct. 1013,—where it is said:

"The question of the construction and effect of a statute of a state, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the state, establishing a rule of property, are of controlling authority in the courts of the United States. * * * If, therefore, different interpretations are given in different states to a similar local law, that law, in effect, becomes, by the interpretations, so far as it is a rule for our action, a different law in one state from what it is in the other."

As was said by Mr. Justice Brewer in Lumber Co. v. Ott, 142 U. S. 627, 12 Sup. Ct. 320:

"The rights of the parties are determined by the local statute, and the construction placed thereon by the supreme court of the state is decisive. The question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors is a question upon which the decisions of the highest court of the state, establishing a rule of property, are of controlling authority in the courts of the United States."

So, also, as to the construction given by the highest court of the state to words in a deed or will, etc. Jackson v. Chew, 12 Wheat. 153; Waring v. Jackson, 1 Pet. 569; Henderson v. Griffin, 5 Pet. 151; Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10; Barber v. Railway Co., 166 U. S. 83, 99, 17 Sup. Ct. 488.

In Nichols v. Levy, 5 Wall. 433, 444, the supreme court of Tennessee, interpreting a statute of that state, had decided that such statute embraced trusts of the nature then under investigation, and that the same exempted the property embraced in the trust from liability to certain creditors. The supreme court of the United States followed such construction, and sustained the trust, but declared that, if decided by them on general principles of jurisprudence, and without regard to the state construction, they must necessarily have given a contrary decision. "Being a local statute, and involving a rule of property, we adopt the construction which has been given to it by the highest judicial tribunal of the state."

The decision reached by the supreme court of Iowa in Independent Dist. v. King, 80 Iowa, 497, 45 N. W. 908, is based primarily on a statute of that state (Code 1873, § 1747) requiring the school treasurer to hold all money belonging to the district, and pay out the same only on orders drawn, signed, and countersigned, as by statute directed. By various decisions of that court, such treasurer was held responsible for the moneys officially coming into his hands, even though it was stolen (District Tp. v. Morton, 37 Iowa, 551); or destroyed by fire (District Tp. v. Smith, 39 Iowa, 10); or lost in a bank, where he had deposited it (District Tp. v. Hardinbrook, 40 Iowa, 130). Following this general line of settled decisions in Iowa, under the statute quoted, the supreme court of that state (Independent Dist. v. King, 80 Iowa, 500, 45 N. W. 909) decide that:

"When [the school treasurer] made the deposits in question, he had no title to the money, excepting that acquired by virtue of his office as treasurer, and no right to part with that title by making a general deposit. The [bank officials] were fully advised as to the material facts, and therefore could acquire

no title to the deposit adverse to the [school district, whose funds were so deposited]. As to them, the money constituted a trust fund, which they had no right to convert to their own use; and the fact that they mingled it with other money, so that the identity of that deposited was lost, would not destroy the trust character of the deposits, nor prevent the enforcement of the trust against property to which they had contributed."

Without special reference to the cases, it may be said that the same general doctrine above considered is applied by the federal courts to suits to set aside conveyances, whether of real or personal property, as fraudulent, and of the rights of the parties thereunder; and there appears the same application, whether the action be at law or equity. The imperative reasons for this adoption of settled state construction readily appear. The two courts, operating within the same territory, with concurrent jurisdiction in the matters to be determined, ought not to engage in unseemly conflict. Though operating on different planes, unless there be some rule which can be properly applied, such conflict is inevitable. The opinion in Suydam v. Williamson, supra, quotes the following pertinent suggestions from Beauregard v. New Orleans, 18 How. 497:

"The constitution of this court requires it to follow the laws of the several states wherever they properly apply; and the habit of this court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state, especially when applied to the title to lands. Upon cases like the present, the relation of the courts of the United States to a state is the same as that of her own tribunals. They administer the laws of the state, and, to fulfill that duty, they must find them as they exist in the habits of the people, and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the states and the Union would be productive of the greatest mischief and confusion."

Apply to the case at bar these suggestions. If defendant's contention is correct, then this court, sitting in Iowa, must, on the same state of facts, arrive at a contrary decision from that to which a state court of concurrent jurisdiction must arrive. A nonresident plaintiff, bringing his suit in this court against the receiver of a bank organized under the state law, would be denied decree, and his claim declared not preferential, and compelled to share with the general creditors; while a citizen of the state, not permitted to bring his action in this court, would, by the state court, acting under the decisions of the supreme court of the state, be granted decree, although he had deposited his funds in the same bank, and under the same circumstances as did the nonresident depositor. So, too, the same substantial facts presented against the receiver of a national bank, who could remove the suit to this court, would bring denial for a preferential claim to the depositor, while such facts, if presented in the state court against the receiver of a state bank in the same city even, would secure a preferential claim. In the absence of any statutory provision in the national bank act and its supplemental legislation, I would hesitate to so determine this case as to place the decision of this court in direct conflict with the settled adjudications of the supreme court of this state, in this matter. There seems involved such a rule of property, and the results of such conflicting decisions of federal and state courts would be so greatly to be regretted, that it appears to be the safer and wiser course to accept as the law of this case the decisions of

the state court. As a matter submitted for my sole determination, without action of the state court thereon, I would be strongly inclined to deny that a preferential claim exists in the case at bar, and believe this would accord with the stronger current of authority; but, for reasons above outlined, and supported in this conclusion by the cases above cited, authorizing me to follow the supreme court of the state wherein their decisions constitute a rule of property within the state, I find herein for the plaintiff, and that it is entitled to decree herein sustaining its preferential claim for the balance shown to be due it from the defendant receiver. Let decree be entered accordingly, with costs.

HUTTON v. JOSEPH BANCROFT & SONS CO. et al.

(Circuit Court, D. Delaware. October 12, 1897.)

1. CORPORATIONS—ACTION BY STOCKHOLDER—FAILURE TO APPLY TO CORPORATION.
   A shareholder cannot maintain a suit to compel the surrender to the corporation of stock illegally transferred, the repayment of dividends paid thereon, and to prevent the further payment of dividends, unless he has first applied to the corporation itself to remedy the wrong.
2. EQUITY PLEADING—DEMURRER—TRUTH OF FACT ALLEGED.
   On a demurrer to the bill the court is not precluded from examining the entire record in the cause for aid in determining the actual verity of a mere bald allegation that a certain thing will be done by another, unaccompanied by any circumstances giving it weight or credence.

William S. Hilles, for complainant.
Benj. Nields, for defendant Joseph Bancroft & Sons Co.
Lewis C. Vandegrift, for defendant Bloede.

DALLAS, Circuit Judge. This is a suit in equity, brought by a shareholder of the Bancroft Company against that corporation and Victor G. Bloede. Its objects are to compel Bloede to surrender to the Bancroft Company, for cancellation, certain shares of its stock, and to repay to that company money which he has received as dividends on that stock, and also to prevent any further payments to him of dividends now or hereafter declared. The relief thus sought is claimed upon the grounds: First, that Bloede obtained the shares in question from the Bancroft Company by means of false and fraudulent representations made by him to its officers; and, second, that the agreement to exchange shares of the stock of the Bancroft Company for a like number of shares of the Victor G. Bloede Company, in pursuance and consummation of which the Bancroft Company issued its shares to Bloede, was not authorized by the charter of the Bancroft Company, and was in violation of the statutes of Delaware, and of the rights of the complainant as a stockholder of the Bancroft Company. It is not alleged that any application had been made to the corporation, or to its officers or managing body, to remedy the alleged wrong, or to institute suit to that end; and inasmuch as, for this reason solely, the demurrer of the defendant Bloede must, in my opinion, be sustained, no other question will be consid-

ered. It is not requisite to determine whether or not the ninety-fourth equity rule is applicable to this case, for my judgment is based upon the general principle, which, quite independently of that rule, is well settled, that a stockholder who conceives that his rights, as such, have been invaded or are imperiled either by an act done or threatened by the corporation, or by any transaction of a third party with it, must, before he can himself successfully invoke the aid of a court of justice, seek redress within the corporation of which he is a member, or properly endeavor to obtain suit to be brought in its name and on its behalf. Dunphy v. Association, 146 Mass. 495, 16 N. E. 426; Holton v. Railway Co., 138 Pa. St. 111, 20 Atl. 937; Holton v. Wallace, 23 C. C. A. 71, 77 Fed. 61; Hawes v. Oakland, 104 U. S. 450. The prayers for cancellation of stock issued to Bloede, and for the repayment by him of the dividends heretofore paid thereon, manifestly and necessarily concede that the alleged rights upon which they are founded are, if existent, rights of the corporation. What is asked is that the delivery of the shares and repayment of dividends shall be required to be made to the Bancroft Company, and, of course, if there be a right to have either of these things done, it must be because that company, not a shareholder, is entitled to the delivery and repayment demanded. I cannot agree with counsel of complainant that, because the dealing of the corporation with Bloede is charged to have been ultra vires, this bill may be maintained without previous effort having been made to induce action by the corporation. The question is not as to the right of a member of a corporation to redress for unlawful acts of any character which affect him injuriously. The allegation either of deceit committed by Bloede or of illegal action on the part of the corporation may, it is assumed, without deciding, give this plaintiff title to relief, yet the condition none the less exists that he should have sought to move the corporation to action before appealing to the court himself.

The prayer for an injunction to restrain the Bancroft Company from paying any further dividends to Bloede cannot avail to sustain this bill. There is no allegation whatever of any actual disagreement between that corporation and this complainant, and the only averment in supposed support of this particular prayer is "that other dividends will be declared on said shares of stock, which, together with said unpaid dividends, will be paid." How it is known, or why it is believed, that such payments "will be" made is not even suggested, and it cannot be doubted that, if the corporation or its officers had been requested not to make them, and had refused compliance with that request, those facts would have been distinctly stated. In Cook, Stock, Stockh. & Corp. Law, § 297, cited for the complainant, it is said, it is true, that "a court of equity will, upon a proper application, grant an injunction to prevent the transfer of illegally issued stock, or the payment of dividends thereon"; but the author proceeds to define what he means by "a proper application" by adding, in accordance with the authorities, that "a suit to that end may be commenced either by the corporation, or by the stockholders themselves in their own behalf, where the corporation fails or refuses to

institute it." It may well be questioned whether the bald assertion that an act will be done by another, unaccompanied by the disclosure of any circumstance to give it weight or credence, should be regarded as a fact well pleaded, and therefore to be, in general, taken as true upon demurrer. Aside from this, however, the court, I think, is not precluded, even on demurrer, from looking to its own record in the cause for any aid which it may lend for the ascertainment of the actual verity of an allegation so unsatisfactorily made as that under consideration (Railroad Co. v. Groeck, 68 Fed. 609-612); and the record in this instance makes it apparent that there is absolutely no ground whatever for apprehending that any further payments of any kind will be voluntarily made by the Bancroft Company to Bloede. As was said by Judge Wales, in disposing of the complainant's motion to remand, it appears from the answer of the Bancroft Company, which was filed before this demurrer was interposed, that there is "no matter of dispute, or any controversy, between the complainant and the defendant Joseph Bancroft & Sons Company. On the contrary, it is apparent that their interests in the outcome of the present suit are really the same, and that they are both seeking the same objects, to wit, the return and cancellation of the stock of the Bancroft & Sons Company which has been issued to Bloede, the repayment of the money paid to him for dividends thereon, and an injunction to prevent the payments of any further dividends on that stock." To uphold this bill at this stage merely because it alleges that a certain thing will be done in the future, without stating the grounds of that obviously inferential allegation, and despite the record evidence in disproof of it, would be but to invite persistence in a course of procedure which can lead to nothing but misdirected effort and the unprofitable expenditure of time and money. It is evident now that the Bancroft Company should have been the plaintiff in this suit, and it is therefore, I think, the duty of the court to decide now—as ultimately it would be compelled to do—that, as the suit of a shareholder, it cannot be maintained. The demurrer is allowed, with leave to the complainant to file any motion which he may be advised to make under rule 35 or otherwise, on or before November 1, 1897; and after that date either party may apply for further orders not inconsistent with the foregoing opinion.

MARTIN et al. v. FORT et al.

(Circuit Court of Appeals, Sixth Circuit. November 1, 1897.)

No. 463.

1. FEDERAL JURISDICTION—CITIZENSHIP—NECESSARY PARTIES.

S., a married woman, had a beneficial life interest in certain property held by a trustee, and a power of testamentary appointment. She conveyed the property to McW., and by will appointed it to complainants and E. *Held*, that if, under the laws of Tennessee, her interest was a mere life estate, complainants, being citizens of another state, could maintain a suit in the federal court in Tennessee to enforce their rights against the personal representative of the trustee, and McW., citizens of Tennessee,

without joining the personal representative of S., or the other appointee, being citizens of Tennessee.

2. WILLS—BEQUEST OF PERSONALTY IN TRUST.
A bequest of personalty to a trustee for the use and benefit of another, without words of restriction, vests the absolute property in the fund in the beneficiary.

3. SAME—LIMITATION OVER.
In a bequest of personal property to a trustee, words of limitation over are to be construed, if possible, in harmony with the general intent of the testator to give an absolute property to the beneficiary.

4. WIFE'S SEPARATE ESTATE—POWER OF DISPOSITION.
Under the former law of Tennessee, a married woman had no power during coverture to dispose of her separate estate except as provided by the instrument creating it; and, if no mode was provided, her power to dispose of it at all was doubtful.

5. SAME.
Under the Tennessee act of 1869–70 (Mill. & V. Code, § 3350), conferring upon married women the power of disposition of property settled for their separate use unless expressly withheld, the mere mention of one mode of disposition does not exclude others.

6. SAME—STATUTORY PROVISIONS.
The Tennessee act of 1869–70 (Mill. & V. Code, § 3350), relating to disposition of separate property by married women, applies to settlements made before as well as after its passage.

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

This is an appeal from a decree of the circuit court for the Middle district of Tennessee dismissing the complainants' bill in equity on demurrer for nonjoinder of necessary parties. The bill was filed by Mrs. Carrie Martin and others, claiming, as appointees under the will of Susan M. Seat to a fund bequeathed under the will of Susan M. Seat's father, James Anderson, their shares of said fund against Fort, the administrator of S. B. Seat, the trustee and custodian of the fund named in the will of Anderson, and A. J. McWhirter and F. P. McWhirter, who, by a deed of conveyance from Susan M. Seat after S. B. Seat's death, acquired the legal title to all of the land and personalty held by S. B. Seat, either personally or as trustee. The circuit court held that the executor of Susan M. Seat was a necessary party complainant to the action. The complainants named were citizens of other states than Tennessee. The defendants named were citizens of that state. The executor of Susan M. Seat was also a citizen of Tennessee; hence the complainants declined to make the executor of Susan M. Seat a party, because it would oust the jurisdiction of the court; whereupon the court dismissed the bill, and this constitutes the error assigned.

A copy of the will of James Anderson is attached to the bill. It discloses that the testator had three sons and one married daughter, Susan M. Seat, and the clause of the will of importance in this controversy is as follows: "I wish my executors, who may now be in my debt, not to be charged with any interest on the same until the day that they qualify as my executors, from which time they will account to each other on settlement and division of my effects. This division will be between Samuel T. Anderson, Matthew Anderson, Susan M. Seat, and George W. Anderson, equal parts of the whole, after my own debts are paid. The part of my estate which is to go to my daughter, Susan M. Seat, I give and bequeath to her husband, Samuel B. Seat, as trustee, in trust to hold for her sole and separate use, to be free from debts, contracts, and engagements of her said husband, and at her death to go to such persons as she may, by writing in the nature of a last will and testament, appoint; such appointment to be witnessed by two subscribing witnesses. The said trustee shall not be required to give any security unless my daughter shall require it, and may invest the money and property in business or otherwise, and from time to time may invest in real estate or other property, with the power to

sell and make other investments in stocks, bonds, etc.; the intents being to give him absolute power and control for the purpose of this trust and the support of my said daughter." The bill avers that the division above directed was made, and that S. B. Seat, the husband of Susan M. Seat, accordingly received, as her trustee, a sum which, with interest unpaid, amounted to about $8,000, and that he died on February 3, 1893. He left no children, and all of the property in his name passed to his wife, Susan. A few days after his death, Mrs. Seat, by deed, conveyed to the defendants A. J. McWhirter and F. P. McWhirter all the property received from her husband, including land and personalty, in consideration of an agreement on their part to provide a home and income for her during life. Shortly after the conveyance, Mrs. Seat filed a bill in the state chancery court to set aside her conveyance to the McWhirters, on the ground that it was obtained by fraud. The chancery court set the deed aside, but the supreme court, on appeal, reversed the decree of the lower court, and dismissed the bill. 29 S. W. 220. Mrs. Seat died in December, 1895, testate, and by her will directed—First, the payment of her debts; second, the payment to Mrs. Sallie Ellis, Mrs. Carrie Martin, Miss Susie Anderson, and Lewis Anderson the sum of $7,500; and, third, the payment to Elizabeth and Mary Anderson, children of a deceased nephew of hers, $500 each. The fourth clause of her will was as follows: "All the balance of my estate, of every kind and character, including that portion of my father's estate willed to me, and taken by my husband, to be held for me under my father's will, and also including that portion of my brother Matt Anderson's personal property taken by my husband, and held by him in trust for me, I will to my nieces Mrs. Sallie Ellis, Mrs. Carrie Martin, and Miss Susie Anderson, and my nephew Lewis Anderson, equally, each to take one-fourth; the interests, however, of Mrs. Sallie Ellis and Mrs. Martin, to be their separate estates, free from the contracts, debts, etc., of their husbands, and that portion which they may receive under the second clause of this will to be also their separate estates." The bill avers that S. B. Seat's estate was insolvent, and that complainants had requested the administrator, Fort, to bring an action against the McWhirters to recover assets for the payment of this trust debt of his intestate, but that he had refused to do so. Mrs. Sallie Ellis, one of the beneficiaries, was a citizen of Tennessee, and was not made a party to the bill. The defendants demurred to the bill on several grounds: First, that there was no equity in the bill; second, that the right of action, if any, was in Mrs. Seat's executor, who did not sue; third, that the only claim complainants had was against said executor; fourth, that, even if there was a right of action against S. B. Seat's administrator, there was none against the McWhirters; fifth, that Mrs. Sallie Ellis, who was a necessary party to the bill, had not been made a party. The circuit court sustained the demurrer, on the ground that the executor of Mrs. Seat, and Mrs. Sallie Ellis, were not made parties to the bill.

Leech & Savage, for appellants.
Vertrees & Vertrees, for appellees.

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

TAFT, Circuit Judge (after stating the facts). The theory of the complainants in framing the bill was that Mrs. Seat only took a life estate under the will of her father, James Anderson, in the trust fund provided for her, and a power of appointment upon her death, and that the complainants, by virtue of the terms of her will, were her appointees. If this is sound, then it is difficult to see what necessity there was for the presence of Mrs. Seat's executor as a party to the suit. Upon the proper exercise of the power of appointment, the appointees were legatees, not under Mrs. Seat's will, but under the will of her father, James Anderson, and they had no claim against

Mrs. Seat's estate or her executor. Again, assuming complainants' theory of their bill to be correct, each of them was entitled to a determinate share of the trust fund bequeathed to S. B. Seat, trustee, and might sue his personal representative to establish his right to a distributive share of the estate, and to enforce it; and it was not necessary to join in such an action other co-legatees as complainants, whose presence in the suit as parties would, because of their citizenship, oust the jurisdiction of the court. The causes of action by the legatees for their shares of the fund were several, and, although they might all have joined in one action, it was not necessary.

Payne v. Hook, 7 Wall. 425, was a bill in equity filed in the federal court by the complainant, as one of the distributees of an estate of an intestate, against the administrator and the sureties on his bond, to compel the payment of the share of the complainant. It was objected that the other distributees were not made parties to the bill. The supreme court, speaking by Mr. Justice Davis, met this objection as follows:

"But it is said the proper parties for a decree are not before the court, as the bill shows there are other distributees besides the complainant. It is undoubtedly true that all persons materially interested in the subject-matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience, will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit. The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where oftentimes the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever. The present case affords an ample illustration of this necessity. The complainant sues as one of the next of kin, and names the other distributees, who have the same common interest, without stating of what particular state they are citizens. It is fair to presume, in the absence of any averments to the contrary, that they are citizens of Missouri. If so, they could not be joined as plaintiffs, for that would take away the jurisdiction of the court; and why make them defendants when the controversy is not with them, but the administrator and his sureties? It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked. A court of equity adapts its decrees to the necessities of each case, and, should the present suit terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and prevent a multiplicity of suits, by allowing the other distributees, either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation."

The case of Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, fully recognizes the right of a legatee or creditor, who is not a citizen of the state of the decedent and his representative, to proceed in the United States court against such representative to establish his claim therein by judgment or decree against the representative, and only limits this right by holding that, where the estate of the decedent is being administered in a probate court, the federal court, after adjudging the validity and amount of the claim, must remit the complainant to the court having possession of the res for distribution. In the case at bar the property which it is sought to subject to the claim of the complainants is not in the custody of any court, and so here we do

not even have the difficulty presented and discussed in Byers v. McAuley.

The theory of the bill at bar against the McWhirters is that, as the McWhirters received all of the assets of the estate of S. B. Seat at a time when his administrator was under obligation, as trustee, to preserve a fund for future testamentary appointees of Mrs. Seat, those assets were impressed with a trust certainly not less sacred than if such appointees had been merely creditors of S. B. Seat; and, therefore, that the cestuis que trustent, after Mrs. Seat's death, may follow the assets into the McWhirters' hands, and compel a distribution through the administrator of S. B. Seat, also made a defendant; and that the McWhirters cannot rely upon Mrs. Seat's deed, if, as the bill assumes, she had only a life interest in the fund, with no power of disposition save by testamentary appointment. The case presented by the bill in this aspect is not unlike Borer v. Chapman, 119 U. S. 587, 7 Sup. Ct. 342. That case was a bill filed by a judgment creditor of one dying testate against his executor and the legatees under his will, to compel satisfaction of the judgment out of the assets distributed to the legatees. The decedent, before his death, was a citizen of Minnesota. Nearlv all his property was in California. In the latter state ancillary administration proceedings had been had, the property there sold had been distributed, the debts there presented had been paid, and the executor in that state had been discharged. The complainant had not been a party to the California administration proceedings, but, after they had been closed, filed his bill. The court held that the assets distributed under the California proceedings, when brought into Minnesota, were impressed with a trust, which the complainant had a right to have administered for his benefit. The court, speaking by Mr. Justice Mathews, said:

"It is upon the ground of such a trust that the jurisdiction of courts of equity primarily rests in administration suits, and in creditors' bills brought against executors or administrators, or after distribution against legatees, for the purpose of charging them with a liability to apply the assets of the decedent to the payment of his debts. As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the constitution of the United States and the laws of congress in pursuance thereof, in the federal courts, to be administered by the circuit courts in controversies arising between citizens of different states. It is the familiar and well-settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their own courts, and cannot be affected by any legislation except that of the United States. Suydam v. Broadnax, 14 Pet. 67; Hagan v. Walker, 14 How. 28; Bank v. Jolly, 18 How. 503; Hyde v. Stone, 20 How. 170; Green's Adm'x v. Creighton, 23 How. 90; Payne v. Hook, 7 Wall. 425, 430. In Payne v. Hook, ubi supra, the rule was declared in these words: '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 modes of redress in their courts, or which regulate the distribution of their judicial power. If legal 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 equitable. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union.' The only qualification in the application of this principle is that the courts of the United States, in the exercise of their

jurisdiction over the parties, cannot seize or control property while in the custody of a court of the state. Williams v. Benedict, 8 How. 107; Youley v. Lavender, 21 Wall. 276; Freeman v. Howe, 24 How. 450. This exception does not apply in the present case, for the assets sought by this bill to be marshaled in favor of the complainant are not in the possession of any other court. They are in the hands of the defendants, impressed with a trust in favor of the complainant, a creditor of Gordon, and subject to the control of this court by reason of its jurisdiction over their persons."

See, also, Comstock v. Herron, 6 U. S. App. 626, 5 C. C. A. 206, and 55 Fed. 803.

It follows from the foregoing that, upon the theory of the bill as to the estate or interest of Mrs. Seat in the trust fund bequeathed by her father, it was not necessary to make either the executor of Mrs. Seat or the resident co-appointee of complainants a party to the bill, and that the McWhirters were properly made co-defendants with Seat's administrator. There was therefore no nonjoinder of necessary parties complainant, and no misjoinder of parties defendant, and to sustain a demurrer on either ground was error. This conclusion must lead to the reversal of the decree dismissing the bill, unless on the face of the bill no cause of action is stated. This depends on the question whether the theory of the bill that Mrs. Seat's interest in the trust fund bequeathed by her father was limited to her use of it for life, so that she had no right to transfer it absolutely to the McWhirters after her husband's death, is correct. We are of opinion that Mrs. Seat took one-fourth part of the estate of James Anderson absolutely, and that her interest was not limited therein to a mere life estate. The averments of the bill show that this provision for Mrs. Seat was a bequest of personalty, and we must then apply the rules usually applicable to such bequests in determining the extent of her interest in the fund bequeathed. It is well settled that the bequest of personalty to a trustee for the use and benefit of another, without words of restriction, vests the absolute property in the fund bequeathed in the beneficiary. Wellford v. Snyder, 137 U. S. 521, 526, 11 Sup. Ct. 183; Adamson v. Armitage, 19 Ves. 416; Garret v. Rex, 6 Watts, 14; Fairfax v. Brown, 60 Md. 50. And even words of limitation over are construed to be in harmony with the general intent of the testator to give an absolute property, if they can be reconciled with it. Kellett v. Kellett, L. R. 3 H. L. 160, 168, 169; Gulick v. Gulick's Ex'rs, 25 N. J. Eq. 324, 27 N. J. Eq. 498; Winckworth v. Winckworth, 8 Beav. 576; Hulme v. Hulme, 9 Sim. 644.

Even if there were no specific rule of interpretation to aid us, we should have no difficulty in reaching the same conclusion as to the testator's intention in this case. After referring to the settlement and division of his effects, the testator said: "This division will be between Samuel T. Anderson, Matthew Anderson, Susan M. Seat, and George W. Anderson, equal parts of the whole, after my own debts are paid." Here is the plainest declaration that the daughter was to share equally with the sons in the estate, and it is not disputed that the sons were to take the amounts given to them absolutely. The remainder of the will is taken up in providing how the part given to the daughter shall be held. The words following, to wit, "the part of my estate which is to go to my daughter," refer

back to the one-fourth equal share which he has already declared his intention to give her, and show, not that he is about to limit or cut down her interest in it, but only that her condition as a feme covert required a special provision for the mode in which it should be held; for he bequeaths this part already described to a trustee, to hold for her sole and separate use, to be free from the debts, contracts, and engagements of her husband, and gives the trustee complete power to invest and reinvest the fund or share thus given for her separate use. There is no limitation over in case of Mrs. Seat's failure to appoint by will, which we should certainly expect if she was only to take a life interest. There are no words expressly indicating the intention of the testator that her interest should be confined to enjoyment of the income during life, as there were in Deadrick v. Armor, 10 Humph. 596, Bradley v. Carnes, 94 Tenn. 27, 27 S. W. 1007, and McGavock v. Pugsley, 12 Heisk. 694, relied on by counsel for appellants. The provision giving Mrs. Seat power to appoint persons by will to take the property on her death finds an explanation in the state of the law of Tennessee, at the time the will of Anderson took effect, with reference to the power of married women to dispose of their separate estates during coverture, and is consistent with Mrs. Seat's taking an absolute and complete interest in the property bequeathed. By that law a married woman had no power during coverture to dispose of her estate given to her for her separate use except in the mode provided by the instrument creating the estate, and, if no mode was provided, it was doubtful whether she had any power of disposing of it at all, however absolute her interest in the property might be. Gray v. Robb, 4 Heisk. 77, 78; Young v. Young, 7 Cold. 461; Molloy v. Clapp, 2 Lea, 586, 591. The testator evidently wished to insure her testamentary power over her absolute estate, which without this provision she might not have had, had she remained covert until her death. Whenever she became discovert, however, her power of disposition became absolute.

This result and the reason for it are set forth succinctly by that learned equity judge, Chancellor Cooper, of Tennessee, in Harding v. Insurance Co., 2 Coop. Ch. 465, 469, as follows:

"It is an elementary principle that an absolute estate or beneficial interest carries with it, as an incident of property, the unlimited power of disposition, which cannot be taken away or impaired by any clause or proviso in the conveyance from a third person, nor, a fortiori, in a conveyance made by the grantor himself for his own benefit. Such a provision is simply void as to a person sui juris. Bouv. Inst. § 1698; Co. Litt. § 360, p. 223, a; Smith v. Bell, Mart. & Y. 302; Brandon v. Robinson, 18 Ves. 429; Dick v. Pitchford, 21 N. C. 486. The same principle has been extended to conveyances for the benefit of married women. Although restrictions upon their power of disposition may be good during coverture, and may even revive during a second coverture, yet, whenever they become discovert, the restriction ceases to be operative, and the power of disposition becomes absolute. Jones v. Salter, 2 Russ. & M. 208; Tullett v. Armstrong, 4 Myle & C. 377; Beaufort v. Collier, 6 Humph. 492. The outstanding legal title in such cases, if it can be said to be outstanding, is only the dry title, and, even at law, will be held to be devested in support of the beneficial interest, without regard to time or possession. Marr v. Gilliam, 1 Cold. 498, 499, citing Aikin v. Smith, 1 Sneed, 304, and England v. Slade, 4 Term R. 682; Doe v. Sybourn, 7 Term R. 2. A fortiori will such an outstanding legal title avail nothing in equity."

See, also, Gray, Restr. Alien. Prop. §§ 140-142.

Indeed, Mrs. Seat's power of disposition would have become complete at the time when she made the deed to the McWhirters, even if her husband had then been in life. By the act of 1869-70 (section 3350, Mill. & V. Code) it was provided that, where property was settled upon a married woman to her separate use, she should have the same power of disposition as if she were a feme sole, unless the power of disposition was expressly withheld. Under the statute, the mere mention of one mode of disposition does not exclude others. Lightfoot v. Bass, 8 Lea, 350. The statute has been held to apply to settlements made before the statute, as well as to those after its passage. Molloy v. Clapp, 2 Lea, 586. Of course, the statute could not enlarge the estate previously vested, but it could enlarge the power of disposition of her separate estate by a married woman, limitations of which are not in the nature of vested rights, but are mere personal disabilities, that may be varied from time to time by the legislature in the exercise of that power which is usually called, for want of a more satisfactory description, the police power of the state.

It follows from the foregoing that, when Mr. Seat made the deed to the McWhirters, she owned absolutely the entire fund left to her by her father's will, and that she had full power to dispose of the same. By that deed, therefore, the validity of which, as between Mrs. Seat and all claiming under her, on one hand, and the McWhirters, on the other, has been conclusively adjudged in the decree dismissing the bill brought by Mrs. Seat in her lifetime against the McWhirters, Mrs. Seat and her legatees are estopped to claim that any of the property thereby conveyed is subject to a trust in her favor to pay what was received by her husband from her father's estate. The deed was, in effect, a release upon valuable consideration of all the property held by her husband, either in his own name or as trustee, and the fairness of it is not here open to investigation. The demurrer to the bill should have been sustained, not for nonjoinder of necessary parties, as held by the learned judge at the circuit, but because the bill failed on its merits. The decree dismissing the bill must therefore be affirmed, at the costs of the appellants.

NATIONAL HOLLOW BRAKE BEAM CO. et al. v. INTERCHANGEABLE BRAKE BEAM CO.

CHICAGO RAILWAY EQUIPMENT CO. v. SAME.

(Circuit Court, E. D. Missouri. October 20, 1897.)

Nos. 4,047 and 4,048.

1. EQUITY PLEADING — WAIVER OF ANSWER UNDER OATH — EXCEPTIONS TO ANSWER.

The waiver of an oath to the answer merely affects the evidential character and value of the answer, and does not operate as a waiver of complainant's right to except thereto for failure to answer interrogatories.

2. SAME—INTERROGATORIES.

In a patent infringement suit, where one of the issues is as to infringement or noninfringement, interrogatories attached to the bill, which require

disclosures going directly to this issue, cannot be objected to on the theory that the bill is for a discovery in aid of an accounting, and that, if any of the defenses set up prevail, the answers would be unnecessary, and therefore ought not to be required at that stage of the case.

3. SAME.

Equity rule 39, which dispenses with a full answer in cases where defendant might, by plea, protect himself from answer and discovery, will not protect a defendant in a patent suit from answering fully to interrogatories, where he has set up every possible defense, on the theory that each of these defenses might have been set up by a plea; for the proper office of a technical plea is to interpose some conclusive defense which may determine the suit without a hearing on the merits.

4. SAME—DISCOVERY.

Though bills of discovery are not now as necessarily and commonly resorted to as formerly, when parties were disqualified from testifying, yet discovery is still permissible, and is an invaluable aid in the administration of equitable remedies, in order to search the consciences of the parties, and thereby the more readily reach and deal with the very matter in dispute.

These were two suits in equity for infringement of a patent, the first being brought by the National Hollow Brake Beam Company and the Chicago Railway Equipment Company jointly, and the second by the last-named company alone, against the Interchangeable Brake Beam Company. The causes were heard together on exceptions to the answers of the defendant.

Paul Bakewell and James A. Carr, for complainants.

Noble & Shields, for defendant.

ADAMS, District Judge. These two causes are submitted on exceptions to the answers of the defendant. These exceptions raise substantially the same questions, and may properly be considered together. The bills allege that the complainants are the owners of certain patents particularly described; that such patents are valid, and have been infringed by the defendant. The bill in No. 4,047 is for relief and discovery, and propounds to the defendant three interrogatories, as follows:

"(1) Whether, prior to the filing of this bill, and subsequent to December 8, 1892, the defendant, Interchangeable Brake Beam Company, made, sold, or used, or caused to be made, sold, or used, any railway brake beams like the brake beam herewith filed, and marked 'Exhibit F'; and, if so, how many such brake beams were made, sold, or used, or caused to be made, sold, or used by it, and between what dates. (2) Whether it made, sold, or used, or caused to be made, sold, or used, the brake beam Exhibit F, before the filing of this bill, and after December 8, 1892. (3) Whether it made, sold, or used, or caused to be made, sold, or used, prior to the filing of this bill, and after December 8, 1892, any brake beams like the brake beam illustrated by Exhibit F, and, if so, how many."

Exhibit F, referred to in the interrogatories, is a full-sized sample brake beam, and is charged to have been made by the defendant, and to be in all particulars like the brake beams made, sold, and used by the defendant, and to embody the device and invention of the complainant's patent, and to be an infringement thereof. The defendant's answer in case No. 4,047 denies the incorporation of the complainant, and the novelty and utility of the invention; alleges want of patent-

able invention, and that the device had been in public use and on sale in the United States for more than two years prior to the application for the patent; alleges anticipation of the invention by several persons; denies acquiescence by the public; and particularly denies any and all infringement by the defendant. From this general summary of the answer it will be seen that the defendant has pleaded and relies upon nearly every possible defense that can be made to a cause of the kind stated in the bill. The interrogatories addressed to the defendant relate to one of the several issues created by the answer, namely, the issue of infringement. The bill expressly waives answer under oath. The defendant fails to answer the interrogatories propounded, and the complainant excepts to the answer because of such failure, for insufficiency.

It is urged, first, by the defendant, in justification of such failure, that the complainant's waiver of an answer under oath is a waiver of all right to exceptions for insufficiency. This cause being against a corporation only, an answer under oath, even if not waived by the bill, could not have been required. Corporations answer under the sanction and solemnity of their seals only; but, whether defendants answer under oath or under corporate seals, when oaths are waived they are required to answer fully on every material issue. The waiver of an oath in any case is made by the complainant for the purpose of depriving the defendant of the advantage of his answer as evidence in his favor. If no such waiver is made, a sworn answer is taken as evidence in favor of the defendant, so forceful as to require two witnesses or one witness and corroborating circumstances to overcome it. From this it appears that the sole purpose of a waiver of an oath to an answer is to affect the evidential character and value of the answer. It has nothing to do with the answer as a pleading, and the rule prevails that the defendant must answer fairly and fully to each and every material fact alleged in the bill. This fair and full answer should serve the purpose of eliminating many undisputed facts from the case. If facts alleged by the complainant are admitted by the defendant in his answer, the necessity for consumption of time and expenditure of money in making proof thereof does not exist, and the court's attention is drawn to the debatable issues only. The power of the court to require such an answer ought not to be abridged at all; and therefore, if the complainant, for the purpose of preventing the defendant from making its answer equal in evidential strength to two witnesses, sees fit to waive the oath to the answer, the right to exceptions for insufficiency must still exist. Gamewell Fire-Alarm Tel. Co. v. Mayor, etc., 31 Fed. 312; Reed v. Insurance Co., 36 N. J. Eq. 393; Colgate v. Compagnie Francaise, 23 Fed. 82; Whittemore v. Patten, 81 Fed. 527, and cases cited.

Again, it is urged by the defendant that the several interrogatories of the complainant's bill are for a discovery in aid of an accounting, and that, as an accounting will not be necessary if any of its defenses prevail, answers to the interrogatories ought not now to be required. This, I think, is begging the question. One of the issues presented by the bill and answer is infringement or noninfringement. The interrogatories propounded go directly to this issue.

Again, it is urged by defendant that, under equity rule 39, it is not required to answer these interrogatories. This rule, so far as it is necessary to quote it, is as follows:

"The rule that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery."

It is contended that because the defendant might have resorted to pleas in bar, and in this way presented each and every one of the defenses separately stated in the answer, he is thereby entitled to protection against discovery, found in rule 39, supra. I think this is a misconception of the rule, and a misconception of the office of pleas as distinguished from answers. The plea is an appropriate resort when the defendant relies upon some definite and conclusive ground why the suit should be either dismissed, delayed, or barred. Story, Eq. Pl. (10th Ed.) § 649; Coop. Eq. Pl. p. 223. The proper office of a plea is to interpose some ground of conclusive defense, like the pendency of a prior suit between the same parties, want of title in the complainant, statute of limitations, former adjudication, or that the defendant is an innocent purchaser for value, which may determine the suit without the necessity of an exhaustive hearing on the merits of the case under the several different defenses which may be appropriately made by answer. The defendant, by such a plea, rests his entire defense on it, and may not resort, after an adverse decision on his plea, to an answer on the merits. Hughes v. Blake, 6 Wheat. 453; Rhode Island v. Massachusetts, 14 Pet. 210, 257. The defendant, as already observed, has pleaded every conceivable defense in its answer, and, among them, the defense of noninfringement. The contention that all these defenses could have been interposed as technical pleas, in my opinion, overlooks the distinctive function of pleas, and cannot be assented to.

Judge Story, in his work on Equity Pleadings (section 652), says:

"But every defense which may be a full answer to the merits of the bill is not, as of course, to be considered as entitled to be brought forward by way of plea; * * * for, where the defense consists of a variety of circumstances, there is no use in the plea; the examination must still be at large. * * * The true end of a plea is to save to the parties the expense of an examination of the witnesses at large. And the defense proper for a plea is such as reduces the cause, or some part of it, to a single point."

And again, in section 653:

"Upon this account it is a general rule that a plea ought not to contain more defenses than one, and that a double plea is informal and multifarious, and therefore improper."

And again, in section 654:

"It may be laid down as a rule that various facts can never be pleaded in one plea, unless they are all conducive to a single point on which the defendant means to rest his defense. * * *"

From these recognized principles it is clear that defendant's answer, involving, as it does, six different defenses, cannot be treated as the equivalent or substitute for so many pleas in bar, within the true meaning of rule 39. To permit defendant to claim immunity

from a full answer would, in effect, permit him to deny to complainant the right to make proof of infringement which is denied by the defendant.

Lord Langdale, in Chadwick v. Broadwood, 3 Beav. 540, referring to what the answer must contain by way of a discovery, makes the following very pertinent and rational observation:

"If they [the interrogatories] are material for the purpose of displacing the plea, they are to be answered; but, on the other hand, if they are not material for that purpose, you are not to answer them, for, by so doing, you overrule your plea."

This doctrine seems to be founded on the intrinsic nature of pleas, as already observed. It presupposes that the plea raises a definite and distinct issue, single in its character, upon which interrogatories may be predicated, and also that there might be possible issues upon which evidence would be immaterial, and therefore not to be inquired into by interrogatories or otherwise; in other words, that the defendant stakes his case on his plea, and of necessity excludes consideration of other possible issues. For these reasons, the defendant is not protected by rule 39 from answering the interrogatories relative to infringement.

The bills in both of these causes are for relief and discovery. Notwithstanding the fact to which my attention was called in argument, that bills of discovery are not now as necessarily and commonly resorted to as formerly, when parties were disqualified from testifying; and, notwithstanding the fact that they may not be available in aid of actions at law,—yet, in my opinion, discovery is not only now permissible, but is an invaluable aid in the administration of equitable remedies. See rule 41 in equity, and addition to rule 41 made by the supreme court at its December term, 1871. These are remedies addressed to the conscience, and litigants in this court ought to have their consciences searched. By so doing, time is saved, expense is avoided, and the court is able the more readily to reach and deal with the very thing in dispute.

The foregoing remarks made in suit No. 4,047 are equally applicable to the other suit submitted, No. 4,048, and the exceptions in both are allowed.

VITASCOPE CO. v. UNITED STATES PHONOGRAPH CO.

(Circuit Court, D. New Jersey. September 4, 1897.)

1. Unfair Competition in Trade.

Complainants' assignors contracted with Thomas A. Edison for the manufacture by him of a certain number of machines, invented by Edison and another, for projecting apparently living figures on a screen. To distinguish these machines from others made for like purposes, they had coined the word "Vitascope," and it was agreed between the parties that they might call them "Vitascopes" or "Edison Vitascopes." Complainants failed to take and pay for all of said machines according to the contract, and thereafter Edison sold the machines not taken to reimburse himself for their cost. *Held*, that the purchasers from Edison, in offering these machines for sale as "Edison Vitascopes," were not guilty of unfair competition with complainants, since there was no misleading or deception of the pub-

lic, who in fact obtained the identical machines to which the name was intended to apply.

2. SAME.

The grounds on which unfair competition in trade will be enjoined are either that the means used are dishonest, or that, by false representation or imitation of a name or device, there is a tendency to create confusion in the trade, and work a fraud upon the public, by inducing it to accept a spurious article. Where these grounds are absent, and no trade-mark rights exist, injunction does not lie.

James Harold Warner, for the motion.
Howard W. Hayes, opposed.

KIRKPATRICK, District Judge. The amended bill or complaint in this cause sets out that Raff & Gammon, the assignors of the complainants, in January, 1896, began the manufacture of a certain machine or device invented by Thomas A. Edison and Thomas Armat, to project upon a screen apparently living figures and scenes, in view of an audience, and that the said Raff & Gammon coined the word "Vitascope," and applied it to designate the said machine or device; that afterwards the said Raff & Gammon assigned to the complainants their rights to manufacture the said machines or devices, and to lease the same under the name of "Vitascope," and to sell territorial rights for giving public exhibitions with said machines and devices under the name of "Vitascope"; and that, in the exercise of such right, the complainants have manufactured a large number of such machines, and given thousands of exhibitions in all the large cities of the United States. The bill alleges that the said machines have been largely advertised, at great expense to them, as "Vitascopes" and "Edison Vitascopes," and have become known to the public by such name. The bill further alleges that on or about January 15, 1896, the said Raff & Gammon entered into an agreement with Thomas A. Edison whereby said Edison agreed to manufacture for them certain of the said machines and devices, and to permit said machines and devices to be known and called "Edison Vitascopes"; that said Edison also agreed, in consideration of the price paid for the manufacture of said machines and devices, to give to said Raff & Gammon the sole and exclusive right to use the name of Edison in connection with the word "Vitascope," as descriptive of said machines or devices, and that he, the said Edison, would not sell, lease, or otherwise dispose of machines similar to the ones referred to as "Edison Vitascopes." The case so presented is fully answered and denied in all material averments by the answer of the defendants and the affidavits annexed thereto. Edison, in his affidavit, denies the making of an agreement such as is set out in the complainants' bill, and avers that he did no more than undertake to make 100 projecting kinetescopes, which, to distinguish from other machines made for like purpose, it was agreed should be called "Edison Vitascopes." Edison swears that he made these machines according to contract, and that Raff & Gammon failed to take and pay for all of them, and that he sold such of the machines as they neglected to take, to reimburse himself for their cost. It is stated in the answer, and not denied or disputed by the complainants, that

the machines or devices put upon the market by the defendants as "Vitascopes" and "Edison Vitascopes" are a part of the original lot of 100 machines or devices ordered by Raff & Gammon from Edison, and that the defendants' machines or devices are in all respects similar to those acquired from Edison by the complainants.

To make the words "Vitascope" or "Edison Vitascope" a distinguishing mark for the manufactured product to be used or sold was the purpose of their adoption, and no exclusive right to their use can be acquired except to identify the article with which they are associated. As the sole object of the name was to distinguish that particular machine or device from others of the same kind or class, I fail to see why the names "Vitascope" and "Edison Vitascope" are not as properly applied in describing the machines of the defendants as those of the complainants. The complainants, in their amended bill, do not ask an injunction because any trade-mark right in the words "Vitascope" and "Edison Vitascope" has been infringed, but relief is sought upon the ground that defendants' action tends to deceive, and is a fraud upon, the public. How is the public deceived, and in what way do the defendants perpetrate a fraud upon them? The defendants offer for sale machines or devices for projecting apparently living figures upon a screen, which are manufactured by Edison according to the ideas, plans, and specifications of himself and Thomas Armat upon the order of Raff & Gammon, and which, to distinguish them from other devices of like kind and purpose, Edison, the maker, and Raff & Gammon, for whom they were made, have agreed should be called "Vitascopes" or "Edison Vitascopes." What the public want, and what they ask for, is a machine made or invented by Edison projecting apparently living figures upon a screen. They get it. They are not deceived. No spurious machine is palmed off upon them, but they receive the identical device made by Edison, and which at the time of its creation was given the name "Vitascope" or "Edison Vitascope," and under which name it was sold to the complainants and defendants alike. It may be that the demand for the machine was in part procured, and the interest of the public excited, by the advertisements of the complainants, but that alone affords no ground for equitable relief. The case as presented seems to me to come clearly within the principle decided in Appollinaris Co. v. Scherer, 27 Fed. 18. There, however, the complainant possessed an element of strength wanting here, in that he had the undisputed exclusive right, so far as it could be acquired, to sell the product in the territory sought to be occupied by the defendant. There is no proof in this case of an exclusive right to the use of the words "Vitascope" and "Edison Vitascope," as connected with the machine. The bill alleges an agreement to that effect between Raff & Gammon and Thomas A. Edison, but it is specifically denied under oath by Edison himself.

The court is always willing to restrain unfair competition in trade, but the ground upon which such relief is granted rests upon principle,—either that the means used are dishonest, or that, by imitation of name or device, there is a tendency to create confusion in the

trade, and enable the seller to pass off upon the unwary his goods as those of another, and thereby deceive the purchaser; or that, by false representation, it is intended to mislead the public, and induce them to accept a spurious article in the place of one they have been accustomed to use. Orr v. Johnston, 13 Ch. Div. 434; Fischer v. Blank, 138 N. Y. 244, 33 N. E. 1040; Sawyer v. Horn, 4 Hughes, 239, 1 Fed. 24; Wilson v. T. H. Garrett & Co., 47 U. S. App. 250, 24 C. C. A. 173, and 78 Fed. 472. As this case is now presented to the court, it lacks all of these principles. I am therefore of the opinion that a preliminary injunction should not issue as prayed for in the bill.

GERMAN SAVINGS & LOAN SOC. v. DE LASHMUTT et al.

STARR et al. v. GERMAN SAVINGS & LOAN SOC. et al.

(Circuit Court, D. Oregon. September 4, 1897.)

1. DEEDS—SUIT TO CANCEL—UNDUE INFLUENCE—PLEADING.
When a deed is attacked on the ground of fraud in the grantee, by taking advantage of confidential relations between the grantor and himself, where the confidential relations are admitted, the burden is on the grantee to show that the grantor was not influenced thereby; and an answer stating that defendant does not know whether or not "she yielded to the persuasions or solicitations or directions, so fraudulently, as alleged, made by him, on account of or by reason of her said alleged confidence in him," etc., is to be construed as an admission that the conveyance was made as a result of the confidential relations, persuasions, etc.

2. SAME.
A deed obtained from a person of weak mind, while she was in a home for inebriates, in consideration of a debt due her grantee, and of a further advance made by him to relieve her pressing need of money, while acting as her agent and confidential adviser, is void, in the absence of any affirmative showing that she was not influenced by her relations with the grantee, and that she acted upon independent advice.

3. ACCORD AND SATISFACTION—CONSIDERATION.
Where a deed made in consideration of an existing debt and further advances is void because of confidential relations and undue influence, such debt and advances are a sufficient consideration to support a subsequent agreement of accord and satisfaction, made between the grantee and the grantor's heir after her death.

Martin L. Pipes, for complainants in cross bill.
Milton W. Smith and Walter S. Perry, for defendants in cross bill.

BELLINGER, District Judge. This is a suit by the German Savings & Loan Society to foreclose a mortgage, given by the defendants De Lashmutt and wife, upon certain real estate acquired by De Lashmutt by deed dated June 7, 1887, from Bridget Lavin, the mother of the defendant Starr. Starr appeared, and filed his cross bill, in which he alleges that on and long prior to June 7, 1887, De Lashmutt was the agent and confidential adviser of Bridget Lavin in respect to the management of her property, of which she owned a large amount, both real and personal; and, as such agent, he had long before said date collected the rents and profits of such property,

and cared for and managed the same as her agent. This allegation is admitted by De Lashmutt. The cross bill further alleges that Bridget Lavin was a person of weak mind, and was greatly addicted to the use of intoxicating liquor and morphine, and at times was insane, and, particularly, in the year 18— she was committed to the State Insane Asylum of the State of Montana, where she was temporarily residing, and afterwards was for a short time committed by the authorities of the city of San Francisco to the Home of Inebriates in that city, and afterwards she was committed to the State Insane Asylum at Stockton, where she died; that, while she was in said Home of Inebriates, De Lashmutt, being then her agent and confidential adviser, fraudulently, and with the intent to overreach and defraud her, induced her to make her mark to a deed, conveying to him the south two-thirds of lot 3 in block 22 in the city of Portland, and, with like fraudulent intent, procured her acknowledgment and delivery to him of such deed; that during this time she was weak and ill and insane and incapable of doing any business, etc.; that she was incapable of making or acknowledging or delivering said deed, and that she did so by reason of the influence and persuasion of De Lashmutt and under his direction, without understanding the purport of her said acts or the legal effect of her deed, and without intending to convey the property to De Lashmutt; that at the time of these acts she had great confidence in De Lashmutt on account of their confidential relations, and in the execution and delivery of such deed she yielded to his persuasions and solicitations and directions, by reason of her confidence in him and his influence over her; that De Lashmutt did not pay any money or other consideration for said deed. De Lashmutt's answer denies that Bridget was non compos mentis or insane or of weak mind or incapable of making the deed in question, or that the deed was fraudulently procured or was executed through the influence or persuasion or under the direction of De Lashmutt. The answer then alleges that De Lashmutt does not know and cannot state whether, at the time the deed was executed, Bridget had great or any confidence in him, as alleged in the bill, or as to whether or not, at said time or in so doing, she yielded to the persuasions or solicitations or directions, so fraudulently, as alleged, made by said De Lashmutt on account of or by reason of her said alleged confidence in him or his said alleged influence over her. The answer further alleges that Bridget was indebted to the defendant in the sum of $5,800, and that she was in pressing need of money, and that he advanced to her the further sum of $4,200, and that such deed was to satisfy such debt and for such advance, etc.

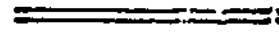
The case then rests, so far as the cross bill and answer taken together are concerned, on the following facts: De Lashmutt was the agent and confidential adviser of Bridget Lavin. She was addicted to the use of intoxicating liquors and morphine. While he was her agent and confidential adviser, and while she was in a home for inebriates, where she had been committed for inebriety, she executed her deed to him in consideration of a debt she owed him of $5,800, and of an advance of $4,200 to relieve her pressing need for money;

and while he denies that the deed was fraudulently procured, or was executed by reason of his alleged influence or persuasion, or was under his direction, or was not understood by her, yet he does not know and cannot state whether at the time she executed the deed she had great or any confidence in him, as alleged, "or whether or not, at said time and in so doing, she yielded to the persuasions or solicitations or directions so fraudulently, as alleged, made by him, on account of or by reason of her said alleged confidence in him or his said alleged influence over her." This pleading has already been construed in this court, and held not to state a defense to the matters charged in the cross bill. 76 Fed. 907. The defendant cannot say that he does not know whether Bridget Lavin yielded to his persuasions or solicitations in executing the deed in question. The confidential business relation and agency being admitted, the burden is upon him to show affirmatively that, in taking a conveyance of her property, she acted upon independent advice. If he does not know that the deed was not the result of his influence and solicitation, by reason of the grantor's confidence in him, then it can never be known that the deed was free from undue influence, since such an influence is, as a matter of law, undue. This allegation in the answer has the effect of an admission that Bridget Lavin conveyed her property to De Lashmutt as a result of his confidential business relations with her, and of his persuasions and solicitations, under circumstances that made her susceptible to such influences. He was, moreover, her creditor to a large amount, and was therefore in a position to enforce his solicitations by the pressure of his debt.

Upon these facts, I am of the opinion that the deed is void; and the question now arises whether the further defense set up by De Lashmutt in his amendment to the answer, of an accord and satisfaction, is sufficient. Had De Lashmutt such a claim of right as would constitute a valid consideration for the agreement of compromise set out in the supplemental answer of De Lashmutt? It is contended that, inasmuch as the deed to De Lashmutt was void, his claim was without consideration in law or equity, and that he therefore had no claim of such a character as would constitute a consideration for what was done in the compromise agreement. But, upon the facts alleged, De Lashmutt had paid $10,000, treating the surrender of his debt for $5,800 as a payment for the land conveyed. If he is not entitled to claim the advantages of that contract, it does not follow that he has forfeited the debt due him and the money paid. If he had no claim of title to the land, he, at least, had a claim against the estate of Bridget Lavin, to the payment of which, in good conscience, the land might be made subject by probate administration. At least there is ground for such a claim. There was therefore something to compromise; otherwise we must assume that De Lashmutt had forfeited his debt and the $4,200 which went to the use of Bridget Lavin. It is not material that the accord did not treat the claim as one of pecuniary character. It is enough that by the accord the right which existed to prefer such a claim was extinguished. The parties necessarily must have considered that De Lashmutt had a

claim growing out of the transaction in its entirety, and that included the payment of this $10,000.

It is contended, however, that the death of Bridget transferred the trust obligation of De Lashmutt to her heir, Starr, so as to bring the agreement of accord and satisfaction within the rule that applies when relations of confidence and trust exist. But the relation thus created is, at most, merely one arising by operation of law, and does not bring the case within the rule sought to be applied. De Lashmutt had a just demand to the amount of $10,000 against the estate of Bridget, and, upon the theory of Starr as to the effect of Bridget's deed to De Lashmutt, the latter had, at least, a reasonable claim to be satisfied of this debt out of this property, and that, in my opinion, is sufficient. There were, in fact, no confidential relations existing between Starr and De Lashmutt. Starr was not afflicted with the weakness and other infirmities attributed to Bridget, nor subject to the influence of De Lashmutt. The dependence of the mother did not apply to the son. On the contrary, the agreement pleaded was in consideration of a controversy between the parties. There was contention, not confidence, between them. By the compromise of that contention, Starr has in fact got rid of a debt for which the property which he took as heir was charged, amounting to $5,800, and of a claim for money advanced to supply the necessities of Bridget Lavin, amounting to $4,200 additional. Starr cannot profit by a transaction which he repudiates, and, if there had been no accord and satisfaction, the estate in his hands must, at least, have satisfied De Lashmutt's debt. The exceptions are overruled.



NATIONAL HARROW CO. v. HENCH et al.

(Circuit Court of Appeals, Third Circuit. October 29, 1897.)

No. 30.

1. RESTRAINT OF TRADE—COMBINATION OF PATENTEES.

Numerous manufacturers, under various United States patents, of float spring-tooth harrows, agreed to organize a corporation, to assign to it all the patents thus owned or thereafter to be acquired, and the good will of their business, and not to be interested in the manufacture or sale of such harrows except as agents or licensees of the corporation; that the corporation should license them to manufacture and sell, for their own account, subject to uniform terms and conditions, their respective makes, and should not itself manufacture or sell; that each licensee should pay one dollar for each such harrow manufactured and sold by him, and should receive paid-up stock in return for the patents and good will. Those who entered the agreement represented 70 per cent. of the total manufacture and sales of the United States. The corporation was formed and the assignments made. The licenses issued also bound the licensees not to cut prices, not to sell other float spring-tooth harrows except under the licenses, and provided liquidated damages for every breach. *Held*, that the arrangement was an unlawful combination in restraint of trade.

2. SAME.

Though the fact that several patentees are exposed to litigation, justifies them in composing their differences, they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage.

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

W. P. Quinn, for appellant.
John G. Johnson, for appellees.

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

BUTLER, District Judge. The essential facts are well stated by the circuit court, as follows:

"The National Harrow Company, a corporation of the state of New York,—to whose contract rights and general purposes the plaintiff, a subsequently created New Jersey corporation, has succeeded,—originated in a written agreement between a number of leading and distinct manufacturers, under various United States letters patent, of float spring-tooth harrows, whereby it was agreed that they would organize a corporation under the laws of New York and would assign to the corporation all United States letters patent which they respectively then owned or should thereafter acquire relating to float spring-tooth harrows and the good will of their business in such harrows, and that they would not thereafter be interested in the manufacture or sale of such harrows except as agents or licensees of the corporation; that the corporation should issue to the persons, firms and corporations respectively so assigning to it their said patents and the good will of their business exclusive licenses to manufacture and sell upon their own account, subject to uniform terms and conditions, the same style of harrows which they were making and selling just prior to the agreement, and that the corporation itself would not manufacture and sell any style of harrows covered by its licenses; that each licensee should pay to the corporation one dollar on every float spring-tooth harrow manufactured and sold by such licensee, and that each person, firm, or corporation transferring to the corporation the good will of their float spring-tooth harrow business and their patents relating thereto, should receive in payment therefor the value thereof as agreed upon or as fixed by arbitration, in paid-up stock of the corporation.

"The agreement in the first instance was signed by six different manufacturers, but the contract contemplated and provided that others should come into the arrangement and become parties thereto. Accordingly other manufacturers of float spring-tooth harrows soon joined the combination, which then embraced twenty-two different persons, firms or corporations. Thus almost the entire output of float spring-tooth harrows made in the United States was brought under the regulation and control of this organization, its licensees manufacturing and selling at least 90 per cent. thereof.

"The defendants were the owners of two United States letters patent relating to float spring-tooth harrows, under which they had been manufacturing and selling harrows. They joined the combination, and, agreeably to the provisions of the above-recited agreement, they assigned to the New York corporation their patents, and that corporation then issued to the defendants a license to manufacture and sell their old style of harrows. The New Jersey corporation, which was formed in furtherance of the general scheme, issued to the defendants a second license in terms and conditions substantially like the former license. These are the two license contracts here sued on. The following stated provisions are common to both licenses: The defendants agree not to sell float spring-tooth harrows, float spring-tooth harrow frames without teeth, or attachments applicable thereto, at less prices or on more favorable terms of payment and delivery to the purchasers than is set forth in the schedule annexed to the license, unless the licensor should reduce the selling prices and make more favorable terms for purchasers, and that the defendants will not directly or indirectly manufacture or sell any other float spring-tooth harrows, etc., than those which they are thus licensed to sell and market except for another licensee, and then only of such style as he is licensed to manufacture and sell. They agree to pay to the corporation one dollar upon each float

spring-tooth harrow, etc., manufactured and sold by them, agreeably to the terms of the license, and the sum of five dollars as liquidated damages for every harrow, etc., manufactured or sold by them contrary to the terms and provisions of the license, and the corporation agrees to defend all suits for alleged infringement brought against the licensees. All the licenses issued by the corporation are upon the like terms and conditions."

[76 Fed. 667.]

It is manifest, as well from the contract as from the proofs outside of it, that the purpose of the parties was to form a combination between the various manufacturers of these harrows, to prevent competition in business and enhance prices; and such is the effect of their agreement. The corporation, provided to hold the legal title of the several patents, is merely an instrument to effect this object. The prior owners are still the beneficial owners, with right to continue their business, subject only to the restraint in its management imposed by the contract. The provision for licenses is made necessary by the transfers of title, and is simply another part of the scheme for combination and control of the business of the several patentees. The result would be the same in legal contemplation if the corporation and licenses had been dispensed with, and the contract had provided simply, as it does, for combination and restraint of competition. That such a contract would be unlawful seems clear. While it is true that all contracts in restraint of trade are not prohibited, and it is sometimes difficult to determine whether a particular one is, there is no room for doubt that such a contract as this, which provides for general and unlimited restraint, is unlawful. To justify restraint, reason for it must be found in the nature of the property or the situation of the parties, as, for instance, in the sale of a business or professional good will, and other similar cases. Even then the restraint must be confined within such reasonable limits as the circumstances require. Here there is nothing to justify restraint, and that imposed is without any limitation whatever. The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact. Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that one patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interests, and abuses of patent privileges. The object of these privileges is to promote the public benefit, as well as to reward inventors. The suggestion that the contract is justified by the situation of the parties—their exposure to litigation—is entitled to no greater weight. Patentees may compose their differences, as the owners of other property may, but they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage. We do not see anything to distinguish this case, in principle, from Nester v. Brewing Co., 161 Pa. St. 473 [29 Atl. 102]; Carbon Co. v. McMillin, 119 N. Y. 46 [23 N. E.

530]; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Distilling & Cattle Feeding Co. v. People [Ill. Sup.] 41 N. E. 188; Straiht v. Harrow Co. [Sup.] 18 N. Y. Supp. 233. The last of these cases arose out of this contract under circumstances substantially like those of the case before us. A similar conclusion was reached by the court in Harrow Co. v. Quick, 67 Fed. 130, where this contract was involved. The doctrine of these cases is not new, and we feel no hesitation in applying it to the contract before us.

The judgment is therefore affirmed.

OLD COLONY TRUST CO. et al. v. CITY OF ATLANTA et al.

(Circuit Court, N. D. Georgia. July 22, 1897.)

1. BILL FOR INJUNCTION—INTEREST OF COMPLAINANTS—APPREHENSION OF LOSS.
Bondholders seeking relief, by injunction, against the enforcement of an ordinance fixing rates of fare on a street railroad, have sufficient interest in the matter to give them a standing in court, if they show a well-grounded apprehension of loss by the enforcement of the ordinance.

2. CITY CHARTER—EXTENT OF AUTHORITY—FIXING FARES ON STREET RAILROAD.
A provision in the charter of a city authorizing it to "pass all by-laws concerning carriages, wagons, carts," etc., "and every by-law, ordinance and regulation it may deem proper for the peace, health, order or good government of the city," does not authorize it to pass an ordinance fixing rates of fare on a street railroad.

3. CHARTER OF STREET RAILROAD—FARES SUBJECT TO MUNICIPAL APPROVAL—POWER TO FIX RATES OF FARE.
A proviso in a street-railroad charter, "that the rates of fare and freight upon said railroad shall be subject to the approval of the mayor and city council," is not sufficient authority to the city to enact an ordinance fixing such rates of fare.

4. SAME—EXERCISE AND EXHAUSTION OF POWER.
A city deriving from the charter of a street-railroad company its only authority to fix rates of fare thereon exhausts such power by prescribing maximum rates in the ordinance authorizing the use of its streets for the construction and operation of such road.

5. SAME—CONSTRUCTION OF STATUTE—AUTHORITY TO FIX FARES.
Laws Ga. 1890–91, p. 169, validating the charter of the Atlanta Consolidated Street-Railway Company and other street railroads of the state, provides that such roads shall be liable to such "regulations" "as are other railroads and street-railroad companies incorporated by separate act or acts by the laws of this state." The charter of one street railroad, incorporated by separate act, authorized the city of Augusta to regulate rates of fare and freight thereon. *Held* not sufficient to authorize the city of Atlanta to fix rates of fare.

6. SAME—RESERVATION OF RIGHT OF CONTROL.
A reservation in an ordinance granting the use of streets for a street railroad that such road shall be "subject to all the laws and ordinances now in force, and such as may be hereafter made," does not authorize the city to pass an ordinance fixing rates of fare on such road, unless it is, either expressly or by necessary implication, thereto authorized by some law of the state.

Brandon & Arkwright, for Old Colony Trust Co.
Payne & Tye, for Consolidated St. Ry. Co.
N. J. & T. A. Hammond, for Seixas.
James A. Anderson and John T. Pendleton, for City of Atlanta.

NEWMAN, District Judge. This is a bill filed by the Old Colony Trust Company and Henry Seixas against the city of Atlanta and the Atlanta Consolidated Street-Railway Company. The Old Colony Trust Company sues as trustee for the holders of the bonds of the Atlanta Consolidated Street-Railway Company, the bonds so represented amounting to $2,025,000. Seixas sues as the owner of $93,000 of the first mortgage bonds of the Atlanta Street-Railroad Company, of the value of $100,000, and $37,000 of the bonds of the Atlanta Consolidated Street-Railway Company, of the value of $33,000, and of 500 shares of the capital stock of the latter company. By a decision just made, Seixas is retained in the bill as bondholder, but is dismissed so far as he complains as stockholder.

The purpose of the bill is to enjoin the city of Atlanta from enforcing the following ordinance:

"Section 1. Be it ordained by the mayor and general council, that from and after the first day of May, 1897, it shall be unlawful for any company operating electric or other railways in or upon the streets of Atlanta, by itself or its agents, directly or indirectly, to charge or collect more than five cents for the transportation of any person from any point on said line or lines owned or operated by said company whether the same be for a continuous passage on a through line or by transfer to any other line or lines owned and operated by said company.

"Sec. 2. Upon the payment of one full fare as above provided it shall be the duty of said railway company to transport such passenger to his destination upon any line or lines of said company, and to furnish a transfer ticket, without additional charge, whenever it is necessary for such passenger to change to the car of any other line or lines operated by said company in order to reach his said destination.

"Sec. 3. Any violation of the above ordinance or any refusal to furnish a transfer ticket as above provided for by any officer or agent of any street railway company in said city, shall be punished by a fine of not less than ten dollars ($10.00) nor more than one hundred dollars ($100.00), or imprisonment not less than thirty days in the discretion of the recorder."

A cross bill has been filed by the Atlanta Consolidated Street-Railway Company, in which it adopts the allegations of the original bill (except as qualified), and sets out some additional facts, and also seeks to enjoin the city from enforcing against it the above ordinance. To the original bill, as well as the cross bill, there is a demurrer by the city of Atlanta. The case has now been heard on the demurrers.

It is said on behalf of the city that neither the Old Colony Trust Company nor Seixas shows such an interest in the matter at issue as will authorize the court to hear them; that they stand upon a bare and unfounded apprehension of loss from the enforcement of this ordinance. We cannot agree to this view. On the contrary, we think that under the allegations of the bill the complainants show a reasonable and fairly well-grounded anticipation of loss of interest on the bonds, and this, we think, is sufficient. It is not necessary in a case like this that the party complainant should be required to sit by and submit to loss as a demonstration of the injuries effected by legislation, before invoking the assistance of the court. It is enough to give them a standing in court if they show a well-grounded apprehension of loss, and we think that is shown in this case.

Two questions are raised by this demurrer: First, had the city power to pass the ordinance in question? and, second, if it had such power, is the ordinance a reasonable one in its effect on the corporation and on its lien creditors?

If the first question is resolved in favor of the street-railway company, or, in other words, if it is determined that the city lacks authority to pass this ordinance, the second question need not be considered.

The power of the city to pass the ordinance is claimed by its counsel to be derived from four sources:

1. It is contended that this authority is given the city by section 15 of its charter. This section of the charter was in the original acts of incorporation of the city, and was re-enacted in what was called the "New Charter," in 1874. So far as its language is invoked here, it empowers the city "to pass all by-laws concerning * * * carriages, wagons, carts, drays," etc., "and every by-law, ordinance and regulation that it may deem proper for the peace, health, order or good government of said city." The contention is that, in the general grant of authority to pass ordinances for the order and good government of the city, such an ordinance as this is embraced. We are of opinion that the general grant of authority to pass ordinances is one which relates to the peace, order, health, etc., of the city, and is not sufficient to authorize an ordinance of this character. Special stress is laid, however, in the argument which invokes this section as a grant of power, upon the authority given to pass by-laws concerning "carriages, wagons, carts, drays," etc.; and it is said that this section having been embraced in the original city charter, granted before street railroads were known in Atlanta, and the city having been authorized and having exercised the power to fix the charges of drays and hacks, the same authority would now exist as to this new mode of conveyance. The exercise of power in these two respects is entirely different. In the case of the street-railway company there is a permanent, fixed investment, said to be over $3,000,000, made by legislative authority, and with the city's consent, and which is only valuable when used for the purpose contemplated. This enterprise is inaugurated and carried on, so far as the city is concerned, for public convenience; so far as the stockholders and bondholders are concerned, as a private investment. By depriving them of the right to receive a reasonable return on the investment made, its value as a property is totally destroyed. When it is considered that this property right exists by special legislative grant, the right to regulate its charges is a very different thing from the right to regulate the charges of a hack or dray, which may run or not as a public conveyance without destroying, or perhaps without substantially affecting, its value. This section of the city's charter, neither by the general terms employed, nor by its special reference to vehicles, gives the city the power to pass the ordinance now under consideration.

2. It is said that the power contended for is derived from the charter of the Atlanta Street-Railroad Company, which was granted in

1866. The Atlanta Consolidated Street-Railway Company is the successor of the Atlanta Street-Railroad Company, the former having bought out the latter company in 1891, and subsequently consolidated it with the other lines of street railway which the consolidated company has acquired. In the act of 1866, incorporating the Atlanta Street-Railroad Company, the company was granted "the exclusive power and authority to survey, lay out, construct and equip, use and employ street railroads in the city of Atlanta, subject to the approval of the city council thereof for each and every route selected, first had and obtained before work thereon shall be commenced; the property of said company to be subject to the same state, county and city taxes as the property of individuals in said city of like value is or may be subject to, unless the city council shall at any time think fit to exempt the same either in whole or in part, from the payment of city taxes, provided that the rates of fare and freight upon said railroad shall be subject to the approval of the mayor and city council of the city of Atlanta." It is insisted that under the language last quoted, which makes the rates of fare subject to the approval of the mayor and city council, the city has the power to fix rates. Soon after the passage of this act an ordinance was passed by the city authorizing the use of the streets, etc. The company did not build under the first ordinance, but subsequently, in 1868 or 1869, as it appears from the bill, another ordinance was passed, and under this it is alleged that the Atlanta Street-Railroad Company constructed its lines. Among other things there was a provision in the ordinance under which the lines were built that "the charges for passage on said road shall not exceed twenty cents for any through line and ten cents for half lines or short distances." We do not express any opinion upon the question raised and discussed at the bar as to whether this constituted a contract between the city and the street-railroad company from which the city could not withdraw, because other conclusions we have reached render its determination unnecessary. This much is manifest, however, that, if the city derived from the above-quoted provision of the charter of the Atlanta Street-Railroad Company any power to fix rates of fare, it exhausted that authority when it passed the ordinance referred to fixing the rates of fare at 20 and 10 cents, respectively. This, of course, so far as it derived power from the provision referred to, and not determining at all how far, with proper additional legislative authority, it might have changed this ordinance with reference to the rates of fare. But even if this power of approval of rates, etc., had been granted directly to the city, and was not a mere reservation in the charter of the street-railroad company, or if it should be here so considered, is the power to approve rates the power to fix rates originally? This was not the view of the supreme court in a case where a question quite similar to this arose. In Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, the supreme court was called upon to determine the right of the interstate commerce commission to fix the rates of fare for railroads doing interstate business, under the provisions of the act of congress. While the grant of power in that case was

claimed by a commission, and here it is claimed and is sought to be exercised by a municipal government, the question is very much the same. The following extract from the opinion of the court (page 196, 162 U. S., and page 705, 16 Sup. Ct.) shows the view entertained by the supreme court:

"We do not find any provision of the act that expressly or by necessary implication confers such a power. It is argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies the right to prescribe rates. This is not necessarily so. The reasonableness of the rate in a given case depends on the facts, and the function of the commission is to consider these facts and give them their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes the rate, that rate is prejudged by the commission to be reasonable."

It will be perceived that the court concedes the right of the commission to pass upon the reasonableness of rates when made by a railroad, but denies its power to fix them originally. We do not distinguish between this authority to pass upon the reasonableness of rates and the power to "approve," and if the authority to fix rates is wanting in the one case it would seem to be wanting in the other.

3. The Atlanta Consolidated Street-Railway Company obtained a charter from the secretary of state of Georgia, and afterwards, in connection with other street railroads of the state, obtained from the legislature a validating act, because of doubts entertained as to the power of the secretary of state to grant charters to street-railway companies. This doubt afterwards proved to be well founded, when the supreme court of the state decided that the secretary of state had no such power. This validating act (Laws Ga. 1890–91, vol. 1, p. 169) provided that the street-railroad companies whose charters were thus legalized should "be subject to pave, and shall be liable for street paving and to other regulations of municipal corporations as are other railroads and street railroad companies incorporated by separate act or acts by the law of this state." It is claimed for the city that by this provision the city obtained, and the Atlanta Consolidated Company became subject to, any and all provisions of any and all charters granted street-railway companies by the legislature of Georgia; and as certain of these charters, one at least, contained a provision authorizing the city to fix rates of fare and freight, that this power was given to the city of Atlanta. There are two obvious difficulties about this contention: First, the power of "regulation" does not necessarily embrace the power to fix rates of charge. There are many matters for it to cover without embracing this latter power. The city unquestionably has the right, within any reasonable limit, to regulate the speed of cars and other matters connected with their movement on the streets; where poles shall be placed in the case of overhead wires; how wires shall be located. and their location with reference to other wires and the safety of the same; and to do many other things which might be noted with reference to the occupancy of the streets, protection to life and limb thereon, and all such matters as involve the safe and orderly use of the streets over which it has, under the legislature, full power

and control. As stated, in one charter at least, the right of the city (the city of Augusta) to regulate rates of fare and freight was given. Under the charter of the Atlanta & Edgewood Street-Railroad Company that company was authorized "to fix, charge and collect such rates for the carriage of persons and property as it may deem proper." The lines of this last company have been acquired and are now a part of the consolidated system, the Atlanta & Edgewood having sold its lines by authority of the legislature. 1 Laws 1890-91, p. 341. There is no more reason for selecting a provision from the Augusta charter than from the Atlanta & Edgewood charter. Indeed, if either should be selected, it would seem to be proper to take the latter as an Atlanta charter. We think, however, that the provision referred to in the validating act is too indefinite to be taken as the basis for a grant of power such as is sought to be exercised by the city in this case. Certainly, therefore, it cannot be held that the provision subjecting the consolidated street-railway company to such regulations as were other street railroads by acts of the legislature would authorize the city to select from the Augusta charter the power therein granted to regulate rates of fare, and apply it to the Atlanta Consolidated Company. We cannot seriously entertain the proposition that the legislature had any such result in contemplation when it inserted this reservation in the act of 1890-91, which legalized the charter of the Atlanta Consolidated Company.

4. It is further insisted that the power to pass this ordinance exists by reason of the reservation made by the city in the ordinance authorizing the Atlanta Consolidated Street-Railway Company to use the streets and to electrically equip its lines. There is some difference between counsel as to the exact language of this ordinance, but, giving it the broadest meaning in favor of the city, it provided that the company should be "subject to all the laws and ordinances now in force and such as may be hereafter made." Of course, this ordinance should be treated as contended for by counsel for the consolidated company, and the word "legally" should be read into it, and it should read as though it said such ordinances "as may be hereafter legally made"; and the question therefore recurs to, and is, what legislative grant has the city empowering it to pass this transfer ordinance? As we do not find in any of the acts of the legislature relied upon the power to pass the ordinance, we are compelled to hold that the city exceeded its authority in passing it. We hold, moreover, that, before the city can exercise the power to fix rates of fare for a street-railroad company, it must obtain that power in express terms, or it must arise by necessary implication from the words used in the legislative act. The power of the state over the subject-matter need not be discussed. We are dealing with the power of a municipality, a creature of the legislature, which derives all its authority from the legislature, and can only act within the limits of the legislative grant. If, under any of the acts of the legislature which have been discussed, it could be held that the city had the power, by necessary implication, to regulate or to fix rates of fare for street railroads, or for this particular company, it might

be gravely questioned, even then, if it had the power to pass that part of the ordinance in question requiring transfers. It would be a subject of serious doubt, at least, if the authority to fix rates carried with it the authority to require the street-railway company to give two, three, or more rides for one fare. One continuous ride for a single fare is one thing, and two or more rides, with the necessary stoppage and letting passengers off and taking them on, is another and entirely different thing. Many reasons have been urged in argument, and others might be suggested, which in our opinion make a broad distinction between the two classes of service, namely, between a continuous ride in one car and a ride requiring transfers from one or more cars to others. Unquestionably this ordinance, as to its feature requiring transfers, is a very broad exercise of municipal power. It appears to go to the limit of municipal control even under legislative authority. The power to pass the ordinance should be clearly shown. On the contrary, it is clear to us that the city is without such power. As we entertain the opinion above expressed on the first question involved, namely, as to the power of the city to pass the ordinance in question, it is unnecessary to go into the second ground on which the ordinance is attacked in the complainants' bill. The question of the reasonableness or unreasonableness of the ordinance becomes immaterial if the city lacked legislative authority to pass it. We hold, therefore—First, that the complainants have shown such an interest in the subject-matter as to give them a standing in court to question the validity of this ordinance; and, second, that, the city being without legislative authority to pass the ordinance, the same is invalid and inoperative. For these reasons an order will be entered overruling the demurrer, both to the original and to the cross bill.

McCORMICK, Circuit Judge. The views and conclusions expressed in the foregoing opinion are the result of careful examination and conference by Judge NEWMAN and myself, and meet my full concurrence.

BYRNES et al. v. DOUGLASS et al. [1]

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 284.

1. MINES AND MINING—EMINENT DOMAIN—CONDEMNATION OF TUNNEL.
   Under the Nevada statute of March 1, 1875 (Gen. St. §§ 256-273), authorizing the condemnation of rights of way for mining tunnels, a mining company may condemn, for use in reaching its mine, an old and partially ruined tunnel in a neighboring claim, which is not used by the owners of that claim at the time, there being nothing to show any present purpose to use it.

2. SAME—COMPENSATION—COMMISSIONER'S REPORT.
   The report of commissioners in condemnation proceedings under the Nevada statute, finding on conflicting evidence that no damage will be done by the construction of a tunnel through certain claims, and that such claims would rather be benefited thereby, will not be disturbed on appeal.

[1] Rehearing pending.

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

A proceeding was commenced by J. M. Douglass and others, the appellees in this case, in the district court of the state of Nevada, under a statute of that state entitled "An act to encourage the mining, milling, smelting, or other reduction of ores in the state of Nevada," approved March 1, 1875 (St. 1875, p. 111; Gen. St. §§ 256-273), to condemn a right of way for a mining tunnel 7½ feet wide by 7½ feet high from the mine known as the "Contact Mine," through five intervening mining claims and locations, namely, the Atlantic, the Annie, the Red Jacket, the South End, and the Clinton, to the Goodman mine. The appellants removed the cause to the circuit court of the United States for the district of Nevada, and under said proceedings in said circuit court commissioners were appointed to assess damages to the owners of the property appropriated to the use of said tunnel, and upon the report of said commissioners and the hearing of the objections of the appellants thereto the court confirmed the report, and entered and filed a decree appropriating to the use of the appellees the right of way through said mines, as applied for in the petition. The appellants appealed from said decree, and assign as error, first, that in and by said proceeding there was condemned to the use of the appellees a tunnel 648 feet in length, running through a portion of the Atlantic Consolidated mine, and having its mouth in the Contact mine, which tunnel belonged to and was a part of the Atlantic Consolidated mine, and was the most convenient means for working the same, and had been for many years used by the owners of the Atlantic Consolidated mine, and was not subject to condemnation under said act of the legislature of Nevada, for the reason that no authority is given by said act to condemn the tunnel of one person, constructed and used for mining purposes, for the use of another for the same purpose. The facts in regard to the tunnel which belonged to the Atlantic mining claim are these: The commissioners, in surveying a tunnel through the mining claims intervening between the Contact claim and the Goodman claim, followed and appropriated for a portion of the distance the tunnel so referred to in the assignment of error. A portion of that tunnel had been constructed in 1860 or 1861, for the purpose of furnishing water to Silver City. Subsequently its use for that purpose was abandoned, and as early as 1866 it was used for prospecting and working the Atlantic claim. It traversed the Atlantic claim, and had its mouth on an adjoining claim, which was first known as the "Cadiz Claim." The Cadiz claim and the Atlantic claim belonged originally to the same owners. They permitted the Cadiz location to revert to the United States, and it was subsequently relocated by others. In 1890 it was relocated by C. E. Brown, under the name of the "Contact Mine." The tunnel was used for mining purposes as late as the year 1877, or perhaps 1881. After that date no work appears to have been done in the tunnel, except to this extent: that in 1887, the tunnel being out of repair, an agent who was in possession of the Atlantic mine and tunnel on behalf of the owners began to repair the tunnel, but shortly afterwards, on consultation with the owners, appears to have abandoned it, for the reason that it was more feasible to construct a new tunnel than to repair the old. In 1887 he commenced the construction of a new tunnel. Since that date the old tunnel was not used, but was allowed to fall into decay. In their report the commissioners in these proceedings awarded to the owners of the tunnel, so far as the same was situate in the Atlantic mine, to wit, 349 feet, the sum of $1,021.95.

W. E. F. Deal, for appellants.
F. M. Huffaker, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

It is the contention of the appellants that, under the act of the legislature of Nevada on which the proceedings in this case were had, the

circuit court was powerless to take the tunnel belonging to the owners of one mine, and bestow it by right of eminent domain upon the owners of another. It appears from the evidence that when the appellees took possession of the right of way under the proceedings in this case the old tunnel was badly caved down, and in very bad shape, and that it cost nearly as much to clean it out as it would have cost to run a new tunnel. The statute under which these proceedings are had declares that "the production and reduction of ores are of vital necessity to the people of this state; are pursuits in which all are interested, and from which all derive a benefit; so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor." Gen. St. Nev. § 256. In Mining Co. v. Seawell, 11 Nev. 394, it was held by the supreme court of that state that the condemnation of a right of way for a tunnel for the operation of a mine under the provisions of the statute in question was constitutional, and that the purpose for which the tunnel was to be appropriated was a public use. That decision was approved in the later case of Mining Co. v. Corcoran, 15 Nev. 147, and it undoubtedly declares the settled law of that state. Under the facts that appear in the record, and that were acted upon by the court in rendering the decree which is appealed from, we deem it unnecessary to consider whether or not a mining tunnel which has been constructed and is in use by a mining corporation may, under the statute of Nevada, be taken from the company by which it is owned or used, and be devoted to the use of another mine. That question is not presented in this case. The tunnel of the Atlantic mine, which was appropriated by the appellees in those proceedings, had not been used for mining purposes for many years. It is true that it had not been abandoned, and that it still belonged to the Atlantic mine, and that the owners of that mine claimed it, and the right to use it; but the fact remains that they had not used it, and there was nothing in the record to show a present purpose to use it, for mining purposes. At the time when these proceedings were begun, therefore, it stood in the same relation to the property of the mining company in which any other of its property stood which was not being actually used for mining purposes. The right to condemn it by the exercise of eminent domain rested upon the principles which have controlled the decisions of courts in cases where the lands of railroad corporations, not actually in use by them, nor absolutely necessary for the enjoyment of their franchises, have been held subject to be taken by other corporations in the exercise of the right of eminent domain. Peoria, P. & J. R. Co. v. Peoria & S. R. Co., 66 Ill. 174; In re Rochester Water Com'rs, 66 N. Y. 413; New York, C. & H. R. R. Co. v. Metropolitan Gaslight Co., 63 N. Y. 326; Morris & E. R. Co. v. Central R. Co., 31 N. J. Law, 205. The commissioners in their report, and the court in its decree, evidently took this view of the relation of the old tunnel to the Atlantic mine.

The remaining assignments of error direct our attention to the fact that in the report of the commissioners and in the final decree no compensation whatever is allowed for that portion of the old tunnel which

was located in the Contact mine, and no compensation was allowed for the right of way through the mines which intervened between the Atlantic mine and the Goodman. The report of the commissioners was based upon conflicting testimony. Competent evidence was produced before them to prove that the old tunnel in the Contact mine and the right of way through the other mines were of no value, and that it was a benefit, rather than a disadvantage, to the intervening mines to develop their lodes by the tunnels which were cut through them, and that in all cases where ore of any value was taken it was placed upon the mining premises, and there left for the use of the owners. Under this state of the record, we cannot say that the fair and actual value of the property taken was not awarded, or that just compensation was not made. Every intendment is in favor of the correctness of the report of the commissioners. Railroad Co. v. Elliott, 5 Nev. 358. The decree will be affirmed, with costs to the appellees.

WHITTLE v. VANDERBILT MINING & MILLING CO. et al.

(Circuit Court, S. D. California. September 14, 1897.)

No. 647.

1. Trusts—Innocent Purchasers of Trust Estate—Corporation Issuing Stock in Payment.
   The trustees of a trust for complainant's benefit conveyed the property, in violation of the provisions of the unrecorded trust instruments, to a corporation organized by them for that purpose only, and which issued to them in exchange nearly all its stock. In a suit to charge the trust on the land, *held*, that under Civ. Code Cal. §§ 869, 2243, relating to purchasers from trustees, the stock issued for the land constituted the corporation a purchaser for value.
2. Corporations—Dealings with Stockholder—Notice.
   A corporation purchased land from two persons, who held the record title, and also owned most of the corporate stock. No one representing it, except one of the grantors, knew that it was affected by an unrecorded trust instrument. *Held*, that as he was dealing for his own interest, and adversely to the corporation, his knowledge was not to be imputed to it, and that it was a purchaser without notice, under Civ. Code Cal. §§ 869, 2243.
3. Wrongful Conveyance by Trustee—Innocent Purchaser.
   The beneficiary of a trust in lands took no steps to enforce it for three years after notice, and never had the deeds recorded. The trustee wrongfully conveyed it to a purchaser for value and without notice. *Held*, that, as between him and the beneficiary, the latter should be the sufferer.
4. Same—Corporations.
   In applying the principle that, as between two innocent parties, an injury effected by the wrongful act of a third party should be suffered by him whose negligence made the wrong possible, the court may look behind the corporate character of the other party, and take notice of the fact that an individual who has bought its stock is a real party in interest.
5. Trust Deeds—Acknowledgment and Recording.
   Although an instrument charging a trust upon lands in California be unacknowledged, yet it may be recorded upon proof of its execution. Civ. Code Cal. §§ 1161, 1183, 1195, 1198, 1199.
6. Same—Imputed Negligence.
   If an instrument creating a trust in lands cannot be recorded for want of an acknowledgment, this defect, as due to the negligence of the creator of

the trust, is imputable to the beneficiary, and does not excuse the failure to record it, as against a purchaser for value and without notice.

7. FRAUD OF TRUSTEE—RIGHTS OF BENEFICIARY.
Where trustees wrongfully convey lands to a purchaser for value and without notice, the beneficiary may recover from the trustee the consideration received by him.

8. CORPORATIONS—SUIT TO CHARGE A TRUST ON LANDS—PROCEDURE.
In a suit to charge a trust on lands of a corporation, and for a receivership, and an accounting by individuals, the land was held to be free from the trust. Numerous creditors intervened and proved their claims against the corporation, and receiver's certificates required payment. *Held* that, while an accounting by the individual defendants should be decreed, this need not delay the sale of the property, and its application to pay the certificates and debts.

Clarence A. Miller and Miller, Wynne & Miller, for complainant.
W. J. Hunsaker and Wm. Chambers, for defendants.
H. C. Dillon, for receiver.
Gardiner, Harris & Rodman, Anderson & Anderson, Hatch, Miller & Brown, and E. R. Annable, for interveners.

WELLBORN, District Judge. This is a suit in equity for the enforcement of a trust and an accounting thereunder. The admissions of the pleadings, together with the evidence adduced orally in open court on final hearing, show the following facts:

On the 21st of March, 1892, Samuel King, R. C. Hall, and James K. Patton were the owners of eight mining claims, situated in the Vanderbilt mining district, California, described as follows: The "Gold Bar," the "Gold Bar Extension," the "Gold Bronze," the "Gold Bronze Extension," the "Eighty-Foot Claim," the "Chippy," the "Lookout," and the "Valley." On that day said King, being ill and in expectancy of early death, conveyed his undivided one-third interest in said mines to said James K. Patton and Joseph P. Taggart; and at the same time said Patton and Taggart executed two instruments, of the same tenor and effect (Patton executing one, and Taggart the other), describing said Patton and Taggart as "parties of the first part," and said King as "party of the second part," and containing, among other provisions expressive of the consideration for said conveyance, the following:

"In case of said second party's death before any reconveyance to him as herein provided, said first parties agree to account to the nephew of said second party, named, to wit, Henry King Whittle, for the gross profits or proceeds (whether derived by sale, working, or otherwise) of one-half (½) of said one-third interests in said mines; it being understood that first parties will pay all expenses connected with the working and care of said mines, and will not charge said expenses, or any proportion thereof, against the said gross proceeds to go to said Henry King Whittle as aforesaid."

Samuel King died April 2, 1892, without any reconveyance of said mines having been made to him. Within a few days thereafter the above facts were communicated by mail to the mother of complainant, Mrs. F. L. Whittle, at Birmingham, Ala., in a letter written by Diehl & Chambers, attorneys at law, then representing said Joseph P. Taggart and James K. Patton; and afterwards, about the month of March, 1893, other parties wrote to complainant, with a view of purchasing

his interest in said mining properties. On the 8th day of February, 1893, said Hall, Patton, and Taggart, pursuant to a sale previously made, conveyed to one William S. Lyle the Gold Bar and Gold Bar Extension Mines, receiving as the consideration therefor the sum of $40,000; and afterwards, on the 21st day of February, 1893, said Hall, Patton, and Taggart conveyed the said Eighty-Foot Claim to said William S. Lyle, receiving as the consideration therefor the sum of $300. Between April 3, 1892, and February 25, 1893, said Hall, Taggart, and Patton, and after said last-mentioned date, and until the 27th day of December, 1893, said James K. Patton and Joseph P. Taggart, extracted from said mines minerals and ore, from which the bill alleges said Joseph P. Taggart and James K. Patton received more than $50,000. Said Patton and Taggart deny that they received from said sources any sum greater than $20,000, and allege that said $20,000 was all used in paying the expenses of mining, shipping, and selling said ore. Afterwards, and prior to the 27th day of December, 1893, the legal title to two of the above-mentioned mines, the Gold Bronze Mine and the Gold Bronze Extension Mine, became vested in James K. Patton and Annie M. Taggart (wife of Joseph P. Taggart), subject, however, to whatever equitable rights complainant may have at any time theretofore had in the mines. The legal title so vested in Annie M. Taggart was merely nominal; her husband, Joseph P. Taggart, being the real owner. On said last-mentioned date said Patton and Annie M. Taggart conveyed said mines to the Vanderbilt Mining & Milling Company, a corporation organized under and by virtue of the laws of California by James K. Patton and Joseph P. Taggart for the sole purpose of aiding them in the management of said mining property, with a capital stock of 1,000,000 shares, of the par value of $1 each, owned at the date of the aforesaid conveyance to said company as follows: James K. Patton, 499,998 shares; Annie M. Taggart, 499,998 shares; Henry T. Hazard, 1 share; William Chambers, 1 share; Samuel T. Godbe, 1 share; Henry C. Dillon, 1 share,—the directors of said corporation being James K. Patton, Annie M. Taggart, Henry T. Hazard, William Chambers, and Samuel T. Godbe. Joseph P. Taggart was the real owner of the shares standing in the name of Annie M. Taggart. William Chambers was an attorney at law, and a witness to the instrument or declaration of trust executed by Joseph P. Taggart, and a member of the firm of Diehl & Chambers, hereinbefore mentioned. The bill, among other things, alleges:

"That the said Anna M. Taggart, Henry T. Hazard, William Chambers, and Samuel T. Godbe at the time of said conveyance were not bona fide stockholders and directors in said corporation, and that they had no interest therein, but were only nominal stockholders and directors therein for the purpose of carrying out the plans and subserving the individual interests of the said Joseph P. Taggart and said James K. Patton, and had no interest in the management and conduct of the affairs of said corporation, except as the implements of the wills of said Joseph P. Taggart and James K. Patton, and that all of said directors at the time of the execution of said deed were entirely governed and controlled by the said James K. Patton and Joseph P. Taggart for the accomplishment of their individual purposes, and that all of the contracts, acts, and things leading up to, and forming a part of, the agreement and conveyance of said property and mining claim to said Vanderbilt Mining & Milling Company,

were done, performed, and carried out by said James K. Patton and Anna M. Taggart (who, as your orator is informed and believes, was but the agent and instrument of said Joseph P. Taggart) as the managing agents and directors of said Vanderbilt Mining & Milling Company."

The bill alleges also that the conveyance by defendants Patton and Taggart to the said Vanderbilt Mining & Milling Company was without consideration, and that said company accepted said conveyance with full knowledge of the interest of the complainant in the property so conveyed. The answer of said corporation is silent as to the allegation that the conveyance was without consideration, but expressly alleges:

"That said corporation never had any notice of the equities or contracts of the complainant herein, or that said complainant had any claim in or to or upon said mining property, or in the production of the same, until this action was brought."

After said two last-mentioned mines were conveyed to the Vanderbilt Mining & Milling Company said corporation proceeded with and continued the working of said mines, until the appointment of the receiver herein, June 15, 1895. During the time that said company was engaged in working the mines, it incurred large indebtedness; and its creditors, none of whom are shown to have any notice of complainant's claims upon said mines, have intervened, asking sale of the company's property, and distribution of the proceeds among themselves according to their respective priorities. The creditors so intervening, with the amounts of their debts and dates of their liens, are as follows: John Hughes, $818.23. Alexander McKenzie, $381.08. Ned Kinney, $53.75. Thomas Phillips, $148.85. James P. Cummings, $79.50. John Phillips, $91.47. S. L. Ferguson, $1,187.96. John Hopkins, $384.98. (The last eight named parties having laborers' liens, which date from January 10, 1894, and were foreclosed in one action, October 22, 1895, in the county of San Bernardino, state of California; the costs of the action being nine dollars.) A. J. Boone, $286; costs, $17, with laborer's lien from February 10, 1894, and foreclosed April 11, 1895; Hall & Stillson Company, a corporation, balance due, $5,325.86; judgment obtained in the superior court of the county of San Bernardino, Cal., on June 15, 1895, with judgment lien from June 15, 1895. R. S. Seibert, $1,347.41; costs, $10; judgment obtained in the superior court of the county of Los Angeles, Cal., on July 20, 1895; the lien thereof fixed by record of transcript in San Bernardino county, Cal., August 1, 1895. Arthur Woods, $4,892.89; costs, $7; judgment recovered in the superior court of the county of Los Angeles, Cal., on July 31, 1895; lien thereof fixed by record of transcript in the county of San Bernardino, Cal., August 3, 1895. Charles Kelly, $221.50; costs $6; judgment recovered in the justice's court of Needles township, San Bernardino county, Cal., on November 14, 1895; the lien thereof fixed by record of judgment in the county recorder's office of said San Bernardino county March 20, 1896. There is also a petition in intervention, filed by Jones Taylor May 1, 1897, resisting the trust, which complainant seeks to enforce against the Vanderbilt Mining & Milling Company. Said Taylor is the owner of 500,001 shares of the stock of said company, one-

third of which he purchased in April, 1894, and the balance in the fall of the same year, paying for the same $25,000. As to whether or not he knew at the times of his purchases of the contract between Samuel King and Joseph P. Taggart and James K. Patton, there is a conflict between the testimony of Taylor and Taggart. I am satisfied, however, that Taylor did not, when he purchased the stock, have any knowledge whatever of said contract. The expenses of the receiver herein have been met in part by certificates of indebtedness issued by the receiver under an order of court made March 28, 1896, which authorized certificates to the amount of $1,153.72 for the payment of the expenses of the receivership up to that date, and certificates to the amount of $100 each month thereafter for the care and protection of the property, and which contains the following provision with reference to said certificates:

"They are hereby made and declared to be a first lien upon all of the real and personal property of the defendant company in the charge and possession of said receiver, and in litigation in this cause, and more particularly mentioned in the receiver's inventory on file herein."

1. The main issue, if not the only controverted matter, in the case, is as to whether or not the legal title to the two mines conveyed to the Vanderbilt Mining & Milling Company is held by said company absolutely, or partly in trust, to account to complainant for one-sixth of the gross profits or proceeds of said mines. Complainant insists that the conveyance of said mines to said company was in violation of the trust created by the contract between Samuel King and Joseph P. Taggart and James K. Patton, and was not made in good faith, nor for a valuable consideration, and, therefore, that the case falls within the provisions of section 2243 of the Civil Code of California, which is as follows:

"Sec. 2243. Every one to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust, unless he purchased it in good faith and for a valuable consideration."

Defendants, on the other hand, contend, among other things, that the Vanderbilt Mining & Milling Company was a purchaser without notice, and for a valuable consideration, and, therefore, that the conveyance to said company must be deemed absolute, as provided in section 869 of the Civil Code of California, which is as follows:

"Sec. 869. Where an express trust is created in relation to real property, but is not contained or declared in the grant to the trustee, or in an instrument signed by him, and recorded in the same office with the grant to the trustee, such grant must be deemed absolute in favor of purchasers from such trustee without notice and for a valuable consideration."

Thus it will be seen that the questions here involved are two: First. Was the conveyance of said mines to said company made upon a valuable consideration? Second. Was said company a purchaser without notice? While it is true that the bill alleges in terms that said conveyance was entirely without consideration, yet the facts, as alleged in the bill, connected with said conveyance, and which are determinative of its character, namely, that the Vanderbilt Mining & Milling Company was organized by Joseph P. Taggart and James K. Patton solely for the management of said mines, and did not acquire

any others, and that said Taggart and Patton were the real owners of the entire capital stock of said corporation at the time when said conveyance was made, show clearly that there was a consideration for said conveyance, and that such consideration was the capital stock of said Vanderbilt Mining & Milling Company. I am also satisfied, from a careful review of the authorities applicable to the undisputed facts of the case, that said company at the time of the conveyance to it of said mines was without knowledge of any trust as to said property which may have theretofore existed in favor of complainant. On this question of knowledge or notice, complainant contends that no issue is raised by the pleadings, and cites Stokes v. Geddes, 46 Cal. 18. That case, however, is clearly distinguishable from the case at bar. There the suit was against the sheriff and the purchaser at an execution sale, to set aside the attachment, execution, and sheriff's certificate of purchase in an action to enforce the lien for delinquent taxes. Among the other grounds of equity set forth in the complaint, it was alleged:

"That until within a few weeks before the commencement of this action the plaintiff had no notice of the pretended assessment, or of the pendency of proceedings in the tax suit; and, on information and belief, he avers 'that no notice was given of said proceedings, or any of them, as required by law.'"

Manifestly, the allegation "that no notice was given of said proceedings, or any of them, as required by law," was not an averment of a fact, but of a conclusion of law; and so the court held. In the case at bar, however, the situation is wholly different. Whether or not the Vanderbilt Mining & Milling Company had knowledge or notice of complainant's claims is evidently an issue of fact, and, I think, squarely raised by the pleadings. Did said company, then, or not, have this knowledge or notice? There is no proof whatever that Hazard or Godbe, who were two of the company's directors, knew anything about the contract between Samuel King and Joseph P. Taggart and James K. Patton. Nor is there any proof that Annie M. Taggart, also a director, knew of the terms or existence of said contract, while her answer specifically denies any knowledge on her part of the matter. Complainant's contention, therefore, that said company had such notice, is maintainable only on the theory that the knowledge of Patton and Chambers, the other directors, is imputable to the company. Numerous authorities are cited by complainant to the effect that notice to the agent of a corporation is notice to the corporation. Phelps v. Mining Co., 49 Cal. 337; Jefferson v. Hewitt, 103 Cal. 629, 37 Pac. 638; Donald v. Beals, 57 Cal. 405. While this, unquestionably, is the general rule, yet it has no application where the officer or agent of the corporation deals with the corporation, for himself, personally. In such a case he is regarded as a stranger to the corporation, so far as concerns any uncommunicated knowledge which he may have in respect to the transaction. 4 Thomp. Corp. §§ 5205, 5206; Frenkel v. Hudson, 82 Ala. 158, 2 South. 758; Johnston v. Shortridge, 93 Mo. 227, 232, 6 S. W. 64; State Sav. Ass'n v. Nixon-Jones Printing Co., 25 Mo. App. 643; Innerarity v. Bank, 139 Mass. 332, 1 N. E. 282; Bank v. Chase, 72 Me. 226; Wickersham v. Zinc Co., 26 Am. Rep. 784; Mathis v. Pridham (Tex. Civ. App.) 20 S. W.

1015; Manhattan Brass Co. v. Webster Glass & Queensware Co., 37 Mo. App. 145. In Frenkel v. Hudson, supra, the court says:

"The general rule is that notice of a fact acquired by an agent while transacting the business of his principal operates constructively as notice to the principal. This rule applies, of course, as well to corporations as to natural persons. Reid v. Bank, 70 Ala. 199. It is based upon the principle that it is the duty of the agent to act for his principal upon such notice, or to communicate the information obtained by him to his principal, so as to enable the latter to act on it. It has no application, however, to a case where the agent acts for himself, in his own interest, and adversely to that of his principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: First, that he will very likely in such case act for himself, rather than for his principal; and, secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject."

In Innerarity v. Bank, supra, the rule is stated thus:

"While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating."

In yet another case the same doctrine has been enunciated thus:

"The general proposition is undoubtedly true, that notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency. The rule is based on the presumption that the agent has communicated such facts to the principal. Story, Ag. § 140. On principles of public policy, the knowledge of the agent is imputed to the principal. But the rule does not apply to a transaction such as that under consideration; for in such a transaction the officer, in making the sale and conveyance, stands as a stranger to the company. Stratton v. Allen, 16 N. J. Eq. 229. His interest is opposed to theirs, and the presumption is, not that he will communicate his knowledge of any secret infirmity of the title to the corporation, but that he will conceal it. Where an officer of a corporation is thus dealing with them in his own interest, opposed to theirs, he must be held not to represent them in the transaction, so as to charge them with the knowledge he may possess, but which he has not communicated to them, and which they do not otherwise possess, of facts derogatory to the title he conveys." Barnes v. Gaslight Co., 27 N. J. Eq. 36.

It is true that some authorities seem to suggest a distinction between the knowledge of a director who, though personally interested, also represents the corporation, and the knowledge of a director who only acts for himself, the corporation being represented by other directors or agents. Bank v. Christopher, 40 N. J. Law, 437. This distinction, however, I think, is not well founded. The reason, as shown by the last two extracts above quoted, why the knowledge of a corporate director, relating to a transaction with the corporation, in which he is personally concerned, and acts for himself, will not be imputed to the corporation, is that his adversary interests are such that he will not be likely to communicate to the corporation a fact which he is thus interested in concealing. This reason applies as strongly when the interested director acts for the corporation as when he does not so act, and therefore the cases are indistinguishable.

The following illustrations seem to be specially applicable to the case at bar:

"When, therefore, the president of a corporation, acting in his own interest, conveys land to the company in payment of his stock subscription, the company is not affected with notice of any equities affecting the title to the land of which the president may have knowledge. In such a case the knowledge of the president is not the knowledge of the company, because the president is acting in a character adversary to the company, and in his own interest. So, where the general superintendent of a corporation conveyed to it, with warranty, lands which he had purchased in his own interest, and which were subject to a lease executed by a prior vendor, of which the superintendent had actual notice when he purchased, and which was recorded, but not acknowledged and certified as required by law, it was held that the knowledge of the superintendent could not be imputed to the corporation." 4 Thomp. Corp. § 5207.

It is true that Chambers was not one of the grantors in the conveyance to the company, but the bill alleges that he was a mere agent and "implement of the wills" of Joseph P. Taggart and James K. Patton in the accomplishment of their plans; so that, on this question of notice, Chambers stands in the same relation to the corporation as Patton. Their knowledge is not the knowledge of the corporation.

There is another view of the case, strenuously urged by defendants, which I think also bars the relief complainant seeks against the Vanderbilt Mining & Milling Company, and it is this: That since either complainant or Jones Taylor, both innocent persons, must suffer from the wrongful acts of Taggart and Patton, complainant should be the sufferer, since it was only through his negligence that said wrongful acts were possible of accomplishment. The doctrine which defendants here invoke is familiar, and in California has become a statutory enactment. Civ. Code Cal. § 3543. This rule was declared by Chief Justice Parker, of Massachusetts, as follows:

"It is a general and just rule that when a loss has happened, which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune." Somes v. Brewer, 2 Pick. 201.

The same rule is enunciated by the supreme court of Pennsylvania thus:

"Where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him ought to bear the loss." Mundorf v. Wickersham, 63 Pa. St. 87.

The supreme court of California, on the same subject, says:

"In this case, plaintiffs and defendant were both innocent. Neither knew that the fraud was being practiced; but, if that fraud was productive of injury, the injury must result to the plaintiffs, for they placed it in the power of the wrongdoer to perpetrate the fraud." Schultz v. McLean, 93 Cal. 357, 28 Pac. 1053.

Again, the same authority quotes with approval from Judge Story as follows:

" 'Whenever the equities are unequal, there the preference is constantly given to the superior equity.' See, also, Jeremy, Eq. Jur. 285, 286." Salter v. Baker, 54 Cal. 143.

There is no fact or circumstance in the case at bar that subjects Taylor to the criticism of having been negligent. When he bought

his stock he had no knowledge of the instrument or declaration of trust in favor of complainant, nor was there any circumstance to put him upon inquiry. On the contrary, there was everything to invite reliance on the title of the corporation. The conveyance of the property to the corporation was regular and valid. The corporation was in possession of, and working, the property so conveyed. I repeat, there was nothing to cause Taylor to suspect the existence of a secret or unrecorded trust. No negligence, therefore, can be charged against him. The case, however, is different with complainant. The trust in his favor came into existence April 2, 1892. Although promptly and fully advised of its existence, he took no steps for its enforcement until the commencement of this action, April 13, 1895,—a period of three years. During all this time the instrument which created the trust was left unrecorded. Complainant, in his brief, answers this latter suggestion by saying that "the instrument was not acknowledged, and could not have been recorded." This answer, however, is without force, since the instrument, although unacknowledged, could have been recorded, upon proof of its execution. Civ. Code Cal. §§ 1161, 1183, 1195, 1198, and 1199. Besides, if it were true that the instrument could not have been recorded, for want of an acknowledgment, still the failure to have it acknowledged was the negligence of the person through whom complainant derives his title, namely, Samuel King, and therefore the negligence is chargeable to complainant. From the facts above stated, it is obvious, that the wrongful acts of Taggart and Patton were accomplishable only because of complainant's negligence. Complainant further contends that the equitable rule above mentioned, namely, "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened must be the sufferer," cannot be invoked by Jones Taylor, for the reason that he was not the purchaser of the property from Taggart and Patton, but that the mines were conveyed to the Vanderbilt Mining & Milling Company, of which Taylor is but a stockholder. Defendants, in response to this, contend that, while it is ordinarily true that the rights of a corporation in any transaction to which it is a party are unaffected by the personal relations of its stockholders to such transaction, yet the doctrine is technical, and a court of equity will disregard it, and treat the corporation, not as an entity, but an association of persons, whenever justice between the parties so requires; citing Mor. Priv. Corp. § 231. As the section is brief, and its argument, to my mind, conclusive, I give it in full, as follows:

"Even in those cases in which only corporate rights and obligations are involved, and the corporation is nominally interested only as an entity, the courts are constantly obliged to consider that the real persons in interest are the individual shareholders. This is especially true in dealing with the rights of creditors, and the obligations existing between a corporation and its shareholders by reason of their contract of membership. The courts of equity will often take notice of the real character and constitution of a corporation, in applying the doctrine of laches against persons asserting equitable claims against the company's property or assets. The shareholders in a corporation are undoubtedly bound by the corporate acts, and cannot set up their several equities against persons who have claims against the corporation; but the fact

that shares represent undivided interests in the corporate concern, and are freely transferable in the open market, passing from day to day into the hands of innocent purchasers, may be a good reason why persons having equitable claims, the enforcement of which would impair the value of the company's shares, should be diligent to assert their rights. Thus, if a corporation should obtain title to property through a fraud on the part of its agents, the rightful owner of the property would certainly be entitled to set aside the transfer, although innocent shareholders and creditors should suffer thereby, provided he was not guilty of inexcusable delay in asserting his rights; but any negligence or unexcused delay until innocent persons have acquired an equitable interest in the property, as shareholders or creditors of the corporation, would be a sufficient reason for refusing relief in a court of equity."

Manifestly, the equities of Jones Taylor are superior to those of the complainant, and, since the relief complainant seeks against the Vanderbilt Mining & Milling Company cannot be afforded without the destruction or impairment of those equities, such relief should be refused.

2. From the foregoing views it results that the complainant is entitled to judgment against the defendants Joseph P. Taggart and James K. Patton for one-sixth of the capital stock of the Vanderbilt Mining & Milling Company; said stock being the consideration received by said Taggart and Patton for the Gold Bronze and Gold Bronze Extension Mines. There is no dispute but that complainant is also entitled to judgment against the defendants Joseph P. Taggart and James K. Patton for one-sixth of $40,000, with interest from February 8, 1893 (said sum of $40,000 being the purchase price received by said defendants on the sale to William S. Lyle of the Gold Bar Mine and of the Gold Bar Extension Mine), and also for one-sixth of $300, with interest from February 21, 1893 (said sum of $300 being the purchase price received by said Patton and Taggart on the sale to William S. Lyle of the Eighty-Foot Claim), and also for one-sixth of the gross profits or proceeds realized by them from the working of the mines described in the bill of complaint, up to December 27, 1893, the date of the conveyance by Annie M. Taggart and James K. Patton of the Gold Bronze Mine and Gold Bronze Extension Mine to the Vanderbilt Mining & Milling Company, and to an accounting by Joseph P. Taggart and James K. Patton for such profits and proceeds.

3. The circumstances of the case manifestly require that the property belonging to the Vanderbilt Mining & Milling Company, now in the possession of the receiver, be sold, and the proceeds distributed among those entitled thereto. Since the intervening creditors are asking that said property be sold without further delay, and since the accounting to complainant by Joseph P. Taggart and James K. Patton for the gross profits or proceeds derived by them from the working of the mines described in the complaint, which accounting is the only undetermined matter herein, cannot in any way be affected by said sale, the receiver should proceed at once, in the manner prescribed by law, to advertise and sell said property at the courthouse of San Bernardino county, Cal.; the proceeds of such sale to be applied as follows: (1) To the payment of the expenses and charges of the receivership, including receiver's certificates. (2) To the pay-

ment of the intervening creditors in the order in which they have hereinbefore been named, except that the liens of the first eight of said crditors belong to the same class, and will be paid pro rata. (3) The balance or residue to be paid into the registry of this court, for such disposition as the court may hereafter direct.

Some questions other than those to which I have adverted were raised at the oral argument, and are also urged in the briefs subsequently filed. My rulings, however, already announced, render further notice of such questions unnecessary. A decree conformable to this opinion will be entered.

BOSWORTH v. WALKER.

(Circuit Court of Appeals, Seventh Circuit. November 8, 1897.)

No. 430.

CARRIERS OF PASSENGERS—EJECTION FROM MOVING TRAIN—PERSONAL INJURIES.

A mere requirement or command by a conductor to a passenger to get off a moving train, when the danger of doing so is evident, if unattended with force, threats, or overpowering intimidation, is not enough to make the railroad company liable for injuries resulting from the passenger's compliance.

Error to the Circuit Court of the United States for the Southern District of Illinois.

The defendant in error, Charles W. Walker, recovered judgment in an action of trespass on the case for personal injury against C. H. Bosworth, as receiver of the Chicago, Peoria & St. Louis Railway Company, plaintiff in error. The declaration contains four counts, the first two of which charge that while Walker was a passenger upon the train of plaintiff in error, going from Edwardsville to Glen Carbon, conducting himself in a peaceable and proper manner, he was compelled and forced, by the threats and violence of the conductor in charge, to leap from the train when it was in rapid motion, whereby he fell, and suffered permanent injury to his left foot. The third and fourth counts, alleging that the plaintiff was on the train conducting himself in a peaceable and orderly way, but not stating whether or not he was a passenger, charge that the servants of the defendant willfully and recklessly ejected him, and by threats and intimidations forced him to leap from the train while running at a high rate of speed, whereby he fell, and was thrown under the cars, and his left foot so crushed that amputation became necessary. The case having been removed from the circuit court of Madison county, Ill., to the court below, and the plea of not guilty interposed, a trial was had by jury, which assessed the plaintiff's damages at $3,000, for which judgment was given as stated.

Of the errors assigned we are asked to consider only those that relate to the special instructions which the court refused give. The facts, in outline, are that on November 6, 1895, the defendant in error, with two companions, boarded a local freight train of the plaintiff in error at Edwardsville, for the purpose of going to Glen Carbon. The train being already in motion, Walker and his companions, instead of entering the caboose designed for passengers, climbed upon a freight car, where the conductor afterwards found them. Walker's testimony, corroborated in important particulars by the testimony of his companions, in substance was that the conductor approached with a club or brake stick in his hand, and demanded fares; that, labor union cards having been offered and refused, cash was tendered, but the conductor, refusing to accept it, said, "You fellows will have to get off here," and made a motion as if to strike Walker with his club, whereupon the latter protested that the train

was going too fast, to which the conductor replied "No, you got on this train while it was going; you get off while it is going," and, approaching nearer with lifted club, compelled him, still protesting, to climb down the ladder, in doing which he lost his hold, fell, and was hurt. This story, in all its essential features, the conductor denied, and testified that he had no club, and made no threats, and that upon his refusal to accept the proffered cards, and informing the men that the fare was fifteen cents for each, they said they had no money, to which he responded, "You will have to get off;" that thereupon the other two climbed down, and got off, and, Walker starting to follow them, he turned away to go back to the caboose; that he did not order the men off the train, but said to them "I cannot carry you," whereupon one of them said, "If he does not want to carry us, we must get off;" that the train was going at the rate of about five or six miles per hour. The conductor's account of the affair is corroborated by a number of witnesses, some of whom were employés of the receiver, and others apparently without interest.

Three of the special instructions asked in behalf of the plaintiff in error were the following: "You are instructed that, even though you should believe from the evidence that the conductor on the train of defendant's road told plaintiff that he would have to get off of the train, and that acting thereupon the plaintiff started to climb down the side of the car, and that thereupon the conductor left him, and started to go to another part of the train, and that the plaintiff, having climbed down the ladder on the side of the car, voluntarily attempted to get off, and in so doing received the injury complained of, your verdict should be for the defendant." "You are instructed that, if you believe from the evidence that plaintiff elected so to do, and started to leave the train on the suggestion or request of his companions, Brockman or Burkley, while the same was in motion, and in attempting so received the injury complained of, he cannot recover, and you should find the defendant not guilty." "You are instructed that, even though you should believe from the evidence that plaintiff was a passenger on defendant's train, and that he was told by the conductor to leave said train while the same was in motion, yet if you further believe from the evidence that at the time he attempted to alight therefrom it was optional with him whether to alight or not, and that he deliberately attempted to alight, and in so doing was injured, he cannot recover." It is asserted that these and similar requests for instructions were embraced in the charge of the court. In that charge occurs the following passage: "If in this case you believe from the evidence that the passage or fare was demanded, and that he failed to pay it, and that force or intimidation was used, or that he was threatened and menaced, or required to get off the train, whether he offered his fare or not (some have sworn that it was offered), if he was trying, as he has sworn, to get off the train when it was running at a speed which made it dangerous if he would try to get off, and in consequence of the speed of the train he was injured, the company will be liable. But if you believe that the train was not running fast enough to make it dangerous for him to try to jump off at the command of the conductor, and that the plaintiff was injured from the result of his own recklessness and negligence, and not from the speed of the train, then he cannot recover. It is a question of fact."

P. B. Warren, for plaintiff in error.

Charles H. Burton, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

While the court instructed the jury quite fully upon the theory of the plaintiff that he was compelled by threats and manifestations of force to leave the train, and that the defendant was liable for an injury so caused, there is in the charge no presentation of the theory of defense, in support of which there is no lack of evidence in the record, that the attempt of the defendant in error to leave the train

while it was in motion was a voluntary act, for the consequences of which the receiver was not responsible. By the charge given the jury was told that the company was liable to the plaintiff if the evidence showed "that force or intimidation was used, or that he was threatened and menaced, or required to get off." That was equivalent to saying that a mere requirement or command of the conductor, unattended with force or threat, was enough. Such a requirement, it may well be supposed, might lead an inexperienced or inconsiderate person to assume or believe that obedience would be safe; but, if the danger is perceived and understood, obedience to such a command is essentially a voluntary act. By his own statement the defendant in error, when required to leave the train, perceived and apprehended the peril of so doing; and, even if he understood the speech of the conductor to be a command which required instant obedience, he was not bound to obey, and, in the absence of force or overpowering intimidation, was not justified in incurring the manifest hazard of attempting to get off while the train was in rapid motion. The dictates of ordinary prudence are not to be disregarded, and no persuasion, request, or command, by whomsoever uttered, can justify the incurring of imminent and obvious risk. The refusal to give any of the requested instructions touching this phase of the case was error which cannot be regarded as immaterial. The judgment of the circuit court is therefore reversed, and the cause remanded, with instructions to grant a new trial.

COVENANT MUT. BEN. ASS'N OF ILLINOIS v. PETERS.

(Circuit Court of Appeals, Eighth Circuit. September 27, 1897.)

No. 888.

APPEAL AND ERROR—EXCEPTIONS TO INSTRUCTIONS.

Where one portion of a charge to the jury, to which exception is taken, is a mere inevitable corollary to a previous portion, which fully warranted the verdict, and as to which no exception was taken or error assigned, and it appears in the light of the pleadings that no harm resulted therefrom to the defeated party, the exception is unavailing.

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

This suit was instituted by Emma Peters, the defendant in error, against the Covenant Mutual Benefit Association of Illinois, the plaintiff in error (hereafter termed the "Association"), on two benefit certificates issued by said association to her deceased husband, Frederick R. Peters, each of which certificates obligated the association to pay to said Emma Peters a sum not exceeding $5,000 within 90 days after receipt of evidence of the death of her said husband. One of said certificates was issued on August 7, 1882; the other, on October 8, 1889. Frederick R. Peters died on June 15, 1895, having prior thereto paid, from time to time, assessments on said certificates, amounting in the aggregate to more than $900. Three conditions printed on the back of said certificates were as follows: "(1) The person on whose application this certificate of membership is issued (hereinafter called 'certificate holder') agrees to pay a mortuary assessment of one ($1) dollar on the death of each and every member of this association occurring subsequent to the date of this

certificate, or such proportional part thereof, all members being assessed ratably according to the certificate held by each, as may be necessary to secure an aggregate amount, not less than the sum required for the payment of the claim; and further agrees to pay all assessments which may, from time to time, be levied by the directors or managers for expenses and collection costs not exceeding eighteen cents per month, reckoned from date of certificate or last assessment collected; and further agrees that the aforesaid assessments shall be paid to the said association, at its principal office in Galesburg, Ill., within thirty (30) days from the date on which the notice relating thereto bears date, and the failure to pay such assessments, as above provided, or any one of them, or any part thereof, shall render this certificate null and void. (2) It is mutually agreed by and between the association and this certificate holder that there shall be six (6) assessments, and six only, issued each year, which assessments shall cover the entire cost of insurance, and include mortuary, expense, and collection costs, and be issued on the first day of January, March, May, July, September, and November of each year, and close thirty (30) days from date. (3) A printed or written notice, directed to the address of each and every member as it appears at the time on the books of the association, and deposited in the post office, or delivered by an agent of the association, or printed in a newspaper printed by the association, and forwarded as aforesaid, shall be deemed legal notice."

By way of defense to the suit, the association, after admitting the death of the plaintiff's husband, the issuance of the certificates, and the receipt of assessments thereon to the amount of $964.91, pleaded in substance the following facts: That on November 1, 1894, the association made an assessment on both of said certificates, being mortuary call No. 129, which assessments amounted in the aggregate to $20.20; that notice was duly given to the deceased, Frederick R. Peters, that said assessments must be paid on or before November 30, 1894, otherwise the certificates would be null and void; that he failed to pay said assessments until December 19, 1894, when the same were paid and received by the association; that receipts were issued therefor in the following form, which contained the following conditions indorsed on the back thereof:

"Received of F. R. Peters, this 19th day of December, 1894, $9.34, being for payment of the premium of $9.34, which became due November 30th, 1894, on policy No. 13,418, which said policy lapsed by reason of the nonpayment of the above sum. The above payment is offered, and the same is received by the association, subject to the conditions upon the back hereof, which are hereby made a part of this receipt. W. H. Smollinger, Secretary.

"The conditions upon which the within payment for which this receipt is given is accepted are as follows: First. That said member is now living, and of temperate habits, and is now, and has been during the past twelve months, in continuous good health, free from all diseases, infirmities, and weaknesses; otherwise, said payment and the within receipt and said policy shall be, and is, null and void, and the sum paid therein shall be subject to the order of the within-named person. Second. The receipt and acceptance of the within-named sum by the association shall not be held to waive forfeiture, the expiration of membership, or to reinstate the member, or create any liability upon the part of the association under said policy, except upon the fulfillment of the first condition of this receipt. Third. The acceptance of the within sum after the same became due shall not be established a precedent for the acceptance of future payments by the association, nor shall any subsequent payments upon said policy impair, waive, alter, or change any of the conditions of this receipt, or of said policy, or of any of the agreements and conditions relating thereto."

It was further alleged that, when said payment of December 19, 1894, was made and accepted, the plaintiff's husband was not in good health, but was afflicted at the time with Bright's disease, of which he subsequently died; that the fact of his having such disease was concealed from the association, and that the assessments on said certificates which were subsequently paid up to the death of the deceased were each and all accepted in ignorance of the fact that he was not in good health on December 1,

1894, and on December 19, 1894, when he was reinstated. In view of the premises, the association alleged "that by reason of said receipt of December 19, 1894, and the fact that said F. R. Peters was not at said time, and had not been for twelve months prior thereto, in continuous good health, said Peters was not reinstated as a member of defendant association, and his benefit certificate was lapsed, and he was not at the date of his death a member in good standing of said association, and that his said policy was on December 1, 1894, and forever thereafter, null and void." The plaintiff below replied, in substance, to the foregoing plea, that it was not true that the deceased was afflicted with Bright's disease on December 19, 1894; that it was not true that he concealed from the association any fact respecting his health; and furthermore alleged "that the defendant continuously and habitually received from deceased, during the whole period of his being insured with it, his premiums long after the expiration of thirty days from the date of the notice for their payment, and thus established a method and a custom, and thereby authorized and induced the said assured to believe that his premium would be received at any time within sixty days after the date of the call, and that, in pursuance of such inducement, the insured paid substantially every premium more than thirty days after its call." On the foregoing issues a trial was had to a jury. The evidence which was produced at the trial showed without substantial contradiction that very few, if any, of the numerous assessments which were paid by the deceased during the five years preceding his death, were made within the period of 30 days limited by the provision of the certificates heretofore quoted; that, as a rule, such payments were made about 45 days after the date of the notices of assessment, and in a few instances after the expiration of a longer period; and that since December, 1890, the association had not been in the habit of exacting payment of assessments from any of its members within the 30-day period limited in its policies or certificates, but had repeatedly advised them that assessments might be paid at the expiration of 45 days. The proof further showed that the payment of assessment No. 129, which was levied on November 1, 1894, was made by the deceased by a check on a bank located at St. Louis, Mo., which check was mailed at St. Louis, Mo., on December 15, 1894, and in due course of mail should have been delivered to the association at its chief office in the city of Galesburg, Ill., on the morning of December 16, 1894. The trial resulted in a judgment against the association, to reverse which it has brought the case to this court.

John M. Olin (W. C. Calkins and T. J. Rowe on brief), for plaintiff in error.

H. M. Pollard (Jesse A. McDonald on brief), for defendant in error.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

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

With one exception, all of the alleged errors which are assigned upon the record and discussed in the briefs were abandoned by counsel representing the defendant company during the progress of the oral argument, for which reason it only becomes necessary to consider a single exception to the charge which was taken at the trial, and is still relied upon as a ground for reversal. That portion of the charge to which the exception was addressed is as follows:

"If the insured paid to the defendant the amount of the call or assessments made November 1, 1894, within the general range of time within which for some years he had paid them, then the defendant had no right to complain of the same, and is estopped from asserting any forfeiture of said poli-

cies because of such delay in payments; and, if you find the facts aforesaid, then the defendant had no right to impose any additional burden or conditions upon the insured by reason of such delayed payments; and in such event the conditions as to health found on the back of receipts sent by the defendant to the insured for money paid for the November calls or assessments were without consideration and void."

Before giving the instruction last quoted, the trial court had charged the jury, in substance, as follows: That the issues raised by the pleadings in the case were whether the defendant company had waived the provision of its policies or certificates requiring mortuary assessments to be paid within 30 days after the date of the notice of assessments, and whether the health of the insured had become impaired, in the manner alleged, prior to December 19, 1894, when he paid mortuary call No. 129, which was levied on November 1, 1894; and that if the jury believed that the defendant company for a period of three years or more prior to November 1, 1894, had been in the habit of receiving payments of assessments from members more than 30 days after the date of the notice of assessment, and by such mode of dealing had induced the deceased to believe, and had given him sufficient reason to believe, that it did not insist upon the payment of assessments within the 30 days limited in its certificates, then the jury were at liberty to find that prior to November 1, 1894, the defendant company had waived or abandoned the provision of its contracts requiring assessments to be paid within 30 days after the notice thereof bore date. No exception was taken to this part of the charge, and with respect thereto no error is assigned.

In this state of the record, it is manifest, we think, that the exception to the charge which is now relied upon is of no avail, and should be ignored. The jury evidently found under that portion of the charge to which no objection was made, and upon abundant evidence, that the forfeiture clause of the certificates which was pleaded and relied upon by the defendant company had been waived prior to November 1, 1894, and was not thereafter a binding provision of either of the two certificates. This left the contracts between the insured and the insurer without any forfeiture clause for the nonpayment of assessments, unless from the conduct of the parties a new or modified agreement might be implied, to the effect that the certificates should become null and void if the assessments levied thereon were not paid within 45 days, instead of 30 days, after the date of the notice of assessment. We need not stop, however, on the present occasion, to inquire whether such a change in the terms of the original contracts between the insured and the insurer might have been fairly implied from the conduct and dealings of the parties as developed by the testimony, for no such modification of the terms of the contracts was pleaded. In its answer to the complaint, the defendant company based its defense solely on the ground heretofore stated that the two certificates in question became null and void on November 30, 1894, by reason of the nonpayment of assessment No. 129 on or prior to that day, and it did not suggest in its answer, in any form, that that clause of the contracts requiring payments to be

made within 30 days had become a dead letter prior to November 1, 1894, and that, in lieu thereof, the parties had substituted a new forfeiture clause, although such was the position which the defendant company attempted to assume during the progress of the trial. As it was in duty bound to do, the trial court confined the defendant to the issues which it had raised by its plea; and the excerpt from the charge above quoted, to which an exception was saved, when read in connection with what preceded it and considered in the light of the pleadings, clearly did the defendant no harm, and is not subject to just criticism. The judgment of the circuit court is therefore affirmed.

WAPLES-PLATTER CO. et al. v. TURNER.

(Circuit Court of Appeals, Eighth Circuit. September 13, 1897.)

No. 643.

1. EVIDENCE—PURCHASE OF GOODS BY INSOLVENT.
   On the question whether one who buys goods on credit, upon his written representation of perfect solvency, and fails three weeks later, was insolvent at date of purchase, and knew it, it is not competent for him to show that he had made some profits during the two years previous.
2. SAME.
   On the question whether one who buys goods on credit, and fails three weeks later, was insolvent at date of purchase, proof of the value of his assets six weeks later still, as shown by the receiver's invoice, is competent against him.
3. APPEAL AND ERROR—EXCEPTIONS TO REFUSAL OF INSTRUCTIONS.
   A single exception taken to the court's refusal of a series of instructions to the jury is of no avail, unless all the instructions state correct propositions of law applicable to the case.
4. SAME.
   If the instructions given to the jury by the court of its own motion substantially cover the issues involved, the refusal of other instructions which are in themselves proper constitutes no ground for reversal.

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

A. G. Moseley (S. S. Fears on brief), for plaintiffs in error.
William T. Hutchings, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a controversy between Clarence W. Turner, the defendant in error, and J. S. Hancock, one of the plaintiffs in error, relative to the right of possession of certain personal property of the value of $2,685.87. The property in question was originally sold on credit by said Turner to C. H. Low, one of the plaintiffs in error, and was shipped to him by the vendor on or about December 23, 1890. On January 12, 1891, Low made a general assignment for the benefit of his creditors to said J. S. Hancock. On the same day, the Waples-Platter Company, another of the plaintiffs in error, who was a creditor of Low, caused an attachment to be levied on the assigned property and effects, whereupon Turner replevied the goods now in controversy, claiming that the sale of the same

to Low had been induced by false and fraudulent representations, and that Low had bought the property in controversy while in a failing condition, with a preconceived intent not to pay for the same. On the trial of the case it was stipulated by counsel that the only question to be tried was whether the property belonged to Low at the date of the assignment, or whether the sale was voidable, and whether Turner was entitled to reclaim the property sold by reason of the alleged fraud. The record shows that, by consent of all the parties, the latter question was the only one litigated at the trial, and the errors assigned relate to the admission and exclusion of evidence, and to the instructions given and refused by the trial court. The various errors assigned, so far as they are deemed material, will be noticed in their proper order.

During the progress of the trial, the present plaintiffs in error made a general offer to show, on the cross-examination of a witness, that Low had done a profitable business as a merchant during the year 1889; that he had conducted his business in about the same way during the year 1890; and that the witness was of the opinion that the result of his business during the year 1890 would show a profit somewhat in proportion to his profits in the year 1889, the amount of which was not stated. The trial court rejected this offer of proof, and an exception was saved. Inasmuch as Low was charged with having made a specific statement in writing on December 9, 1890, as a means of inducing Turner to ship the goods in controversy, that he had enough means to pay all he owed, and that there was no cause for alarm, and inasmuch as he confessed his insolvency a very few days after the goods arrived, by making a general assignment of all his property and effects, including the goods which he had just received, we are not prepared to say that the court committed an error in rejecting the proof in question. Conceding that the witness would have testified in the manner indicated, the evidence would have had no tendency to show that Low was in fact solvent, and able to pay all he owed, on December 9, 1890, at the time he made such a statement, as a means of inducing Turner to ship the goods, and little, if any, tendency, we think, to show that Low, in good faith, believed himself to be solvent, and that the representation which was made he believed to be true. The trial court subsequently permitted Low to testify, as a witness in favor of the plaintiffs in error, that he believed the statement which was made to Turner on December 9, 1890, to be true at the time he made it; and also to state his reasons for entertaining such a belief. This action, we think, was as favorable as the plaintiffs in error had the right to expect or demand.

It is assigned for error that the trial court erroneously permitted one of the witnesses for the defendant in error to testify what was the total value of all the property of Low, as shown by an invoice which was taken by the witness, as receiver of the assigned effects, on or about March 1, 1891. We can perceive no valid objection to such evidence, inasmuch as it was not claimed that the invoice was defective or improperly taken. The testimony in question had a marked tendency to show the financial condition of Low at the time he pro-

fessed to be solvent, which was one of the material issues of the case.

A single exception was also taken to the refusal of a series of seven instructions which were asked by the plaintiffs in error. According to well-established rules, a single exception taken to the refusal of a series of instructions is of no avail, unless all the instructions state correct propositions of law applicable to the case, nor unless it appears that the instructions given by the court failed to cover the case. If any of the instructions which were refused were faulty, the exception cannot be sustained. New England Furniture & Carpet Co. v. Catholicon Co., 49 U. S. App. 78, 25 C. C. A. 595, and 79 Fed. 294. Furthermore, if the instructions given by the court of its own motion substantially covered the issues involved, the refusal of other instructions, which were in themselves proper, constitutes no ground for a reversal of the case. As we read the series of refused instructions, one of them, at least,—the third,—required the court to charge, in effect, that, although Low knew when he made it that the statement to Turner concerning his solvency was false, yet this would not entitle Turner to a verdict, unless, in addition, he proved a distinct intent on the part of Low to mislead and defraud. The court charged the jury, however, that if Low represented that he was solvent and able to pay all his debts at the time he made the purchase from Turner, and that representation was false, and was known by Low to be false, and if Turner relied upon the statement and parted with the property in controversy on the strength of such representation, then and in that event Turner was entitled to recover. We think that the instruction thus given by the trial court of its own motion contained a correct statement of the law applicable to the case, and that the refused instructions, for the reasons above indicated, were liable to confuse and mislead the jury. The other assignments of error are of less importance, and not deserving of special mention. The case, so far as the record discloses, was correctly tried, and the judgment below is accordingly affirmed.

MOLINE MALLEABLE IRON CO. v. YORK IRON CO.

(Circuit Court of Appeals, Seventh Circuit. November 8, 1897.)

No. 416.

1. PRINCIPAL AND AGENT—SALES BY AGENT—PURCHASER'S LIABILITY TO PRINCIPAL.

   Where a purchaser of goods from agents knows whom they are agents for, and that the goods in question are of the principal's manufacture, and where the invoice calls attention to the agency and to the principal's ownership, the purchaser is liable to the principal for the agreed price.

2. SAME—ELECTION TO HOLD AGENT.

   Even if it were true that the reception by one party, of a contract executed on the other part in the name of an agent, with knowledge that the agent acted for a principal, constitutes a conclusive election to look alone to the agent, yet quære whether such election involves a reciprocal abandonment by the principal of his rights against the other party to the contract.

3. SAME—PRESUMPTIONS.

   Even if that proposition were established, yet there would, at least, be a presumption that the principal was the contracting party, unless it

clearly appeared that the agent contracted on his own account, and that, with a knowledge of the facts, the opposite party elected to look to the agent.

4. CONTRACTS—PERFORMANCE—ACTIONS.

When a party has fully performed his part of a written contract, and nothing remains to be done but for the other party to pay the money due under the contract, a recovery may be had under the common counts.

5. REVIEW ON ERROR—HARMLESS ERROR.

Though improper evidence be admitted, under an erroneous theory of the measure of damages, the error is not ground for reversal if the actual recovery is in accordance with the correct rule.

6. SALE BY AGENT—SUIT BY PRINCIPAL—AGENT'S LIEN.

The fact that an agent who sells goods had a qualified title in the goods and their proceeds as pledgee, as against his principal, does not impair the principal's right of action against the purchaser to recover the agreed price, particularly where the purpose of the pledge is accomplished before the action is brought.

7. SAME—SET-OFF.

A purchaser of goods from the agent of a known principal cannot set off against his debt for the purchase a sum owing to him from the agent.

Showalter, Circuit Judge, dissents.

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

This is an action in assumpsit upon the common counts, brought by the York Iron Company to recover for 300 tons No. 2 soft Minneapolis pig iron, alleged to have been sold to the plaintiff in error through the agency of Forsyth, Hyde & Co., at the price of $15 per ton. For nearly seven years prior to the 16th of May, 1893, Forsyth, Hyde & Co. had been the agents at Chicago of the defendant in error, under a written agreement by which that firm undertook to act as the agents of the York Iron Company in the sale of the product of its furnace at Black River Falls, Wis. They were to have the exclusive sale of all the pig iron produced at the furnace during the period of the agreement. All sales of such iron should be made by them as agents for and in the name of the York Iron Company, and subject to its approval, and for a stated commission; and they were to collect for sales made by them, and to remit to the company, but they did not guaranty the collections. On May 16, 1893, Forsyth, Hyde & Co. sold to the plaintiff in error 300 tons No. 2 soft Minneapolis pig iron, manufactured by the defendant in error. This iron was at the time at the furnace at Black River Falls, Wis., not segregated from a larger amount of similar iron stored at that place. The iron was shipped to the Moline Malleable Iron Company between June 6 and June 8, 1893, and was received by them on the 16th, 17th, and 18th days of June, 1893. Forsyth, Hyde & Co. rendered to the plaintiff in error a sale memorandum, describing the character and price of the commodity sold, and stating the terms to be "spot cash," with privilege of four months' time, at 6 per cent. interest, upon a blank headed, "Forsyth, Hyde & Company, Pig Iron Commission," and, prior to the receipt of the iron by the Moline Malleable Iron Company, rendered to it invoices of the iron shipped upon billheads headed, "Commission Pig Iron. Moline Malleable Iron Company, St. Charles, Ill., bought of Forsyth, Hyde & Company, Agents for York Iron Company. Terms, Cash." The plaintiff in error had for several years dealt with Forsyth, Hyde & Co., and knew that they were agents for the York Iron Company, and knew that the stated brand of iron was the product of the furnace of the York Iron Company, which was a well-known brand of iron of that company's manufacture, and the iron delivered was so marked. A few days before the sale, Hyde, of Forsyth, Hyde & Co., went to Minneapolis, and arranged with the York Iron Company that he should endeavor to make immediate sales of iron, and, if necessary, to lower the price one or two dollars a ton. He returned to Chicago, and sold 200 tons to the Rockford Malleable Iron Works, 300 tons to the Moline Malleable Iron Company, and 1,500 tons to the Pullman Company, and at once, by wire and by letter,

notified the York Iron Company of the sales. He then returned to Minneapolis to further consult with the York Iron Company. Before this time, Forsyth, Hyde & Co. had accepted drafts for the accommodation of the York Iron Company to the amount of $30,000, and it was desired that they should accept further drafts to the amount of $6,000 to enable the York Iron Company to meet pressing liabilities. It was arranged that such acceptances should be made, and that 3,000 tons of iron should be placed by the York Iron Company in possession of a storage company, and that such company should issue certificates for the iron. This was done, the storage company issuing certificates for 2,000 tons to Forsyth, Hyde & Co., and for 1,000 tons to the York Iron Company. It was arranged that Forsyth, Hyde & Co. should use the certificates issued to them to complete the sales made to the three companies named, and that the proceeds could be used to take up the obligations of the York Iron Company upon which Forsyth, Hyde & Co. were liable. The iron was estimated to be worth $13.50 per ton at the furnace where it was stored. At this time one piece of accommodation paper to the amount of $2,500 had matured, and had been taken up by Forsyth, Hyde & Co.; and they subsequently, in May and June of that year, took up three other pieces of paper of $2,500 each, making a total of $10,000, which they paid. They received the avails of the sale to the Pullman Company, amounting to over $20,000, and a portion of the Rockford claim. Forsyth, Hyde & Co. failed and assigned on the 5th day of July, 1893, at that time owing to the York Iron Company $20,000 over and above the $10,000 of accommodation notes which they had paid. All the other accommodation paper upon which Forsyth, Hyde & Co. were liable was taken up and paid by the York Iron Company. It was understood between the parties at the time of the making of the arrangement that if the Moline Company should fail, and the account should not be collected, the loss would fall upon the York Iron Company.

Some time in the year 1892 the Moline Malleable Iron Company had executed its notes to the amount of $5,000, for the accommodation of Forsyth, Hyde & Co. For these notes, renewal notes had been given, maturing in July, 1893, at which time they were paid by the plaintiff in error. With respect to that transaction, Mr. Ullman, the president of that company, states that Forsyth asked him for some notes which he could discount. "I told him that we owed him nothing, and he said that he wanted the money, and it would be a great accommodation if I could give him that amount in notes. I finally told him that I would do so, but I would charge it on account to Forsyth, Hyde & Co." The plaintiff in error pleaded the general issue with a statement of special matter intended to be relied upon under that plea, which was to the effect that, for many years prior to the purchase of the iron sued for in this suit, the defendant had purchased iron of the firm of Forsyth, Hyde & Co. on many occasions and in large amounts; that it purchased such iron of that firm as the owners thereof, and made payments therefor with the notes of the defendant to the order of Forsyth, Hyde & Co., without any knowledge that the plaintiff (defendant in error here) was the owner of any of the iron so procured; that it purchased the iron in controversy of Forsyth, Hyde & Co., and at that time the Moline Malleable Iron Company had a credit with Forsyth, Hyde & Co. for the proceeds of the accommodation notes given to that firm; that it purchased the iron in question without knowledge that the plaintiff had any interest therein, and, if it had, the iron had been paid for to them by drafts accepted by Forsyth, Hyde & Co., and was at the time of the purchase the property of Forsyth, Hyde & Co.; and that in accordance with its custom in purchasing iron of Forsyth, Hyde & Co., and paying for the same with notes, the Moline Malleable Iron Company had the right to purchase the iron from Forsyth, Hyde & Co., and pay for the same with its said notes then held by Forsyth, Hyde & Co. The only witness testifying verbally to the contract of sale was Mr. Ullman, the president of the plaintiff in error. He states that he purchased the iron in question of Mr. Hyde; that he did not remember the particular conversation had with him further than the purchase of the iron, and, after stating that at the time of the purchase a reference was made to the accommodation notes given to Forsyth, Hyde & Co., he first stated that all that was said with respect to the notes was that Hyde had those notes,

"and he wanted me to take this iron in satisfaction of the notes." Being asked whether he was certain about that, he responded: "I testified that there was nothing said in the talk about the notes. We having the notes then, he said: 'I want to sell you that iron. I want to sell you three hundred tons of iron;' and we took the iron, and I understood— Q. Never mind what you understood; just what you said. A. No; nothing further was said about it. Q. So, there was no reference made to these notes at the time you purchased this iron? A. There was the talk that he owed us for those notes earlier in the conversation, but there was no conversation further than that in the purchase of the iron. We talked about his owing us for these notes. Then he went on, and talked about buying so much iron from him. I said there was no connection made with the purchase of the iron at that time. There was the talk that he owed us for those notes earlier in the conversation, but there was no conversation further than that in the purchase of the iron. We talked about his owing us for those notes, and afterwards about buying so much iron from him." At the trial, counsel for defendant below requested the court to instruct the jury that if they believed from the evidence that exclusive credit was given by defendant to Forsyth, Hyde & Co., and it contracted with them exclusively in respect of the iron to recover the price for which suit was brought, then plaintiff could neither sue nor be sued upon such a contract. This request was refused, and a proper exception reserved. The court was further requested to charge the jury that, from the facts given in evidence, plaintiff was not entitled to recover. This request was overruled, and proper exception reserved. The court charged the jury that the only question was whether it had been proven that the plaintiff, through its agent, had sold and delivered to the defendant the pig iron sued for, and, if so, they should return a verdict for the plaintiff for the value at the time and place delivered. There was a verdict for the plaintiff below.

S. S. Gregory, for plaintiff in error.

Charles M. Sherman, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge. The right of a principal to sue and his liability to be sued upon a contract made by an agent in the name of and for the benefit and advantage of the principal are unquestioned; nor is it doubted that an undisclosed principal may sue or be sued upon a contract made by his agent in the name of the latter (Story, Ag. § 160a; Mechem, Ag. § 769), except possibly (1) when the agent has contracted personally by deed; (2) when, in a contract of sale, the agent has a lien upon the subject-matter of the contract, or its proceeds, exceeding or equal to the value, in which case the right of the agent is paramount to that of the principal; (3) when an exclusive credit is given to and by the agent. Ewell's Evans, Ag. 525 (404). There has been some contention whether, with respect to a written contract executed in the name of an agent, the party who received the contract knowing that the agent acted for a principal could hold the principal; the supreme court of New Hampshire holding, contrary to Story, that in such case the reception of such a contract constituted a conclusive election to look alone to the agent. Chandler v. Coe, 54 N. H. 561–573. It may be doubtful whether the doctrine of this case can be upheld. Calder v. Dobell, L. R. 6 C. P. 486–498; Insurance Co. v. Allen, 116 Mass. 398; Byington v. Simpson, 134 Mass. 169; Nicoll v. Burke, 78 N. Y. 580. But quære whether such election by a third party involves an abandonment by the principal of his rights against the third party under a

contract made by his authority. Whart. Ag. § 403. We need not concern ourselves, however, at this time, with that controversy; for as well the court of New Hampshire as the other courts recognizes the doctrine as to express verbal contracts that, "if the principal was known, it is to be presumed that he was the contracting party, unless it clearly appears that the agent contracted on his own account, and that, with a knowledge of the facts, the opposite party elected to look to the agent." Chandler v. Coe, 54 N. H. 561, 575.

The difficulty with the instruction the refusal to give which is first assigned for error is that there is no evidence to support it. The plaintiff in error knew that Forsyth, Hyde & Co. were dealing in iron upon commission; that they were the agents of the York Iron Company; and that the iron purchased was of its manufacture. Presumably, therefore, the iron was the property of that company. For several years prior to the transaction in question the plaintiff in error purchased that description of iron of these agents with such knowledge of their agency and of the ownership of the iron. Every invoice delivered spoke to those facts and to that ownership. Ullman, the president of the plaintiff in error, who alone testifies to the question, does not pretend to deny his knowledge of the facts. He frankly states that he "had never bought any except through agency of Forsyth, Hyde & Co." It is true, he states he never had any dealings with the York Iron Company. That is true in the sense that he did not deal directly with that company, and that is the sense in which the statement is intended to be understood; for it is no less true that the plaintiff in error had for years dealt with the York Iron Company through its agents with knowledge of the agency and of the ownership of the iron. It is therefore the case of a dealing with an agent of a disclosed principal touching the property of the principal. In such case the presumption is indulged that the principal is the contracting party; and the contention of the plaintiff in error, if it can in any case be upheld, can only be applied when it clearly appears that the agent contracted on his own account, and that the plaintiff in error elected to look to the agent alone. There is not in this record a scintilla of evidence to sanction such conclusion. Nothing transpired at the time of the contract to justify such inference. It is not sustained by the fact that in previous dealings the purchase price of iron had been paid to the agents. It was their duty, within the terms of their agency, to make such collections, and the fact of such payment does not warrant an inference that it was contemplated either by the plaintiff in error or by the agent that the principal should be ignored in the transaction. The instruction requested was therefore properly refused.

It is said, however, that, if the principal sue upon the contract made by the agent, he must adopt the precise contract made, and cannot repudiate that contract and sue in assumpsit upon an implied contract for the value; or that, if the contract be unauthorized, the principal must repudiate the contract, and sue in trover for the value of the goods. We are not called upon to pass upon the technical question of pleading which was strongly urged to our attention, for the reason that, upon the assumption of the correctness of the propo-

sition, in our judgment the evidence wholly fails to disclose any contract with Forsyth, Hyde & Co. by which as a term of the contract the iron was to be paid for by offsetting the indebtedness of Forsyth, Hyde & Co. to the plaintiff in error for the accommodation notes stated. The memorandum of sale and the invoices, so far as they speak to the contract, show that it was a sale for cash. The evidence of Mr. Ullman, the president of the plaintiff in error, shows no other or different contract. He distinctly states that the question of the payment of Forsyth, Hyde & Co.'s indebtedness to his corporation was not a term of the contract for the purchase of the iron. The fact that the bookkeeper of Forsyth, Hyde & Co., in their account with the plaintiff in error, credited the latter with the amount of the notes executed for their accommodation, and subsequently, at the time of the sale nearly a year thereafter, charged the amount of the sale to the company, does not in any degree tend to prove that it was agreed at the time of the sale that the price of the iron should be paid for by their indebtedness to the plaintiff in error. It is urged that the question should have been submitted to the jury, and that they would have a right to infer such a contract; but we think no such inference is warranted in the light of Mr. Ullman's positive statement that the two subjects were not connected. It would have been the duty of the court, if the verdict had been rendered upon the testimony adduced in favor of the plaintiff in error, to have set aside the verdict for want of evidence to support it. It may further be observed that no such contract is set up in the notice or statement of facts which the plaintiff in error gave as his defense under the general issue. The correspondence of the parties discloses no claim to any such contract, but merely the right to set off. We therefore need not inquire what would have been the rights of the principal if the contract of sale had been as is now claimed by the plaintiff in error. The contract being then as appears in the memorandum of sale and in the invoice, and having been executed, the defendant in error had a right to sue upon it, and could, under the common counts, recover the contract price. Crane Elevator Co. v. Clark, — U. S. App. —, 26 C. C. A. 100, 80 Fed. 705–710.

If the court below erred in admitting evidence of the value of the iron at the time and place of delivery, the error was harmless, and the judgment is not reversible for that reason, the amount of the recovery being for the contract price of the iron, and not for its value, which was proven to be greater than the contract price.

We do not think the situation is at all disturbed, or that the right of the principal to sue is impaired, by the transaction by which the iron was turned over nominally to the agents, and they were authorized to apply the proceeds in payment of obligations assumed for the accommodation of their principal. The agents did not thereby acquire the absolute title to the iron. It was pledged to them for a specific purpose. This pledge enabled them to hold the goods against third parties, and against the York Iron Company, but only so far as was necessary for their protection and security; and the title thereby acquired was a qualified one. The title to the iron or its proceeds was not exclusive in the agents. The right of the principal to col-

lect the proceeds of sale was not thereby impaired. Hill v. Railroad Co., 43 S. C. 461, 21 S. E. 337; Merrill v. Thomas, 7 Daly, 393; Francklyn v. Sprague, 10 Hun, 589; Balderston v. Rubber Co., 18 R. I. 338, 27 Atl. 507. If, by such an arrangement, the subject-matter became the property of the factors, and was of a perishable nature, and had been destroyed, the loss would fall upon the factors, and they would have no recourse upon their principal for payment of the obligations upon which they were bound. So, likewise, if it had been lost in transit, or had met destruction in any way. It is, we think, manifest, that they took the property under no such assumption of responsibility. Indeed, it seems to have been understood at the time of the arrangement referred to that it was a mere transfer of the possession of the property to be disposed of under the terms of the agency and the proceeds applied to the discharge of the obligations. They did not even assume the risk of the collection of sales. If there should be loss in that regard, it was to fall upon the York Iron Company, and not upon them. The relation created was that of an agency, coupled with an interest. We cannot regard the arrangement as in any degree impairing the right of the principal to collect of the purchaser the proceeds. Possibly, equity would intervene at the instance of the factors to prevent collection when the purpose for which the iron was pledged would be defeated by such collection. The agents had a special property in the iron, which was paramount to the right of the York Iron Company; but the latter company had a right of property in the iron, and could demand the application of its proceeds to the payment of its obligations upon which the agents were bound. Any appropriation of the iron or its proceeds by the agents to the payment of their debt to the plaintiff in error (with which the York Iron Company was not concerned) would have been in violation of the terms of the contract of pledge, and could not be sustained; and equally would it be wrong to permit a purchaser of the property of the principal to set off against his debt for the purchase a sum owing to him from the agent. It appears that before this suit the specific purpose for which the iron was pledged had been accomplished. The agents had paid $10,000 of the obligations. The balance of them was paid by the York Iron Company. Forsyth, Hyde & Co. had received from the sales of the iron over $20,000, and at the time of their failure were largely indebted to their principal. The purpose of the pledge being consummate, the right to the proceeds revested in the principal. The judgment will be affirmed.

SHOWALTER, Circuit Judge (dissenting). Mr. Edward C. Gale, secretary of the York Iron Company, defendant in error, and the only witness who testified on behalf of the defendant in error at the trial other than Mr. Ullman, the president of the Moline Company, the plaintiff in error, said in his testimony:

"About the middle of May, Mr. Hyde came to Minneapolis, and we authorized him to come back to Chicago, and sell as much iron as he could. The arrangement was not in writing. We told him to drop the price, if necessary, one or two dollars a ton, in order to make immediate sales. He went to Chicago same day, and in a day or two we received from him the letter in evidence, showing the sale to the Moline Company for 300 tons."

The relations between the defendant in error and Forsyth, Hyde & Co., up to the time of the conversation referred to by the witness, are shown by the following contract put in evidence by defendant in error:

"This agreement, made this 7th day of July, 1886, by and between the York Iron Company, of Minneapolis, Minnesota, party of the first part, and J. F. Forsyth and E. H. Hyde, of Chicago, Illinois, co-partners, as Forsyth, Hyde & Co., parties of the second part, witnesseth: That said parties of the second part undertake to act as the agents of said party of the first part in the sale of the product of the furnace of said party of the first part, situated near Black River Falls, Wisconsin, upon the terms and conditions following, viz.: (1) Said parties of the second part are to have the exclusive sale of all pig iron produced by said furnace so long as this agreement shall remain in force. (2) All sales of such iron shall be made by them as agents for and in the name of said York Iron Company, and subject to its approval, and all collections made by them on account thereof shall be at once remitted to said company at Minneapolis. (3) Said parties of the second part agree to exercise due caution in respect to the financial responsibility of all parties to whom sales are made, and shall collect all sums due from purchasers of the company's iron, whenever possible, but said second parties do not guaranty collection of accounts or paper taken in settlement thereof. In case suit is necessary or other unusual expenses are incurred in making such collections, the same shall be borne by the company. (4) In case of sales known to the iron trade as 'cash sales,' said second parties agree to honor drafts of the company at thirty days' sight, for the net proceeds of such sales. (5) Said second parties agree to exert their best endeavors to sell the products of said furnace for the best interests of said first party, and to collect and remit the proceeds thereof, and for such services they are to receive a commission of two and one-half per cent. of the net price of the iron at the furnace. Any commissions due on sales made and settled for by note or cash may be deducted by said second parties out of any collections in their hands, but, in case any sums due for iron sold shall not be collected, said parties of the second part are to return the commission charges thereon, and all commissions on sales made to stockholders of the company shall be remitted to the party of the first part. (6) Said parties, in consideration of the benefits accruing to them from this contract, agree to advance money to said first party, when desired, upon any merchantable iron made by it of the quality known as 'Lake Superior Charcoal Iron,' in sums equal to any part of its market value above three dollars per ton at per rate of interest, not exceeding seven per cent. per annum, and at a less rate when practicable. All iron upon which said advances are made shall be pledges to said second parties in the customary manner. (7) This agreement shall continue in force so long as the same may prove satisfactory to the party of the first part, and on its termination said second parties agree to promptly turn over all accounts and other property of the company to which it may then be entitled."

The letter referred to in Mr. Gale's testimony above quoted was as follows:

"Forsyth, Hyde & Company, Dealers in Pig Iron, Chicago, 68 and 70 Dearborn Street.

"Chicago, May 16, 1893.

"Messrs. York Iron Company, Minneapolis, Minn.—Gentlemen: We wired you to-day to ship to the Rockford Malleable Iron Works two hundred ton No. 2, and send to you S. M. No. 1,789 herewith for sale. We also send you S. M. 1,790 for 300 tons of soft 2 for the Moline Malleable Iron Company, at St. Charles, Illinois. You will see that the Moline concern has moved, and they are not quite ready yet to take any iron. We therefore request that you ship to Rockford first, and the Moline Company second. We send the S. M. to you, and a copy to Black River Falls. The sales are fifty per cent. better than the memorandum shipment of yesterday. Both Mr. Gaylor and Mr. Pullman were out of town yesterday, and Mr. ——, of the Malleable

Iron Company, could not be found. We hope to see both of them to-morrow, and will close up sale for 2,000 tons possibly.

"Very truly, yours, Forsyth, Hyde & Co."

The S. M. (sales memorandum) No. 1,790 inclosed in the foregoing letter was in words following:

"Forsyth, Hyde & Company, Pig Iron Commission, 68 and 70 Dearborn Street, Chicago.

"Sale Memorandum 1,790. Chicago, May 16, 1893.

"Messrs. York Iron Company, Minneapolis, Minn.: We have sold for your account to the Moline Malleable Iron Company, of St. Charles, Illinois, —— cars, 300 tons soft, No. 2 Minneapolis pig iron, at $15.00 per gross ton, spot cash, f. o. b. St. Charles, Illinois, six per cent. for four months' time, deliverable at once. Notify them two days before you ship. Firm sale memorandum sent to buyer, Rhodes. Subject to possible delay from accident or other cause unavoidably delaying manufacturers. Shipment via E. J. & E., care of Chicago & Great Western Railway; rate of freight —— per gross ton from —— to ——. Forsyth, Hyde & Company.

"H. Nott."

The sale in controversy was made in a conversation between Mr. Ullman, acting for plaintiff in error, and Mr. Hyde, acting for Forsyth, Hyde & Co. Afterwards Forsyth, Hyde & Co. sent to plaintiff in error the following sales memorandum:

"Forsyth, Hyde & Co., Pig Iron Commission, 68 and 70 Dearborn Street, Chicago.

"Sale Memorandum, Including all Shipping Directions Received with Your Order, No. 1,790.

"Chicago, May 16, 1893.

"Sold to Moline Malleable Iron Co., St. Charles, Ill., —— cars, 300 tons No. 2 soft Minneapolis pig iron. Price (freight cash) $15.00 per gross ton, spot cash, f. o. b. St. Charles, Ills., privilege of 4 mos. time @ 6% int. If this lot is divided in delivery, settlement to be made for each lot promptly when delivered. If sold on time, settlement is to be by note or acceptance. Delivery to be made at once, * * * subject to possible delay from accident or other cause, unavoidably delaying manufacture or shipment. Order shipped via E. J. & E., c/o C. & G. W. N. Ry.

"[Signed] Forsyth, Hyde & Co.

"J. H. Mott.

"Please advise us if this is not in accordance with your understanding."

Plaintiff in error, at the time of the purchase, knew or had reason to suppose that Forsyth, Hyde & Co. would procure the iron from the defendant in error, and it is probable that they knew at that time that there was some sort of arrangement between defendant in error and Forsyth, Hyde & Co. whereby the firm handled the product of the corporation; but what the terms of that arrangement were they did not know, or seek to know, so far as appears. The testimony touching the sale was entirely by Mr. Ullman. That testimony is certainly not inconsistent with the theory of counsel for plaintiff in error that the plaintiff in error was, in fact, contracting with Forsyth, Hyde & Co. themselves, and not with them in any representative capacity. At the time of the sale, Forsyth, Hyde & Co. were indebted some $5,000 to plaintiff in error, that being the proceeds of two accommodation notes then outstanding, but afterwards paid by plaintiff in error. Mr. Ullman testified:

"The notes shown me, dated March 2, 1893, and April 15, 1893, are the notes which I gave. They were paid through the First National Bank of Moline, Illi-

nois, at maturity. I had dealt with Forsyth, Hyde & Company, I think, ever since they were in business; that is, for a number of years. Q. What were the circumstances under which these notes were given? A. Mr. Forsyth asked me at one time to give him some notes which he could discount. I told him that we owed him nothing; and he said that he needed the money, and it would be a great accommodation if I could give him that amount in notes. I finally told him that I would do so, but I would charge it on account to Forsyth, Hyde & Company. I purchased the iron of Mr. Hyde. I do not remember the particular conversation we had with him further than the purchase of the iron. I had made no payments for iron bought of Forsyth, Hyde & Company prior to this time, except to them by note or otherwise. Had never bought any except through agency of Forsyth, Hyde & Company. I never had any dealings with the York Iron Company. * * * Q. At the time that this iron was purchased, in May of 1893, was any reference made to these notes? A. Yes, sir. Q. What was it? With whom was the conversation had? A. With Mr. Hyde. Q. Well, what was said? A. Nothing was said except that he had those notes, and that he wanted me to take this iron in satisfaction of the notes. Q. Are you certain about that? A. I testified that there was nothing said about the talk about the note. 'We having the notes then,' he said, 'I want to sell you that iron. I want to sell you 300 tons of iron;' and we took the iron and I understood— Q. Never mind what you understood; just what you said. A. Nothing further was said about it. Q. So there was no reference made to these notes at the time you purchased the iron? A. There was the talk that he owed us for those notes earlier in the conversation, but there was no conversation further than that in the purchase of the iron. We talked about his owing us for these notes, and then afterwards we went on, and talked about buying so much iron from him. Q. But that was not my question. A. I said there was no connection made with the purchase of the iron at that time. There was the talk that he owed us for those notes earlier in the conversation, but there was no conversation further than that in the purchase of the iron. We talked about his owing us for these notes, and afterwards about buying so much iron from him. The York Iron Company was never represented when the accounts of Forsyth, Hyde & Company were paid. So far as I know, they had no knowledge of the manner in which they were paid."

That the terms of the sale to plaintiff in error were correctly stated in the sales memorandum last above quoted was not disputed. Plaintiff in error, not electing, when it received the iron, to give notes at four months' time, was then charged with the price in the books of Forsyth, Hyde & Co.; and, so far as concerned that firm and plaintiff in error, the iron (which was delivered in June, 1893) was paid for in full by the credit in favor of the latter. Forsyth, Hyde & Co. failed in July, 1893. I think the jury might have inferred from the testimony of Ullman and the bookkeeper that the price of the iron was to be offset against the credit. I do not understand Ullman's testimony to be "positive" "that the two subjects were not connected." The insistence by defendant in error is that the sale contract of May 16th was with defendant in error, it being principal, and Forsyth, Hyde & Co. merely agents; that defendant in error, as vendor, has not been paid; and that plaintiff in error must now again pay the price of the iron. The testimony tends to show additional matters about as follows: On May 19th defendant in error, being advised that Forsyth, Hyde & Co. had made the sale of the 300 tons to plaintiff in error, also that they had made two other sales which would bring up the aggregate to 2,000 tons, delivered to Forsyth, Hyde & Co. that quantity of iron. In consideration of this, Forsyth, Hyde & Co. bound themselves to pay at maturity a certain indebtedness of

$6,000 then owing by defendant in error to a third party. They also engaged to pay four promissory notes made by defendant in error, for $2,500 each, and on which they had become sureties, of which notes one had fallen due May 12, 1893, another would fall due May 20th, another May 28th, and still another on June 10, 1893. They also engaged to pay, as they matured, other obligations of the defendant in error on which they had become security, in sums of $5,000 and $2,500, aggregating altogether $20,000, and maturing at different dates in the future. The witness Mr. Gale, who alone testified on the subject, added: "If the Moline Company had failed, and the account had been lost, it was talked and understood between Mr. Forsyth and ourselves that it would be our loss. Mr. Hyde never told us about any account against the Moline Company." This means that Forsyth, Hyde & Co. took the chances of collection from Pullman and the Rockford Company. It is to be noticed, further, that defendant in error then knew that plaintiff in error had the privilege of four months' time on the purchase of May 16th. The last of the obligations which Forsyth, Hyde & Co. were to pay matured August 15, 1893. The contract of May 19th could not mean, therefore, that Forsyth, Hyde & Co. were to pay with the proceeds of the iron.

Out of the 2,000 tons so obtained by them, Forsyth, Hyde & Co. shipped the 300 tons here in question to plaintiff in error about the 7th of June, and the same was received by the plaintiff in error about 10 days later. They also delivered the remainder of the 2,000 tons, except about 105, in carrying out other sales made by them. Forsyth, Hyde & Co. paid the four notes first above mentioned, aggregating $10,000. Presumptively these notes were paid before there had been any delivery of iron to plaintiff in error. When the deliveries of other portions of the 2,000 tons were made does not appear, nor was it shown when the price of said other portions would be payable. The presumption is that Forsyth, Hyde & Co. paid the first $2,500 note as soon as the contract of May 19th was made, and each of the other three at maturity. They had paid as much as $5,000, then, by May 20th, or, at latest, by May 23d. Up to this time there could hardly have been any delivery of iron to either of the other vendees. At all events, there is no showing that the $5,000, or even the entire $10,000, or any part of it, was the price or proceeds of the 200 tons sold to the Rockford Malleable Iron Company, or of the 1,500 tons sold to Mr. Pullman. Apart from the four notes mentioned above, no other obligation included within the arrangement of May 19th matured till about the time of the failure of Forsyth, Hyde & Co. They made no further payment under the agreement of May 19th, but they did collect from Pullman and the Rockford Company, though when is not shown.

It is said, in effect, as I understand, that the 2,000 tons of iron were actually sold to the three vendees by this defendant in error; that Forsyth, Hyde & Co. were mere bailees of this iron; that, as agents of defendant in error, they had negotiated the three sales; that, as such agents, they were to collect from each vendee the price of the iron sold to him; and that the payment of outstanding obligations under the arrangement of May 19th was, in effect, but an account-

ing to their principal for proceeds which, as soon as received, belonged to such principal. Suppose A., an agent, has negotiated sales of certain goods for and on behalf of B., his principal. The latter puts the goods into A.'s possession, authorizing him to deliver to each purchaser the portion bought by such purchaser, and to collect the price from each. A. makes delivery first to C., a purchaser; but, instead of receiving from C. the price in cash, it is then agreed between the two that a debt which A. owes C. shall be canceled, and A., out of his own pocket, is to pay B. a sum equal to that for which the goods were sold. A. at once makes this payment on the agency account. Then A. makes delivery to and collects from each of the other purchasers. These latter purchasers have now paid B., since payment to B.'s agent is payment to him; but A. becomes insolvent, and fails to account to B. for any further proceeds. Is it law that B. may now turn on C., and force him to pay B. the price of the goods sold to him? I think not. From the standpoint of all the vendees including C., B. has been paid in full. He received in cash from C.'s debtor the price of the goods sold to C., and his agent received the price on each sale, respectively, from each of the other vendees. Or, again, suppose that A., before he has made any delivery, advances to B. on his agency account, and meaning to reimburse himself out of the proceeds of the goods, a sum of money as large as or greater than the price C. is to pay. He then makes delivery to C., and, instead of receiving the price in cash, he agrees with C. that an old debt from himself to C. be canceled, or that C. will do something for him at a future time, and the price of the goods is to be deemed paid. A. thereafter makes delivery to and collects from the other vendees, and, becoming insolvent, fails to make any further payment to B. May B. now recover from C.? I think not. He has received the price of the goods sold to C. His loss results from the default of his agent on the other sales.

In brief, on the theory of agency, the $5,000 paid by Forsyth, Hyde & Co. on or about the 20th of May was more than an equivalent for the price of the 300 tons of iron bought by this plaintiff in error. This defendant in error has already received—this, at least, would be the presumption—the price of the iron sold to plaintiff in error. It ought not therefore to recover the same. Defendant in error suffered no loss by reason of any failure to get value for the iron sold to plaintiff in error. Its losses resulted from the failure of the agents, Forsyth, Hyde & Co., to account for proceeds actually received by them in their character as agents. The case would not be different if plaintiff in error had advanced the full price in cash to Forsyth, Hyde & Co. on May 16, 1893, and the latter had thereupon, and before delivering or collecting for any portion of the iron sold to the other parties, paid and advanced on their agency account a sum equal to or greater than the price of 300 tons of the iron, and then delivered the 300 tons to plaintiff in error. Assuming that defendant in error was vendor in the contract of May 16th, then the understanding between plaintiff in error and Forsyth, Hyde & Co. that the firm should pay defendant in error for the iron, so that plaintiff in error might settle with the firm, seems clearly inferable from the evidence. This side arrangement would probably signify nothing as against

defendant in error but for the fact that Forsyth, Hyde & Co. did at once pay on their agency account, with respect to the 2,000 tons of iron, $10,000. On the agency theory, in the absence of proof that they paid this $10,000 with proceeds received from Pullman or the Rockford Company, why shall it be said that this payment was not in response to the obligation due by the firm to this plaintiff in error? Suppose there had been but the one sale, namely, the 300 tons to plaintiff in error, and Forsyth, Hyde & Co., having agreed with plaintiff in error that they would pay the price to defendant in error, did so pay; could defendant in error afterwards recover the price again from plaintiff in error?

But I do not think this defendant in error was or ever became the vendor in the sale contract of May 16, 1893. It was a term in that contract that the vendee (plaintiff in error), when it received the iron, might, instead of paying cash, give notes at 6 per cent. payable in four months. This defendant in error never authorized Forsyth, Hyde & Co. to make on its behalf any such contract. By the writing of July 7, 1886, Forsyth, Hyde & Co. had no authority to make any contract of sale at all. The scheme by that writing was that Forsyth, Hyde & Co. would report orders, and, when approved and accepted by defendant in error, the sale was made. Defendant in error then delivered the iron, and Forsyth, Hyde & Co. collected the price, and accounted for the same, less their commission. I do not see that the conversation testified to by Gale was meant to change the contract in any way. Certainly, that talk was no authority to Forsyth, Hyde & Co. to conclude a sale on four months' time. When, therefore, Forsyth, Hyde & Co., on the 16th of May, made the sale to plaintiff in error, they alone were bound. They were bound to obtain iron and deliver it. There was no agency in the case; nor did defendant in error ever assume by ratification or in any other way to become the principal or vendor in that contract. The arrangement of May 19th, as testified to by Gale, does not by any kind of necessity have any such meaning. By that arrangement, Forsyth, Hyde & Co. themselves, for valuable consideration, then took the title to the 2,000 tons of iron. Plaintiff in error had no notice of that arrangement. It is conceivable that, as against a third person dealing with the 2,000 tons or some part thereof as a mere volunteer or with notice, a constructive trust in favor of defendant in error might have been declared in a court of equity. But here the rights of defendant in error are determined by the contract. The proceeds of the iron when and as received did not necessarily become, in the hands of Forsyth, Hyde & Co., the money of defendant in error. It was their own money. They were to take up certain outstanding commercial paper when and as the same fell due. For this engagement by them, defendant in error parted with the iron. There was no relation of principal and agent between defendant in error and Forsyth, Hyde & Co. so far as concerned the sale of the 300 tons of iron to this plaintiff in error, prior to the treaty of May 19, 1893; and it was not necessary, in order that the terms of that treaty be carried out, that defendant in error become or be treated as vendor in the contract whereby plaintiff in error bought the 300 tons of iron. All this on the assumption that,

as against plaintiff in error, it was possible, by some ex post facto agreement between Forsyth, Hyde & Co. and defendant in error, of which plaintiff in error had no notice, for this defendant in error to become principal and vendor in the contract last named. The theory of ratification presupposes, as beyond question, that, within the intent of plaintiff in error, defendant in error was vendor in the contract of May 16th. But I do not so understand the record. If Forsyth, Hyde & Co. had been in fact authorized to make that contract, then the evidence, it may be contended, would not affirmatively and distinctly exclude a possible understanding by plaintiff in error that defendant in error was really vendor. But Forsyth, Hyde & Co. were not so authorized. There is no basis for the theory of ratification. I am not able to see that defendant in error sold to plaintiff in error the 300 tons. It ought not therefore to recover the price.

The court instructed the jury: "The only question before you is the question as to whether or not the plaintiff has proved that, through these agents, they did sell and deliver to the defendant the pig iron that is sued for. If so, you may find a verdict for the plaintiff for the value of the iron at the time and place of delivery," etc. The record shows that the counsel for defendant "excepted to so much of said charge as directed the jury that the only question was as to whether plaintiff shipped to defendant certain pig iron in suit, and its value." The counsel for defendant also requested the court to charge the jury that "if they believe from the evidence that exclusive credit was given by defendant to Forsyth, Hyde & Company, and it contracted with them exclusively in respect to the iron to recover the price for which suit was brought, then plaintiff could neither sue nor be sued upon such contract." This request the court refused, and exception was duly taken and allowed. In other words, upon the theory which prevailed in the circuit court, the relation of principal and agent, as between the defendant in error and Forsyth, Hyde & Co., was assumed as beyond question. I think this judgment is error, and that the same ought to be reversed.

POST et al. v. BURNHAM et al.

(Circuit Court of Appeals, Third Circuit. November 10, 1897.)

No. 9.

SALE—WARRANTY OF TITLE—EVIDENCE.

In an action to recover damages for alleged breach of warranty of title upon a sale of certain locomotives, *held*, on the evidence, consisting of certain correspondence between the parties, that the sale was not made by defendants to plaintiffs, but to a railroad company, from which plaintiffs subsequently purchased, and that defendants were therefore not liable because of a failure of title.

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

This was an action by Henry A. V. Post and Charles C. Pomeroy, as surviving partners of the firm of Post, Martin & Co., against George Burnham and others, trading as Burnham, Williams & Co., for breach of an implied warranty of title

arising upon an alleged sale of four locomotives by defendants to plaintiffs. In the circuit court the judge directed a verdict for defendants, and the plaintiffs have appealed.

The real question in issue between the parties was whether the plaintiffs in fact purchased the locomotives of the defendants; defendants claiming that the purchase was made by plaintiffs from the Toledo, Ann Arbor & North Michigan Railway Company, to which the defendants had previously sold the locomotives. There was no question that the original sale by defendants was made to the railway company, and that the locomotives were shipped to them in November, 1892, and put in use on its road. From that time, defendants were pressing the railroad company for payment. Thus, on February 28, 1893, they wrote to the railroad company's general manager as follows:

"Dear Sir: We hand you herewith statement of account, showing amount due on engines shipped to your company in November, say $37,780, for which we shall be pleased to receive remittance, as we are not in funds. Trusting that we shall hear from you at an early date, we are," etc.

To this letter the general manager replied: "I have your letter of the 28th ult., with invoice. As soon as the engines are received, I will send this invoice to New York for payment."

On March 16, 1893, Post, Martin & Co., of New York, whose survivors are plaintiffs herein, addressed the following letter to the defendants:

"Gentlemen: We have arranged with Vice President Ashley, of the T., A. A. & N. M. Ry. Co., to pay for locomotives 37, 38, 39, and 40, which have been delivered his road from your works. Please, therefore, send us an invoice in our name of said locomotives,—such invoice to be in substitution for and cancellation of any previously rendered invoice of said company,—and we will remit the same in due course. Mr. Ashley will address you on the subject, in conformity with this letter."

On receipt of the foregoing letter the defendants addressed to Mr. Ashley, president of the railroad company, the following:

"Dear Sir: We are requested by Post, Martin & Co., of New York, to send them invoices for engines 37, 38, 39, and 40, recently delivered to your company, as they have arranged to make settlement. Kindly confirm this, and have invoices already rendered for these engines returned to us."

To this Mr. Ashley replied by telegram as follows:

"Post, Martin & Co. notification correct, and duly authorized."

Thereupon defendants wrote to Post, Martin & Co. as follows:

"Gentlemen: We duly received your favor of March 16th, advising us that you have arranged with Mr. Ashley, of the T., A. A. & N. M. Ry. Co., to pay for locomotives 37, 38, 39, and 40, recently delivered to them, and requesting invoices. We at once wrote for the return of the original invoices, but have not yet received them. In the meantime, however, we hand you invoices in your name, and will cancel the originals as soon as received from the Railroad Co."

Accompanying this letter were invoices made out to Post, Martin & Co. On March 28, 1893, the defendants again wrote to Post, Martin & Co. as follows:

"Gentlemen: We have your favor of March 27, and think we can explain the difference in the price of the engines as per invoices furnished by us, and the price named to you by the Railroad Co. The brakes for engines 37, 38, 39, and 40 were furnished by the Railroad Co., and simply attached by us. Our price for Nos. 37 and 38 is therefore made up as follows: For each engine, $8,990.00, plus $105.00 for attaching brakes. For Nos. 39 and 40, each engine $9,690.00, plus $105.00 for attaching brakes. Probably, in the price named to you by Mr. Ashley, he has included the brakes themselves. We have not yet received the original invoices from the Railroad Co. If you see Mr. Ashley, kindly ask him to expedite the return of these invoices."

On April 7, 1893, Post, Martin & Co. addressed the following to defendants:

"Gentlemen: We beg to inclose the Railroad Equipment Co.'s check No. 672, $37,780, in payment of your invoice of Nov. 23rd, 1892, and Nov. 26th, 1892,

for four freight locomotives delivered under the series A/99 Car Trust, receipt of which please acknowledge. We return the original invoice of January 26th, 1893, made out to the Tol., A. A. & N. Mich. Ry., which invoice please cancel, and so record."

To which the defendants answered:

"Gentlemen: We have your favor of 7th inst., inclosing check to our order for $37,780, in payment for locomotives Nos. 37 to 40, inclusive, shipped in November of last year, for which please accept our thanks. We inclose formal receipt for same. As you advise, we have canceled our invoice of January 26th for $81,280, made against the Toledo, Ann Arbor & Northern Michigan R. R. Co."

On the same day the defendants wrote to Mr. Ashley as follows:

"Dear Sir: We have to-day received, through Messrs. Post, Martin & Co., remittance for $37,780, in settlement for the four locomotives, Nos. 37 to 40, inclusive; and, in accordance with your instructions, we have made and forwarded bills to them. Kindly let us know whether similar settlement will be authorized for locomotives Nos. 41 and 42, shipped February 22nd, and 43, and 44, shipped March 7th."

J. S. Clark and Richard C. Dale, for plaintiffs in error.

John G. Johnson, for defendants in error.

Before SHIRAS, Circuit Justice, and ACHESON and DALLAS, Circuit Judges.

DALLAS, Circuit Judge. This was an action to recover for breach of an implied warranty of title arising upon a sale of chattels alleged to have been made by the defendants below to the plaintiffs below. The question was as to whether the contract of sale alleged had in fact been made, and this question being, as was agreed, for determination by the court, upon the documentary evidence adduced, the learned judge held that the sale alleged had not been established; and, inasmuch as without such sale the implied warranty of title relied on could not exist, he directed a verdict for the defendants. The subject-matter of the alleged sale was four locomotives. That the defendants had sold them to the Toledo, Ann Arbor & North Michigan Railway Company is beyond question, as is also the fact that delivery of them had been made by the defendants to that company. It is also unquestioned that after the sale and delivery just mentioned the plaintiffs did purchase the same locomotives. They assert that they bought them from the defendants, but the defendants insist that the plaintiffs did not buy from them (the defendants), but from the railroad company before mentioned. This difference between the parties is the gist of the present controversy; and its right decision depends upon the effect which should be given to certain correspondence and other writings which are set forth at length in the record, but to which it is not necessary to refer with particularity. After careful examination of them, we have all reached the conclusion that a sale by the defendants to the plaintiffs does not appear, but that, on the contrary, it is quite apparent that the only sale to the plaintiffs was made by the railroad company, and that, as was said by the learned judge in the court below, "the defendants did no more than carry out the arrangement between the railroad company and the plaintiffs." The judgment is affirmed.

NORTHERN PAC. R. CO. v. FREEMAN et al.

(Circuit Court of Appeals, Ninth Circuit. November 1, 1897.)

No. 365.

1. RAILROADS—DEATH AT CROSSING—CONTRIBUTORY NEGLIGENCE.
The mere fact that one approaching a railroad crossing in a wagon was not seen by the witnesses of the accident to stop or turn his head to look and listen is not conclusive of contributory negligence, so as to require withdrawal of the case from the jury, where there were indications from the track of his wagon that he may have seen the train as soon as it was possible to do so from the conformation of the ground, and that he attempted to get out of its way; there being also evidence tending to show that no signal was given by the approaching train.

2. DEATH BY NEGLIGENCE—DAMAGES—INSTRUCTIONS.
The court charged that, in fixing the damages, the jury might take into consideration deceased's ability to earn money, to support, maintain, care for, and protect his wife and children, and to educate and train the latter, "and the loss to the wife and children because of being deprived of the use and comfort of his society, and the loss of his experience, knowledge, and judgment in managing his and their affairs," etc. *Held*, that this was not calculated to mislead the jury into the belief that they might give damages for a loss of society in the sentimental sense, it being clear that the court intended a loss of society in the material and pecuniary sense.

Ross, Circuit Judge, dissenting.

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

This was an action at law by Serette O. Freeman and others, being the widow and three minor children of T. A. Freeman, against the Northern Pacific Railroad Company, to recover damages on account of his death. In the circuit court there was a verdict and judgment for plaintiffs, and the defendant sued out this writ of error.

Crowley & Grosscup, for plaintiff in error.
J. B. Bridges, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The widow and the three minor children of T. A. Freeman, brought an action against the Northern Pacific Railroad Company to recover damages on account of his death. The decedent, just prior to the accident which caused his death, was in his wagon, driving a team at a slow trot along the county road towards a railroad crossing. He was a man of 30 years of age; his eyesight and hearing were good; and he was familiar with the crossing, having frequently driven the same team over it. The team was gentle, and was accustomed to the cars. The wagon road crossed the railroad track nearly at right angles. The track at this point was in an excavation 8 feet below the elevation of the surrounding country, and the wagon road approached it by a gradual incline, the length of which was from 130 to 150 feet. Along the greater portion of this distance the view of any train approaching, either from the north or the south, was shut off by the banks of the cut on either side of the wagon road; but, at a distance of about 40 feet before reaching the

track, the road emerged from the cut, and the view up the track for 286 feet was unobstructed.

It is contended by the plaintiff in error that the trial court should have instructed the jury to return a verdict for the defendant, for the reason that the undisputed testimony shows that the deceased, as he approached the railroad crossing, did not look up the track, and did not stop and listen, and did not see the train which was approaching in full view, and that, therefore, his contributory negligence is proven to be such as to preclude his representatives from recovering damages. A careful consideration of the evidence does not convince us that the court erred in declining to give this instruction. There were witnesses who testified, it is true, that the deceased drove his team along the road at a gentle trot, and that he turned his head neither to the right nor to the left, and did not stop his team until the train was upon him; but there is evidence, on the other hand, that, at about the first point where the decedent could have seen the train after emerging from the cut, the tracks of his wagon left the beaten road, and swerved to the right, and that the horses crossed the railroad track several feet away from the usual crossing. According to the record, there were but three witnesses who saw the accident,—two women and a girl of 10 years of age. The women were upon the wagon road, and were approaching the railroad track from the side opposite that from which the decedent was coming. At the time when the latter was struck by the train, they were from 200 to 250 feet away. They testified that he was approaching at a slow trot, not faster than a brisk walk, and that his speed was uniform up to the time of the accident; that he looked straight before him, without turning his head towards the approaching train; and that his team did not swerve from the direct course in which it was going. The other witness was standing by the side of the road, upon the opposite side of the track. She was near the point where the descent of the wagon road into the cut began, and was consequently from 130 to 150 feet from the railroad track. She testified that the decedent passed her going at a slow trot, and that she saw him drive all the way down the hill; that the team "went down a ways, and then run and flew back." She testified, further, that the horses slowed up,—pulled up,—and that, just when he went down, the train was close to him, "and he saw the train, I guess, and he just tried to get out of the way"; that the horses tried to get out of the way of the train. In answer to the question, "Do you know whether he was looking either way?" the witness replied, "No, sir." It is manifestly impossible, in the nature of things, that any of these witnesses could testify of her own knowledge that the decedent did not look towards the approaching train, or that he did not see it as soon as he emerged from the banks, and reached a point where it was visible. It does not follow that he did not look and listen from the fact that he was not seen to turn his head towards the approaching train. The wagon road was sandy, and the wagon made but little noise. The decedent had the right to believe that any train coming towards the crossing would give the usual signal. There was evidence which went before the jury tend-

ing to prove that no signal was given. The majority of the witnesses who testified in the case were at the time of the accident so situated that, if the train had whistled for the crossing, they would have heard it They all, excepting the conductor, the engineer, and the fireman of the train, testified that they did not hear the whistle, and one testified that the whistle was not blown. When all this testimony is borne in mind, it cannot be said that the jury should not have been permitted to decide whether there was contributory negligence on the part of the decedent. Improvement Co. v. Stead, 95 U. S. 161; Railroad Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044; Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653; Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679; Lynch v. Railroad Co., 16 C. C. A. 151, 69 Fed. 86.

It is urged that the court erred in instructing the jury in regard to the elements of the plaintiffs' damage, in that it permitted the jury to consider the loss to the wife and children because of being deprived of the use and comforts of the decedent's society. When the whole of the charge upon this subject is considered, it will appear that it was not the intention of the court to instruct the jury to measure by their verdict the loss of decedent's society in a sentimental sense, or to include a solatium for injury to the feelings of the widow or children, but only the loss of his society in a material and pecuniary sense. The whole of the charge is as follows:

"If you find, under the evidence and instructions of the court, that the plaintiffs are entitled to recover damages against the defendants, then, in arriving at the amount of such damages, you should take into consideration the age of the deceased at the time he was killed, his probable duration of life had such accident not occurred, his mental and physical condition, his ability to earn money and to support and maintain his wife and children, his ability to care for and protect his wife and children, and to educate and train the latter, and the loss to the wife and children because of being deprived of the use and comforts of his society, and the loss of his experience, knowledge, and judgment in managing his and their affairs, and any and all other things which may have appeared in the testimony enlightening you upon the subject."

The portion of the charge which is complained of is here so connected with the remainder of the instruction as to make it sufficiently clear to the jury that the loss of the use and the comforts of the decedent's society, which they were allowed to consider, was the material use and comfort which were akin to the other elements of damage contained in the charge, and which it is admitted that the law sanctions,—the loss of experience, knowledge, judgment, etc.

In the case of Railroad Co. v. Goodman, 62 Pa. St. 329, the jury were instructed that damages should be given as "a pecuniary compensation, the jury measuring the plaintiff's loss by a just estimate of the services and companionship of the wife, of which he was deprived by the accident." Upon this, the court says:

"Looking at the entire charge upon the subject of damages, we think it clearly confined to damages to a pecuniary compensation. * * * Companionship was used to express the relation of the deceased in the character of the services she performed. He merely meant to say that the loss should be measured by the value of her services as a wife or companion."

Of similar purport is the case of Cregin v. Railroad Co., 19 Hun, 343. We find no error for which the judgment of the circuit court

should be reversed. It is accordingly affirmed, with costs to the defendants in error.

ROSS, Circuit Judge, dissenting.

EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES v. TRIMBLE.[1]

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 367.

1. INSURANCE—CONFLICT OF LAWS—WHAT LAW GOVERNS.
   Where an application to a New York life insurance company for a policy is made in another state, where also the advance premium is paid to the company's agent to be forwarded to the company, under an agreement that the insurance is not to take effect unless the premium is accepted and the risk approved in New York, and, by the terms of the policy issued, all premiums and the policy itself are payable in New York, and proof of death is to be there made, the policy is a New York contract, and the rights of the parties thereunder are governed by the statutes of New York, there being no statute in the other state affecting the rights of the parties.
2. SAME—FORFEITURES—STATUTORY PROVISIONS.
   The statute of New York (Laws 1877, c. 321) prescribing the condition upon which a policy of life insurance may be forfeited for the nonpayment of a premium is mandatory, and its provisions are not subject to be set aside or waived either by the company or the assured, or by both together.
3. ABATEMENT AND REVIVAL—DEATH OF PARTY—SUBSTITUTION OF EXECUTOR—PLEADING.
   Upon suggestion to the court of the death of a plaintiff, where the cause of action survives, the executor or administrator may, upon motion, be substituted as plaintiff, and permitted to prosecute the action, without filing any supplemental pleading showing the transfer of the cause of action. Rev. St. § 955.
4. INTEREST ON VERDICT—MOTION FOR NEW TRIAL.
   A verdict for plaintiff was returned and entered on January 16th, for $8,318. A motion for a new trial having been interposed by defendant, judgment was not entered until January 29th, to which date interest was computed and included, bringing the total to $8,333. *Held*, that this involved no error.

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

Burke, Shepard & McGilvra, for plaintiff in error.

Geo. E. De Steiguer, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This suit was brought upon a policy of assurance issued by the plaintiff in error, a New York corporation, upon the life of one Edward H. Fleming, a then resident of Fresno county, Cal., payable upon his death to his wife, Sallie F. Fleming. Edward H. Fleming having deceased, the suit was begun October 17, 1895, by the beneficiary named in the policy, under the name of Sallie F. Redding; she, subsequent to the death of Fleming, and before the institution of the suit, having married one Redding. Thereafter,

[1] Rehearing denied October 6, 1897.

to wit, February 3, 1896, upon suggestion to the court below of the death of Sallie F. Redding since the beginning of the action, and upon the production of letters of administration with the will annexed granted to William P. Trimble upon the estate of the deceased, Sallie F. Redding, the court, on the application of the administrator, made an order permitting him, as such administrator, to prosecute the action, and substituting him as plaintiff therein, of which due notice was given the defendant's attorneys. The trial of the cause resulted in a judgment for the plaintiff. The main point presented and argued on the part of the plaintiff in error is that the policy sued on was not a New York contract, and therefore not governed by the New York statute in relation to life insurance companies. The facts in relation to that question, it is conceded in the brief for the plaintiff in error, are substantially the same as the facts in the case recently before this court, entitled Equitable Life Assur. Soc. v. Nixon (81 Fed. 796), which case was decided by this court at the last term against the contention of the plaintiff in error. Under the ruling there made, the policy sued on here must be held to be a New York contract, and therefore governed by the statute of that state, which is as follows:

"Section 1. No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent, or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice: provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for." Laws N. Y. 1877, c. 321.

The decision of this court in the Nixon Case is also conclusive of the second point made by the plaintiff in error in the present case. As there said:

"The statute of New York prescribes the condition upon which a policy may be forfeited for the nonpayment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived either by the company or the assured, or by both together."

The third point made on behalf of the plaintiff in error is to the effect that the filing of a supplemental pleading showing the trans-

fer of the original plaintiff's cause of action to the substituted plaintiff was essential to a recoverv by the plaintiff, Trimble, as administrator. No authority is cited in support of this position, and we do not think it well taken. Section 955 of the Revised Statutes provides:

"When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant will answer accordingly; and the court shall hear and determine the cause, and render judgment for or against the executor or administrator, as the case may require. * * * The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court."

In Wilson v. Codman's Ex'r, 3 Cranch, 205, 207, Chief Justice Marshall, in delivering the opinion of the court, said:

"The first question which presents itself in this case is, was the defendant entitled to oyer of the letters testamentary at the term succeeding that at which the executor was admitted a plaintiff in the cause? It is contended on the part of the defendant that, on the suggestion of the death of either plaintiff or defendant, a scire facias ought to issue, in order to bring in his representative; or, if a scire facias should not be required, yet that the opposite party should have the same time to plead and make a proper defense as if such process had been actually sued. The words of the act of congress do not seem to countenance this opinion. They contemplate the coming in of the executor as a voluntary act, and give the scire facias to bring him in, if it shall be necessary, and to enable the court 'to render such judgment against the estate of the deceased party' 'as if the executor or administrator had voluntarily made himself a party to the suit.' From the language of the act, this may be done instanter. The opinion that it is to be done on motion, and that the party may immediately proceed to trial, derives strength from the provision that the executor or administrator, so becoming a party, may have one continuance. This provision shows that the legislature supposed the circumstance of making the executor a party to the suit to be no cause of delay. But, as the executor might require time to inform himself of the proper defense, one continuance was allowed him for that purpose. The same reason not extending to the other party, the same indulgence is not extended to him. There is, then, nothing in the act, nor is there anything in the nature of the provision, which should induce an opinion that any delay is to be occasioned where the executor makes himself a party, and is ready to go to trial. Unquestionably, he must show himself to be executor, unless the fact be admitted by the parties; and the defendant may insist on the production of his letters testamentary before he shall be permitted to prosecute; but if the order for his admission, as a party, be made, it is too late to contest the fact of his being an executor. If the court has unguardedly permitted a person to prosecute who has not given satisfactory evidence of his right to do so, it possesses the means of preventing any mischief from the inadvertence, and will undoubtedly employ those means."

The fourth and last point made on behalf of the plaintiff in error is that the judgment appealed from was rendered for a larger sum than that specified in the verdict. The verdict was returned and entered on the 16th of January, 1897, for $8,318. A motion for a new trial having been interposed by the defendant to the suit, the judgment was not entered until January 29th. The amount for which judgment was entered was $8,333, which included interest. In this there was no error. Gibson v. Cincinnati Enquirer, 10 Fed. Cas. 309; Griffith v. Railroad Co., 44 Fed. 574. The judgment is affirmed.

HARDMAN v. MONTANA UNION RY. CO.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 358.

1. REVIEW ON ERROR—FINDINGS OF FACT.
   Where, under a stipulation, a case is tried by the court without a jury, the facts found by the court are not open to review in the circuit court of appeals.

2. BAILMENT—GOODS IN RAILROAD DEPOT.
   While a railroad company which has carried property for hire is keeping it for a reasonable time in its own warehouse, at the point of destination, until it shall be called for, it is a bailee for hire, and not a naked depository.

3. CARRIERS—NEGLIGENCE—GOODS IN WAREHOUSE—DESTRUCTION BY FIRE.
   A railroad company holding property in its warehouse as a bailee for hire allowed a car marked "Powder," which was in fact empty, but locked, to be placed in close proximity thereto. The warehouse caught fire, and the property was destroyed solely because the firemen were prevented, through reasonable fear of the powder car, from extinguishing the fire. *Held*, that the company was liable for the loss.

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

John W. Cotter, for plaintiff in error.

Geo. Haldorn, for defendant in error.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was an action to recover the value of certain goods shipped by the plaintiff from the city of Anaconda to the city of Butte, in the state of Montana, which the defendant railway company, a common carrier between the points named, undertook to and did carry for a consideration paid, and which goods were thereafter damaged by fire while in the warehouse of the defendant company in the city of Butte. The case was tried before the court below without a jury, pursuant to a stipulation of the parties. The facts found by the court are not, therefore, open to review here. Farwell v. Sturges, 6 C. C. A. 118, 56 Fed. 782; Skinner v. Franklin Co., 6 C. C. A. 120, 56 Fed. 783; Wile v. Bank, 17 C. C. A. 25, 70 Fed. 138. From the findings of the court, these among other facts appear: On or about June 21, 1895, the plaintiff delivered to the defendant at the city of Anaconda, to be transported by the defendant, and delivered to the plaintiff at the city of Butte, Mont., the goods in question, paying the defendant for such transportation the sum of $11.09, in consideration of which payment the defendant agreed to deliver the goods to the plaintiff in the city of Butte. The defendant transported the goods to the city of Butte in accordance with its undertaking, and there unloaded the same from its cars, and stored the goods in its warehouse in that city, in which they remained from June 21 until the night of July 2, 1895, at which time the warehouse caught fire, inflicting the damage which gave rise to the action. The findings further show that the defendant did not itself have sufficient fire appliances to extinguish or control the fire, but that its warehouse was

situated within the city of Butte, which city possessed a fire department with sufficient water facilities; that upon the discovery of the fire one of the police officers of the city turned in a fire alarm, to which the fire department immediately responded; that upon the arrival of the department at the scene of the fire it was notified by one of the police officers of the city that a car load of powder was standing immediately adjoining the platform on the south side of the warehouse, and that thereupon the fire department withdrew, upon the order of the chief of the department, until he could make an investigation; that the car was sealed by the employés of the defendant company, and was labeled "Powder," but that by whom it was so labeled did not appear from the evidence; that it was subsequently discovered by the chief of the fire department of the city that the car did not in fact contain any powder, upon the discovery of which fact the fire department was ordered by him to immediately return to the fire and attempt to extinguish it; that a period of about 10 or 12 minutes elapsed between the departure of the fire department from the scene of the fire and its return thereto. The thirteenth finding of fact is in these words:

"That if the said fire department had not believed that a car load of powder was standing on the track adjoining the said warehouse, and had begun to work at the said fire upon their first arrival, the same could have been extinguished without any loss."

The conclusions of law drawn by the court below, in respect to which errors are assigned, are as follows:

"First. That it was not the duty of the defendant to furnish or keep any fire apparatus in the vicinity of the said warehouse, to extinguish fires in or about the same. Second. That the defendant is not liable to the plaintiff for the loss of the said goods so stored in the warehouse as aforesaid, defendant's liability being that of a warehouseman; and it was not guilty of any negligence in connection with said fire, or in extinguishing the same."

The plaintiff in error assigns for error the second conclusion of law above given—

"For the reason that the testimony of the defendant's own witness, McGrade, and all of the evidence, shows that the defendant, by its servants and employés, loaded a car labeled 'Powder,' and negligently allowed and permitted the same to stand upon the track near and adjoining the said warehouse, at a point at or near where the fire occurred therein, and thereby prevented the fire department of the city of Butte from extinguishing or attempting to extinguish the said fire in its incipiency, and that the said act of the said defendant and its servants and employés in negligently allowing the said powder-labeled car to be and remain in said position was the direct cause of the plaintiff's loss, and that, if it had not been for defendant's negligence in allowing the said car to be in the said position, labeled 'Powder,' the said fire could have been extinguished without any loss or damage to plaintiff."

If the car labeled "Powder" had in fact contained that dangerous combustible, the right of the plaintiff to recover could not admit of doubt, in view of the finding of the court to the effect that but for its presence the fire would have been extinguished without loss. A railroad company, keeping the property of its patrons in its own warehouse for a reasonable time, until it shall be called for, is to be regarded, in the absence of a statute declaring otherwise, as a bailee for hire, and not as a naked depository. Whart. Neg. § 478; Norway Plains

Co. v. Boston & M. R. R., 1 Gray, 273; White v. Railroad Co., 3 McCrary, 559, Fed. Cas. No. 17,543. The actual storage of powder in such close proximity to the property so held as to prevent, through reasonable fear, firemen from extinguishing the fire that does the damage complained of, would be such negligence as would render the company liable. White v. Railroad Co., supra, and authorities there cited; Myers, Fed. Dec. § 612. Although, as a matter of fact, there was in the present case no powder in the car, yet it was labeled "Powder," which fact indicated to every ordinarily prudent person that it contained that article. The fire company acted, as it had the right to do, upon appearances. While it is not shown that the defendant actually put the powder label on the car, it had the control of the car, and permitted it to remain so labeled on its track by the side of its warehouse, and thus represented to every one that it did contain powder. The finding of the court below is to the effect that but for the label upon the car the fire that caused the damage sued for would have been extinguished without loss. Under these circumstances, we are of opinion that the plaintiff was entitled to recover. Judgment reversed, and cause remanded for a new trial.

JOY v. GLIDDEN VARNISH CO.

(Circuit Court, D. Massachusetts. November 9, 1897.)

No. 655.

1. PLEADING IN ASSUMPSIT—ALLEGATIONS OF PERFORMANCE.
   In assumpsit to recover for services rendered under the contract of hiring alleged in this case, performance may be alleged in general terms.
2. SAME—PLEADING CONTRACT.
   In this case, arising under the practice acts of Massachusetts, the declaration is not defective because it annexes a copy of a contract which refers to other contracts, without also setting out the latter.
3. SAME—ILLEGAL CONTRACT—DEMURRER TO DECLARATION.
   In a suit to recover compensation under a contract, and not for damages for a breach, or to enforce specific performance, the fact that the contract does not show the nature of the services contemplated is not sufficient ground for holding that public policy prevented recovery for services actually rendered.

This was an action at law by William F. Joy against the Glidden Varnish Company to recover compensation for services alleged to have been rendered under a contract. The case was heard upon demurrer to the declaration.

Hutchins & Wheeler, for plaintiff.
Heman W. Chaplin, for defendant.

PUTNAM, Circuit Judge. The plaintiff's declaration in this case contains two counts, which are as follows:

"First Count. And the plaintiff says that in or about the month of April, 1883, the plaintiff and the defendant entered into an agreement under seal, a copy whereof is hereto annexed, marked 'A,' whereby the defendant, in consideration of the covenants of the plaintiff therein contained, covenanted and agreed, so long as it should continue in business, to hire and employ, in Boston,

the services of the plaintiff in its business, and to pay him for said services the sum of one hundred sixty-six 66⅔-100 dollars monthly for each and every calendar month beginning with the 1st day of January, 1883, and also covenanted and agreed on the 1st day of January in each year, so long as it should continue in business, to render a true account of the same, wherein its net profits should be shown on January 1st of each year, and should pay to the plaintiff each said 1st day of January in each year during the continuance of said agreement, for the plaintiff's services, a sum which, added to said one hundred sixty-six 66⅔-100 dollars per month, should make the sum paid to the plaintiff for his services equal to fifty per cent. of the net profits of the said business of the defendant; such net profits to include the sums drawn out by the defendant's president, F. H. Glidden. And the defendant continued in business up to and including the year 1890, and the plaintiff performed all the services covenanted by him to be performed during said year 1890; but the defendant neglected and refused to pay him for said services in accordance with its covenants contained in said agreement, and has neglected to pay him any sum therefor; and the defendant neglected and refused on January 1, 1891, to render an account of its business for the year 1890 to the plaintiff, showing its net profits for the year 1890, and has never rendered such account, although requested so to do; and the net profits of the defendant during said year 1890 amounted to a large sum of money, to wit, the sum of twenty-four thousand dollars, and the defendant owes the plaintiff a sum equal to fifty per cent. thereof, namely, the sum of twelve thousand dollars, with interest thereon from January 1, 1891, when payment of the same was demanded. Second Count. And the plaintiff says the defendant owes him the sum of twelve thousand dollars, according to the account hereto annexed:

"Account Annexed.

"The Glidden Varnish Company to William F. Joy, Dr.

(1) 1891, Jan. 1. For services rendered at Boston during the year 1890 .... $12,000"

The plaintiff subsequently amended as follows:

"Now comes the plaintiff, and, with the consent of the defendant and leave of court, amends his declaration heretofore filed in said cause as follows: By inserting in the first count of said declaration, after the words 'And the defendant continued in business up to and including the year 1890,' the following words: 'And the plaintiff entered the employ of the defendant, in Boston, Massachusetts, on the execution of said agreement, and continued in said employ thereafter, and during the entire year 1890; and while in the defendant's employ, and during said year 1890, the plaintiff devoted so much of his time therein as the exigencies of the defendant's business required, and in the prosecution of said business used his best endeavors for the interest of said defendant.' "

The defendant, as permitted by the practice acts of Massachusetts, joins with a general denial a demurrer, as follows:

"[In respect of the first count.] (1) The contract set forth is void for indefiniteness. (2) The count does not sufficiently set forth the services due from, or the services rendered by, the plaintiff, and does not in any manner sufficiently allege performance by the plaintiff. (3) The agreement between the plaintiff and Glidden W. Joy, referred to in Exhibit A of the declaration, should have been, but is not, set forth; nor is the substance or legal effect thereof alleged. (4) The count sets forth no cause of action. [In respect of the second count.] (1) The count annexed is indefinite, general, and vague, and thereby the count is defective, for indefiniteness, vagueness, and generality."

No objection was urged at the hearing against the second count, and plainly it contains a good indebitatus assumpsit at common law, and also under the practice acts.

The plaintiff's amendment fully meets the second ground of demurrer to the first count. It contains allegations of performance,

which are clearly sufficient, under any system of pleading, as applied to all cases where more particular allegations would involve great detail.

On the present state of the record, the third ground of demurrer to the first count presents no difficulty. Under the practice acts, the plaintiff might have set out a copy of the contract sued on, or the part thereof relied on, "or the legal effect thereof." That the alternative gave the plaintiff an option which, if exercised, would relieve him from setting out a copy of any part of the contract, seems to have been settled in Higgins v. McDonnell, 16 Gray, 386. In the present case the plaintiff does not seem to have availed himself of his option, but he has attempted to set out a copy of the alleged contract, and also its legal effect. Whether or not, under the practice acts, he could properly do this, thus incurring the risk of duplicity and inconsistency, we need not determine, as the defendant has taken no objection on this point. The defendant's precise objection is that the copy of the contract set out refers to other contracts in such manner as to make them substantial parts of itself, and that, therefore, the contracts thus referred to should also be set out. It would sufficiently answer this to say that the practice acts are satisfied by the plaintiff setting out the parts of the contract relied on by him. Of course, in selecting the parts so relied on he takes the chance of its appearing at the trial that parts not set out are essential. It cannot always appear in advance of the trial that essential parts have been omitted, and such is the present position, as the relation of the parts omitted to those stated are not clear to thè court on the face of the declaration. But there is a more fundamental reason for this conclusion. The contract itself requires interpretation in the light of the circumstances surrounding it, and therefore, as an element of the plaintiff's declaration, it is of a lower order than the formal allegations in the declaration, and so the latter overrule whatever appears in the copy of the contract. The formal allegations set out a complete contract, and, if there is a variance, it cannot appear until the trial on the issue of fact.

As to the remaining ground of demurrer to the first count, Hervey v. Moseley, 7 Gray, 479, in a suit to recover damages for the breach of a contract for services not defined, and at a place not defined, holds that such a contract is against public policy. In the case at bar the place of service is defined, and the nature thereof is limited by the character of the business of the defendant corporation. However, the suit at bar does not relate to the specific enforcement of a contract, or to damages for its breach, but only to compensation for services already rendered under it. As the defendant is a mere business corporation, and exercises no public function, none of the objections raised by defendant touch any question of public policy of such a character as to prevent recovery for services actually rendered; nor are the objections to any want of definiteness or reasonableness of so radical a character as to prevent such recovery, if the contract declared on be shown on trial to be in fact that of the defendant corporation. Therefore, as the

suit is not for specific performance, or for damages for nonperformance, but only for compensation so far as the contract has in fact been executed, none of the objections taken by the defendant require that they be further investigated on this demurrer, whatever difficulties, if any, may be developed at a trial of the issue of fact. The demurrer to the first and second counts is overruled, and the counts are adjudged sufficient.

NORTHERN PAC. R. CO. et al. v. HEFLIN.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 347.

1. RECEIVERS OF CORPORATIONS—LIABILITY FOR TORTS.
   A receiver of a corporation, appointed in an action to foreclose a mortgage, is not liable for a tort committed by the corporation prior to the receivership.

2. SAME—PARTIES.
   In an action to recover damages for a tort committed by a corporation prior to the appointment of a receiver, the latter is not a proper party.

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

Crowley & Grosscup, for plaintiffs in error.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. For the alleged negligence on the part of the Northern Pacific Railroad Company in causing, or permitting to remain, an opening in one of its wharfs, through which, it is alleged, the defendant in error, who was plaintiff in the court below, fell, and was thereby seriously injured, he commenced this action in the court below against Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the railroad company mentioned. The complaint itself showed that the injury complained of occurred prior to the appointment of the receivers, and at the trial upon the original complaint and the answer thereto the defendants, at the conclusion of the plaintiff's evidence, moved the court to direct the jury to return a verdict for the defendants. The court denied the motion, and entered an order "that the case be withdrawn from the consideration of this jury, for the reason that there is a defect of parties defendant, to which ruling of the court the plaintiff, by his attorneys, excepts, and his exception is allowed." To the action of the court below, in each respect stated, the defendants at the time excepted. Subsequently the plaintiff filed an amended complaint, in which the Northern Pacific Railroad Company was joined as defendant with the three receivers named, upon which amended complaint a summons was issued, and served upon one A. Tingling, as agent of the company. A motion was made on behalf of the company, appearing specially and only for that purpose, to quash the service of summons so made on the ground that Tingling was not, at the time of

such service, an agent of the company, and had not been at any time since the beginning of the receivership; which motion the court denied, as it also did a motion made on behalf of the receivers to strike the amended complaint from the files. The case subsequently came to issue, and to trial before another jury, resulting in a verdict for the plaintiff for $5,000. After the verdict, Andrew F. Burleigh, who had succeeded to the receivership, was substituted for and in the place of the former receivers, and thereupon judgment in favor of the plaintiff was rendered and entered upon the verdict against the Northern Pacific Railroad Company and Andrew F. Burleigh, as receiver, for $5,000, with interest and costs, and with the direction that "said judgment as against said receiver to be paid by him only upon the further order of this court." The judgment expressly recites, what appeared from the complaint as well as the evidence in the case, that the cause of action sued on "arose prior to the appointment of receivers for the Northern Pacific Railroad Company." Those receivers were appointed, as this court judicially knows from its own records, in an action brought for the foreclosure of a mortgage executed by the railroad company, the purpose of such appointment being the conservation of the mortgaged property pending the foreclosure proceedings. The change in the personnel of the receivership was of no consequence. McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11. Neither of the receivers was answerable for any injury resulting from any negligent act of omission or commission on the part of the railroad company, arising prior to the commencement of the receivership. Even in respect to contracts entered into by the corporation prior to the receivership, the rule seems to be settled that receivers are not liable thereon unless they adopt or ratify such contract. Express Co. v. Railroad Co., 99 U. S. 191; Railroad Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787; United States Trust Co. v. Wabash Ry. Co., 150 U. S. 287, 14 Sup. Ct. 86; Electric Co. v. Whitney, 20 C. C. A. 674, 74 Fed. 664. A fortiori, a receiver is not liable for a tort committed by the corporation prior to his appointment; and, not being liable therefor, it necessarily results that the receivers in the present case were not proper parties to the action brought by the defendant in error as plaintiff in the court below to recover damages for injuries alleged to have been sustained by him through the negligence of the Northern Pacific Railroad Company. Decker v. Gardner, 124 N. Y. 334, 26 N. E. 814; Finance Co. v. Charleston, C. & C. R. Co., 46 Fed. 508. The original receivers were, therefore, entitled to a verdict upon the original trial, and the judgment against Receiver Burleigh for damages growing out of negligence of the railroad company arising prior to the beginning of the receivership is, for the same reason, erroneous. Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

BURKE et al. v. PIERCE et al.

(Circuit Court of Appeals, Third Circuit. October 29, 1897.)

No. 33.

1. LANDLORD AND TENANT—COVENANT TO REPAIR—MEASURE OF DAMAGES.
A lease contained a covenant by the lessee that upon the termination thereof he would deliver up certain parts of the property "in as good repair as the same now are, or to pay to" the lessor "a sum sufficient to put said parts in such repair." In an action for damages for a breach, *held*, that the landlord was entitled to a sum sufficient to make the repairs stipulated for, and that, if this could only be done by the use of new materials, no deduction should be allowed the tenant on that account, and that in such case the landlord would not be restricted to the difference between the value of the property when received by the tenant and its value when surrendered.

2. SAME—AGREEMENT TO ARBITRATE.
A lease contained a provision that if the parties could not, at the termination of the lease, agree upon the condition of the property, or the sum to be paid by the lessee under his covenant to surrender the premises in good repair, or to pay a sufficient sum to make repairs, they should submit the dispute to arbitrators, and be bound by their finding. In an action by the lessor for damages for a breach, *held*, that this clause afforded no defense, it never having been acted on by the parties.

3. EVIDENCE—VALUE—ORIGINAL COST.
Evidence of the original cost of an article is relevant upon the question of its value at a subsequent period.

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

This was an action at law by Walter, Frank, and James B. Pierce against Stevenson Burke, James Corrigan, and Price McKinney, trading as Corrigan, McKinney & Company, to recover damages for breach of a covenant to repair, contained in a lease. In the circuit court a judgment was given for plaintiffs, and the defendants sued out this writ of error.

Samuel S. Mehard, for plaintiffs in error.

A. M. Imbrie and Q. A. Gordon, for defendants in error.

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

BUTLER, District Judge. The suit is for damages for breach of covenant to repair, in a lease, which reads as follows:

"The said parties of the second part covenant and agree to keep the furnace, tools, machinery and other property hereby demised and let, in good order and repair during the continuance of this lease, and at its termination, whether by limitation of time or otherwise, to deliver the same to said parties of the first part in as good order and repair as the same now are, ordinary wear and tear and accidents by fire, wind or lightning excepted. The provisions of this clause as to ordinary wear and tear shall not apply to the hearth, bosh, bottom lining or hot blasts of the furnace, but the said parties of the second part agree to keep these parts of the furnace in good working repair, and return the same to the parties of the first part at the termination of the lease, whether by limitation of time or otherwise, in as good repair as the same now are, or to pay to said parties of the first part a sum sufficient to put said parts in such repair."

The court charged substantially "that the measure of damages was the amount required to put the hearth, bosh, bottom lining and hot

blasts of the furnace in the state of repair stipulated in the lease; and that while, in ascertaining the damages for the breach, regard was to be had to the character and condition and state of repair of the designated parts as they existed at the date of the lease, yet if the agreed repairs could not be made without the use of new materials no allowance was to be made to the defendants on account of new materials, but the defendants were liable to the plaintiffs for a sum sufficient to construct these deficient parts anew if the stipulated repairs could not otherwise be made"; and refused to charge as the defendants requested "that the measure of damages was the difference between the value of such part or parts in the state in which they were when plaintiffs gave possession thereof to the defendants, and their value in the state in which they were when defendants surrendered possession thereof to the plaintiffs."

The lease further provides as follows:

"In case the parties hereto cannot agree on the condition of the hearth, bosh, bottom, lining or hot blasts of the furnace at the termination of these presents, or cannot agree on the amount, or sum to be paid by said parties of the second part to said parties of the first part to put the said parts of the furnace in repair as above provided, such matters in dispute shall be referred to three arbitrators, one to be designated by each of the parties hereto, and the third by the two so chosen as aforesaid, and the finding of any two of such arbitrators shall be final and binding on the parties. In case either of the said parties neglects or refuses to appoint an arbitrator as above provided after receiving five days' notice so to do from the other parties of their desire for the appointment of such arbitrators then the parties giving such notice may appoint two arbitrators, and the two so chosen shall appoint the third, and the finding of any two of the arbitrators so chosen shall be final and binding on the parties. In case the two arbitrators chosen as aforesaid neglect or fail to agree on a third arbitrator within five days of their appointment, either of the parties hereto may petition the president judge of the court of common pleas of Mercer county, Pa., to make such appointment, and the said judge is hereby authorized to make such appointment, and the finding of a board of arbitrators so chosen, or any two of them, shall be final and binding. The said arbitrators shall meet in Sharpsville, Pa., within ten days of their appointment and shall make award in writing within 30 days of said meeting."

As respects this latter provision the court charged as follows:

"There was a clause in this contract looking towards arbitration, but it was not acted upon, and at any rate it was a revocable provision; it did not preclude the parties from coming into the ordinary courts of justice for the determination of their rights."

The defendants excepted to the charge, and assigned the matters involved, as well as the admission of the testimony of Mr. Pierce, received under exception, as errors. While the assignments are numerous they embrace no more than is stated above.

The measure of damages for breach of similar covenants has been much discussed by text writers, and frequently considered by the courts. The general rule established appears to be that the landlord is entitled to a sum sufficient to make the repairs stipulated for, and that where this can only be done by the use of new materials no deduction is allowed the tenant on that account. If he is thus required to pay more than seems equitable, it results from the terms of his covenant, and he cannot therefore complain. If he had complied with these terms, he must have supplied the new materials at his

own cost, and having failed to do this the landlord must be allowed the cost of doing what he should have done. 3 Sedg. Dam. (8th Ed.) § 990; Watriss v. Bank, 130 Mass. 343; Cooke v. England, 27 Md. 14. Where rebuilding is made necessary, not by usual wear and tear, but by some unexpected cause, such for instance, as fire, the courts seem to have struggled to relieve the tenant from the literal terms of his covenant to repair, as appears in Yates v. Dunster, 11 Exch. 15, and some other cases; and these cases appear to have established an exception to the general rule above stated. In the case before us the question is freer of difficulty than in most instances where it has arisen. The covenant is unusually particular and conclusive in its terms, and specifies clearly the measure of compensation for the tenant's failure. The landlord is not to have simply what might equal the value of the property at the time specified, as the defendants contend he should accept, but a sum sufficient to restore the property. The tenant's duty is stated alternatively. He is to return the property in as good condition as it was at the date specified, or to pay a sum sufficient to restore it to that condition. As he failed so to return it, and the property could only be restored to the required condition by the use of new materials the cost of such materials is necessarily covered by the language.

The circuit court was right also in holding that the arbitration clause affords no defense to the action. Hamilton v. Insurance Co., 137 U. S. 370 [11 Sup. Ct. 133]; Assurance Co. v. Hocking, 115 Pa. St. 407 [8 Atl. 589].

The testimony of Mr. Pierce was properly admitted. The original cost of the seal was a proper element in estimating its value at the time in question. Such testimony is usually heard in considering such questions.

The judgment is therefore affirmed

UNITED STATES v. SWIGGETT.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 350.

1. LOCAL LAND OFFICES—COMPENSATION OF RECEIVER—ALLOWANCES FOR OFFICE RENT, ETC.

The sundry civil appropriation acts, which carry the expenditures of the local land offices, and which provide merely that the amounts appropriated are for salaries and for contingent expenses, without declaring that they are in full for these purposes, show no intent to diminish the compensation of the receiver by requiring him to bear the expense of office rent; and where the secretary of the interior, in allotting to various land offices the sum appropriated, refuses to allow to a particular office any amount for rent, there is an implied obligation on the part of the government to reimburse the register for moneys expended for necessary office rent. 78 Fed. 456, affirmed.

2. SAME—DISTRIBUTION BY SECRETARY OF INTERIOR.

Under the terms of the sundry civil appropriation acts, which simply provide a gross sum for contingent expenses of "the several land offices," it is the duty of the secretary of the interior to make an equal distribution of

the sum among the several land offices; having regard, in the matter of rent, for those offices not accommodated in government buildings.

In Error to the District Court of the United States for the District of Montana.

The writ of error is sued out by the United States, the defendant in the court below. Samuel A. Swiggett brought suit against the United States to recover the sum of $699, money expended by him for the necessary rent of the land office of the United States in and for the Helena land district, Mont. The United States filed an answer denying, among other things, that any money had been appropriated by the United States for the payment of the rent of said office. Evidence having been introduced, the cause was submitted to the court, which made the following findings of facts: "First. That Samuel A. Swiggett is a resident of Helena, state of Montana. Second. That he was appointed register of the United States land office for the Helena land district of Montana, in May, 1890, and served as such officer from the 3d day of July, 1890, to the 1st day of June, 1894. Third. That during said dates the said land office for the district of Helena, Montana, was established by law at the city of Helena, said state, and that in order that the business pertaining to said office should be properly conducted a place or office was required, that the same should be kept open during business hours, and that it was necessary that said office should be kept, not only for the transaction of the business pertaining to said office, but was also necessary as a place for the keeping of the books, records, papers, and files pertaining to said office, and the furniture used therein, the property of the United States. Fourth. That petitioner, in company with the receiver of said land office, took charge of the rooms used as, and provided as, an office, and of the books, records, papers, files, and furniture therein, and that they did occupy said rooms in discharge of their respective duties as register and receiver during the time they held said offices, and that said records, books, files, and furniture were kept in the same during that period. Fifth. That during the time said petitioner and receiver occupied as an office said rooms the United States failed to pay any part of the rent for the same; that the petitioner during said time paid on said rent, for and on behalf of the United States, to the end that said land office might be maintained, the sum of six hundred and ninety-nine dollars; that said expenditure was necessary in order that the said land office of said Helena land district, Montana, should be kept open, and the business of the United States pertaining to the sale of public lands in said district should be properly transacted; and that the sum so paid was a reasonable and proper sum for that purpose. Sixth. That the salary petitioner was to receive was to equal three thousand dollars per annum, provided the salary and fees received for the discharge of the duties of said office amounted to that sum; that the earnings of said office of register amounted to more than said sum, to wit, three thousand and two hundred dollars per annum, and that said sum was paid into the treasury of the United States as required by law; that the United States paid to petitioner the said sum of three thousand dollars, but although petitioner presented his account for the sum so paid for rent as above stated to the proper officers of the United States, and demanded payment therefor, the United States failed and refused to pay the same." From these findings of facts the court found, as a conclusion of law, "that there was an implied contract on the part of the United States to refund and pay to the petitioner the said sum of six hundred and ninety-nine dollars; being the full amount of said rent for rooms for said United States land office paid by him, said petitioner." Judgment was accordingly rendered in favor of the plaintiff for the sum of $699. There are only two assignments of errors, which are as follows: "(1) The court erred in finding, as a conclusion of law, that there was an implied contract on the part of the United States to refund and pay to petitioner the sum of six hundred and ninety-nine dollars; being the amount of said rent for rooms for said United States land office paid by him, the petitioner. (2) The court erred in giving petitioner judgment for the sum of six hundred and ninety-nine dollars against the defendant, the United States."

H. S. Foote, U. S. Atty., and Samuel Knight, Asst. U. S. Atty.

Geo. M. Bourquin, for defendant in error.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge, after stating the case as above, delivered the following opinion:

It is provided in section 2237 of the Revised Statutes that "every register and receiver shall be allowed an annual salary of five hundred dollars." In section 2238 it is further provided that registers and receivers, in addition to their salaries, shall be allowed certain fees and commissions on the business transacted in their respective land offices. Section 2240 provides that the compensation of registers and receivers, including salary, fees, and commissions, shall in no case exceed, in the aggregate, $3,000 a year each. It appears from the findings that the earnings of the register at Helena, Mont., for the period in question, were $3,200 per annum, and that this sum was paid into the treasury of the United States, as required by law; that the register was paid a compensation of $3,000 per annum, but was not reimbursed the amount paid by him for the rent of rooms for the land office at that place during his term of office, from July 1, 1890, to May 30, 1894. The defendant in error contends that a reasonable expenditure for office rent was authorized by law, and that its disallowance to him diminished his salary for official services to that extent below the maximum amount he was entitled to receive under the law. It is practically conceded, although not found as a fact by the court, that the reason why the register was not reimbursed for his expenditure for office rent was the lack of sufficient appropriations by congress to pay the office rent for the several land offices in the United States for the period in question. Whether there is an implied contract on the part of the government to continue a specified salary, or reimburse a public officer for a necessary and reasonable expense incurred in connection with the duties of his office, depends largely upon the method congress has adopted in providing for the salary or expenditures of the particular office or service, and the circumstances of the particular case. In U. S. v. Fisher, 109 U. S. 143, 3 Sup. Ct. 154, the question was whether the chief justice of the territory of Wyoming was entitled to receive a salary at the rate of $3,000 per annum, as provided in section 1879 of the Revised Statutes, or at the rate of $2,600 per annum, as provided by the acts making appropriation for the legislative, executive, and judicial expenses of the government. These last-named acts provided that the appropriations were "in full compensation for the service" of the fiscal years to which they related. The supreme court held that the later act must prevail, and the earlier act, for the term covered by the appropriation acts, be considered as suspended. The claim for the higher salary was therefore rejected. In the case of U. S. v. Mitchell, 109 U. S. 146, 3 Sup. Ct. 151, the question was whether an Indian interpreter, serving at an agency in Nebraska, was entitled to receive a salary at the rate of $400 per annum, as fixed by the Revised Statutes, or a salary of $300, as provided by the Indian appropriation acts, where the appropriations were made specifically for the pay of seven interpreters in Nebraska at $300 per annum. The interpreter receipted for his salary at $300 per annum in full for the period in question.

The supreme court held that it was plainly the intention of congress, by the appropriation acts, to fix the annual salary of the interpreter at $300, and the claim was disallowed. In the case of U. S. v. Langston, 118 U. S. 389, 6 Sup. Ct. 1185, the court had under consideration the effect of the omission from the consular and diplomatic appropriation acts of the provision that the salaries provided in these acts for the officers named should be "in full for the annual salaries thereof." The acts had reduced the salary of the minister to Hayti from $7,500 to $5,000 per annum, and the question was whether, in view of the omitted provision, he was entitled to recover the difference in the court of claims. The supreme court held that there was nothing in the acts appropriating the lesser sum from which it might be inferred that congress intended to repeal the act fixing the salary of the minister at $7,500, and this salary was accordingly allowed. These cases, and others that might be cited, indicate that, where an appropriation is insufficient to pay an officer of the government a previously fixed compensation, the terms of the appropriation (that is to say, whether the appropriation provides that the amount appropriated is in full compensation or not) may be considered, in ascertaining whether the government is liable for the original salary of the officer. The same rule would appear to be applicable to the question of liability of the government for the necessary and reasonable contingent expenses of an office. For many years prior to the period involved in this case, congress had appropriated varying sums of money to defray the expenses of the several land offices in the United States; one gross sum being appropriated annually for the salaries of the registers and receivers, and another for the contingent expenses of the offices, including clerk hire, rent, and other incidental expenses. In these appropriations congress had recognized the rent of a land office (when the office was not in a federal building) as a legitimate expense of the government. In the act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1891, and for other purposes, approved August 30, 1890 (26 Stat. 389), it is provided, under the head of the "Collection of Revenue for Sales of Public Lands," as follows:

"For salaries and commissions of registers of land-offices and receivers of public moneys at district land-offices, at not exceeding three thousand dollars each, five hundred and fifty thousand dollars, and for contingent expenses of land offices: For clerk-hire, rent and other incidental expenses of the several land-offices, one hundred and seventy-five thousand dollars."

The appropriations for the years 1892, 1893, and 1894 are in precisely the same terms, the only difference being in the amounts appropriated. For 1892, for salaries and commissions of registers and receivers, $600,000, and for contingent expenses, $200,000, are appropriated (26 Stat. 970); for 1893, for salaries and commissions of registers and receivers, $550,000, and for contingent expenses, $175,000 (27 Stat. 368); and for 1894, for salaries and commissions of registers and receivers, $520,000, and for contingent expenses, $150,000 (27 Stat. 591). It will be observed that gross sums are appropriated to defray the salaries and commissions and certain contingent expenses in "the several land offices," but no method is indicated for

the distribution of the sums appropriated for contingent expenses. By section 2256 of the Revised Statutes, as amended, it appears that in 1891 there were 123 land offices in the United States, 14 of which were established in 1890; but there is no classification of these offices, either in the Revised Statutes or the appropriation bills, by which it can be determined what offices are entitled to be allowed for contingent expenses, or how much allowed to each. It is true that section 2255 of the Revised Statutes provides that the secretary of the interior is authorized to make a reasonable allowance for office rent for each consolidated land office, but what offices are consolidated land offices it would be difficult, and perhaps impossible, to determine from the statutes; and as it is not found as a fact that the land office at Helena, Mont., was a consolidated land office, it may be assumed that it was not. But the fact, whatever it may be, is perhaps immaterial, since the appropriations now under consideration were all made subsequent to the enactment of the Revised Statutes; and as they do not recognize the distinction of consolidated land districts, in providing for the contingent expenses of the several land offices, it is to be inferred that the distinction was not intended to be continued by congress, and that the terms of the appropriation were to be followed in the distribution of the amount appropriated. That this was the view entertained by the secretary of the interior appears from his action in the matter. In the reasons given by the court below for the conclusions it reached in the case, it is stated that it appeared from a letter of the secretary of the interior, in evidence in the case, that, when these appropriations have been insufficient to pay the rent of all such offices, he has designated the offices of which the office rent should be paid, and, according to his sense of justice, has designated that the office rent at places where the register and receiver was entitled to a salary of $3,000 per annum should not be paid. This action was clearly not in accordance with the requirements of section 2255 of the Revised Statutes, and we may therefore dismiss the further consideration of that section as authority for the refusal of the secretary of the interior to make a reasonable allowance out of the appropriations for the rent of the land office at Helena, Mont. But neither was it authorized by the terms of the appropriation, which provided for the contingent expenses of the "several land offices," without reference to the compensation of the register and receiver derived from the volume of business transacted at such offices. It is plain that, had the secretary of the interior followed strictly the terms of the appropriation acts, he would have made an equal distribution of the amount appropriated for contingent expenses among the several land offices of the United States; having regard, in the matter of rent, for those offices not accommodated in government buildings. But it is contended that the insufficiency of the appropriations made by congress to meet the requirements of the department in this respect imposed upon the secretary of the interior the necessity of exercising his discretion in making some reasonable and equitable distribution of the fund appropriated, and when this discretion has been exercised the liability of the govern-

ment for any deficiency was at an end. It is undoubtedly the law that where congress intrusts a public officer with the expenditure of a sum of money for a designated purpose, without restriction or limitation as to details, the exercise of the judgment and discretion of such officer cannot be reviewed by the courts for the mere purpose of determining whether or not the authority was exercised in the most judicious manner, but it does not follow that an expenditure by an officer under such authority limits the liability of the government under the law. The sundry civil appropriation acts, which carry the expenditures of the land offices, are not limited in terms, as are the legislative, executive, and judicial, the diplomatic and consular, and the agricultural appropriation acts. In these last acts it is expressly provided that the appropriations are in full compensation for the services, purposes, and objects therein expressed, while in the sundry civil appropriation acts the appropriations are simply for the objects therein expressed, without any conditions whatever. Moreover, the insufficiency of these acts is frequently supplied by what is called a "deficiency bill"; and, as an example of such appropriations, we find the acts of March 3, 1891 (26 Stat. 878), and December 21, 1893 (28 Stat. 18), each provided an appropriation of $25,000 for the deficiency in the appropriation for clerk hire, rent, and other incidental expenses of the several land offices for the years 1891 and 1894. There is certainly nothing in the terms of these appropriation acts indicating a purpose on the part of congress to reduce the salaries of the registers of the district land offices, or to subject any of them to the expense of office rent during the period in question. The case of Bane v. U. S., 19 Ct. Cl. 644, is cited as being in point in determining the liability of the government in this case. In that case the claim of the receiver of public moneys at Salt Lake City for rent of office had been transmitted to the court of claims by the secretary of the interior, under the provisions of the Bowman act (section 2, Act March 3, 1883; 22 Stat. 485); and the question was whether the claimant had a legal claim against the department of the interior for reimbursement of the money paid by him for that purpose. The court found that he had not, and so reported its findings to the department. In general, the departments of the government are limited, not only in their expenditures, but in their contracts, to the appropriations made to defray the expenses of the government for each fiscal year. Rev. St. §§ 3679, 3732. But as said by the court of claims in Semmes v. U. S., 26 Ct. Cl. 119, 130:

"These provisions undoubtedly apply to express contracts, and prohibit the making of such contracts except as therein provided. They have no application to that class of implied contracts which arise from the acts of public officers, in the performance of their duties, in carrying on the business of the government intrusted to them by law in their respective spheres."

It was accordingly held in that case that the postmaster general, being authorized by law to establish post offices, may procure buildings for them, and, while he cannot bind the government by an express contract, his action will render it liable for a just compensation for rent. The liability in that case ran to the owner of the building, because he had not been paid by the postmaster general; but it is not

perceived that there is any difference in principle in such a case and where the rent has been paid by an officer of the government in the discharge of a necessary duty. There is, clearly, a wider range to the liability of the government arising directly from the legislation of congress than there is under the limited agency of a department; and it is equally clear from this later case that the doctrine of Bane v. U. S., advising the interior department as to its liability, as an agent of the government, under the appropriation act, does not, in the opinion of the court of claims, determine the liability of the government under the law and the facts of a case like the one at bar.

In U. S. v. Reed, 20 U. S. App. 595, 9 C. C. A. 563, and 61 Fed. 414, the United States shipping commissioner at the port of New York had incurred expenses and made disbursements for various purposes connected with the administration of his office, including a sum for rent of offices. It appeared from the record in the case that the expenditures were necessary and reasonable and required, to enable the commissioner to comply with the statutes and regulations relating to his official duties. The original act of June 7, 1872, which created the office, regulated its administration, and fixed the fees to be paid and the compensation to be received by the shipping commissioner, provided that every commissioner should lease, rent, or procure, at his own cost, suitable premises for the transaction of business, and for the preservation of the books and other documents connected therewith. This act was amended by the act of June 26, 1884, which provided that all expenditures by shipping commissioners should be audited and adjusted in the treasury department, in the mode and manner provided for expenditures in the collection of customs, and that all fees of shipping commissioners should be paid into the treasury of the United States, and should constitute a fund which should be used, under the direction of the secretary of the treasury, to pay the compensation of the commissioners and their clerks, and such other expenses as they might find necessary to insure the proper administration of their duties. Under the law as it thus stood, expenses of this character in controversy were audited and paid by the treasury department; but the law was again amended by the act of June 19, 1886, which provided that the secretary of the treasury should allow and pay the commissioners such compensation for their services as each would have received prior to the passage of the amendatory act; also, such compensation to clerks of commissioners as would have been paid them had the amendatory act not passed. Pursuant to this amendment the claim of the shipping commissioner at New York for rent and other incidental expenses was disallowed, and he brought suit in the circuit court to recover the amount, where a judgment was rendered in favor of the plaintiff. The case was taken to the circuit court of appeals, where it was contended on behalf of the United States, among other things, that the amendment of 1886 repealed the provision of the act of 1884 as to expenditures by shipping commissioners, other than for clerks. The court held that this defense was without merit, and that where the statute which renders such expenditure a necessary incident to an office does not expressly, or by clear implication, provide that they shall be paid by the incumbent

of the office, out of his compensation, they are, under the authorities, a proper charge against the United States; citing the case of Andrews v. U. S., 2 Story, 202, Fed. Cas. No. 381; U. S. v. Flanders, 112 U. S. 88, 92, 5 Sup. Ct. 67. The judgment of the circuit court was accordingly affirmed, and the United States appealed to the supreme court, where the further defense was made that the secretary of the treasury had failed to allow the shipping commissioner any of his expenses for rent or otherwise, upon the ground that congress had failed to make any appropriation for that purpose. The court appears to have given no weight to this feature of the statutes, and, referring to the merits of the case, said:

"The government's claim that the commissioner was to meet rent and expenses out of his salary might result in the application of his entire salary to that purpose. We are not willing to construe the statute so as to require so unreasonable a result."

The decree of the circuit court of appeals was affirmed. U. S. v. Reed, 167 U. S. 664, 17 Sup. Ct. 919. That case appears to be directly in point, and virtually disposes of the question involved in the present case.

It appears from the findings that the land office for the district of Helena, Mont., was established by law; that an office at that place was required for the transaction of the business pertaining to the office; that it was also necessary as a place for the keeping of the books, records. papers, and files belonging to the office; and that the amount paid for the rent was reasonable and proper for that purpose. In view of these facts, and the general character of the appropriations for the contingent expenses of the several land offices, and the lack of authority on the part of the secretary of the interior to withhold an allowance for the rent of the land office at Helena, the court is of opinion that an implied contract did exist, on the part of the government, to reimburse the register the amount expended by him for that purpose. The judgment is affirmed.

PORTER v. BLAIR.

(Circuit Court, N. D. Iowa. October 28, 1897.)

CONTRACTS—ACTION FOR BREACH—PLEADING.

A petition alleged that plaintiff was engaged, in 1882, in promoting a proposed railroad enterprise, and the defendant agreed with him to aid in furnishing means for constructing it; that in 1884 work ceased because another company had acquired and used a part of the proposed right of way; and that thereafter no work was done, and defendant ceased to contribute further. Plaintiff demanded an amount representing investments, loss of prospective profits, and his salary from the company. On demurrer, *held*, that the petition failed to set forth a cause of action.

This was an action at law by John Porter against John I. Blair to recover damages alleged to result from breach of contract. The case was heard on demurrer to the amended petition.

W. J. Moir, for plaintiff.

Chas. A. Clark and C. E. Albrook, for defendant.

SHIRAS, District Judge. From the allegations in the petition filed in this case it appears that, in 1882, the plaintiff, with other parties, were engaged as promoters in locating and arranging for the construction of a line of railway, now known as the Chicago, Iowa & Dakota Railway, from its point of intersection with the line of the Chicago & Northwestern Railway Company, in Hardin county, Iowa, and thence northwesterly, through Wright and Hancock counties, to Forest City, Winnebago county. Previous to August, 1882, a corporation had been organized to further the undertaking. A 5 per cent. tax in aid thereof, amounting in the aggregate to the sum of $25,000, had been voted by Eldora township, and donations to the amount of $10,000 had been secured from private individuals, and other subscriptions or aid had been promised. In March, 1882, a contract was entered into between the railway company and the Iowa Railway & Construction Company, whereby the construction company agreed to construct the line from Eldora Junction to Forest City, and to furnish certain rolling stock to be used in the operation of the line, and as compensation therefor was to receive the first mortgage bonds of the railway company at the rate of $15,000 per mile of completed road, and a like amount of the capital stock of the company; and it is averred that the construction company entered upon the building of the line in June, 1882, in pursuance of the terms of said contract. It is further averred in the petition that on August 8, 1882, plaintiff and defendant had an interview at Chicago, Ill., at which time the situation of affairs with respect to the construction of the named line of railway was fully explained to the defendant, and that thereupon it was orally agreed between the parties that the defendant was to subscribe the sum of $25,000 to aid in building said line of road from Eldora Junction to the town of Eldora, for which said defendant was to receive in bonds of said Chicago, Iowa & Dakota Railway Company the sum of $37,500 and a like amount of the capital stock; that the plaintiff was to remain with the enterprise until the road should be constructed to Forest City, and should cause the majority of the then outstanding stock, amounting to about 91 shares, to be assigned to plaintiff, in order that the control of affairs should be in plaintiff's hands, and upon this understanding the defendant stated he would assist in building the entire line of road to Forest City. It is further averred that after the completion of the line to Eldora, and the delivery of the stock and bonds to which defendant would then become entitled, the bonds of the company were to be sold at par, the said defendant agreeing to purchase a sufficient amount thereof, with such as could be otherwise sold, and with the subsidies and local aid, as would complete the road to Forest City, or to such other point as would afford a working division and reasonably profitable line of road, it being agreed that defendant should share in all profits, stocks, bonds, aids, and subsidies in the same ratio with plaintiff and others who should buy any of said bonds or otherwise put money into the undertaking. It further appears that it was the expectation of the parties that, in extending the line from Alden to Forest City, use could be made of a partially constructed roadbed built by the Iowa & Minnesota Rail-

road Company. It is further averred that, in accordance with this understanding, the plaintiff procured the transfer to him of a majority of the stock of the railway company; that the defendant advanced the money he had agreed to do for building the line from Eldora Junction to Eldora, and the line was constructed, and the bonds and stock to which defendant became entitled were delivered to him during December, 1882; that in June, 1883, the building of the road from Eldora to Alden was undertaken and completed in December, 1883, in aid of which the defendant paid the sum of $80,000. It is further averred that the plaintiff made every reasonable effort to carry out said agreement, to the end that said road should be extended to Forest City without unnecessary delay, but that defendant failed and refused to perform his agreement on his part, and in consequence thereof the Burlington, Cedar Rapids & Northern Railway Company entered upon and occupied the right of way and graded roadbed between Belmond and Forest City, and built a branch of its line through the territory, thereby rendering it impracticable for the Chicago, Iowa & Dakota Railway Company to extend its line via Belmond to Forest City or elsewhere in that direction, so as to afford any reasonable profit or gain to said railway company, or to any of its promoters, stock or bond holders other than said defendant. It is then alleged that on the 7th day of July, 1884, the defendant wrote to the plaintiff that he was informed that the Burlington, Cedar Rapids & Northern Company had its road then built between Belmond and Forest City, and that it would be necessary to wait until it should be known what that company would do, and then seek some other route for the extension of the Chicago, Iowa & Dakota Railway; and it is averred that it has been reasonably possible to extend said railway in a northwesterly direction through a region that would afford a reasonably profitable patronage, and that plaintiff and others have frequently laid before defendant the feasibility and propriety of so extending said line, but the defendant has entirely failed and neglected to extend or assist in extending said line to Forest City or elsewhere, and hence the same has not been extended beyond Alden, in Hardin county. It is also averred that it was understood that plaintiff was to give his time and attention to the business of said railway company, to securing the right of way, procuring aid and subsidies, to attend to the letting of all contracts for the construction and equipment of the road and other like work, and that his salary was to be the sum of $2,000 per annum. Based upon these facts, the plaintiff seeks damages against the defendant, there being three counts in the petition, in the first of which it is averred that, in reliance upon defendant's promises, the plaintiff invested in the enterprise the sum of $15,000, which it is averred would have proven a profitable investment if the defendant had performed his agreement, but is now practically worthless, and therefore plaintiff asks judgment for the said sum of $15,000. In the second count it is averred that, if the road had been built from Alden to Forest City, the parties engaged therein, through the benefit of subsidies and sale of bonds, would have realized a large profit, of which there would have been coming to

plaintiff the sum of $15,000; and for the failure to realize this amount plaintiff asks damages in the sum of $10,000. In the third count it is charged that the plaintiff's salary has not been paid in full up to the 1st day of August, 1894, but that since the 1st of August, 1884, there has accrued and remains unpaid the sum of $7,200. To this petition, and the several counts thereof, the defendant interposes a demurrer to the effect that no cause of action in favor of plaintiff is shown to exist on the face of the petition.

From the allegations in the petition contained it appears that in 1882 the plaintiff and others, at Eldora, Iowa, were engaged as promoters in starting the enterprise of building a railway line northwesterly from Eldora Junction, and they succeeded in getting the defendant interested therein. During 1882 the line was built from Eldora Junction to Eldora. In 1883 the line was extended to Alden, being completed to that place in December of that year. The further extension of the line in 1884 was not resumed, because it appears that another company, the Burlington, Cedar Rapids & Northern, had built a branch through the territory towards Forest City. There are no facts alleged in the petition charging the defendant with any violation of contract during the years 1882 and 1883, and nothing to show that the defendant is responsible for the building of the branch line of the Burlington, Cedar Rapids & Northern Company. On the contrary, it is expressly averred that it was the plaintiff who was to give attention to the prospecting and locating said line of railway, to procure aid and subsidies and the right of way, attend to the letting of all contracts for the construction of the road, and procure the necessary depot grounds. Therefore in any race of diligence in the way of locating a line of railway from Alden to Forest City the burden was upon the plaintiff, and, if the rival line won in the race, there is nothing to show that the fault was that of the defendant. The theory of the petition seems to be that, when the territory towards Forest City was occupied by the building of the Burlington, Cedar Rapids & Northern branch, the defendant within a reasonable time should have extended the line of the Chicago, Iowa & Dakota Railway in a northwesterly direction, and that, having failed to do so, the defendant is responsible to the plaintiff for the supposed profits that would have accrued to the plaintiff had this been done. It is not averred that in 1884, or at any time thereafter, the plaintiff located a line in any direction, or secured aid or subsidies therefor, but the averment is that in April, May, and June, 1884, the defendant failed to perform his promises and undertakings, and hence the road was not extended beyond Alden. The failure of which plaintiff complains was in not extending the road beyond Alden, but it is not averred that there was a contract on part of the defendant to build any specific number of miles of road, nor in any direction, nor to advance any special amount of money in aid thereof, and, in the absence of specific averments of facts, the general allegations of failure on part of the defendant to perform his promises and undertakings do not show a breach of contract on part of the defendant. In substance, all that is charged is that the defendant

agreed to assist in building a line of railway which was being engineered and promoted by the plaintiff and others, and which it was proposed to build to Eldora, and thence to Forest City or some other point, and that the defendant did assist in all the work that was undertaken in the years 1882 and 1883, expending about $105,000 in so doing, but declined to invest any further sum in 1884, because the proposed extension from Alden to Forest City was rendered inexpedient because another railway company had occupied that territory. The theory of the plaintiff seems to be that the defendant, after assisting to build the road from Eldora Junction to Alden, was then bound to build the road, with or without assistance, in some direction northwesterly and to a length or distance that would make the entire line, and all investments made therein by the plaintiff and his associates, remunerative. It need hardly be said that, before a court and jury would be justified in finding that such a contract had been entered into, the evidence would have to be full and satisfactory, and the averments of facts found in the petition are not such as to show clearly that the defendant entered into such an undertaking. Undoubtedly the pleader in drawing the petition has stated the facts as favorably for the plaintiff as is reasonably possible, and it is apparent that the defendant never obligated himself to build the road beyond Alden. All that is charged is that he agreed to assist the other parties in building from Eldora Junction, and he did assist in the enterprise as long as the other parties kept at the work; but the work ceased in December, 1883, and was not resumed in 1884, because the rival railway company had occupied the territory to Forest City. It is averred in the petition that in 1882, and before the defendant had become interested in the line, the railway company had contracted with the Iowa Construction Company to build and equip the road to Forest City, and if a failure in this respect can be charged against any party it would seem to be the fault of the construction company. Under these circumstances, it must be held that the facts alleged in the petition are not sufficient to show a legal liability on part of the defendant to make good to plaintiff any sums he may have invested in the enterprise, as is claimed in the first count of the petition, or any supposed loss of profits, as is claimed in the second count. In the third count the damages claimed are based upon the alleged failure to pay plaintiff salary of $2,000 yearly from 1884 to 1894, a period of 10 years, during which time it does not appear that any work was done in extending the road beyond Alden. The facts in this respect are not clearly stated, but it is certainly not directly charged that the defendant hired the plaintiff as his agent at a salary of $2,000 per year, and the probable meaning of the facts averred is that, as the managing officer of the railway company, the plaintiff's salary was to be the sum named, but it was to be paid by the company, and not by the defendant, and under that construction of the petition it is clear that no liability exists on part of the defendant to pay any amount as a salary to plaintiff. The demurrer is therefore sustained to all the counts of the petition.

FOREST OIL CO. v. ERSKINE. SAME v. DAVIS. SAME v. REED.
SAME v. CRAWFORD (three cases).

(Circuit Court of Appeals, Third Circuit. November 10, 1897.)

Nos. 11-16.

WILLS—LIFE ESTATE—REMAINDERS.

A devise to testator's son by name, "and to his children," *held* to give a life estate to the son, and an estate in remainder to his children living at testator's death, which afterwards opened to let in after-born children. Oil Co. v. Crawford, 23 C. C. A. 55, 77 Fed. 106, followed.

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

These were actions of ejectment, brought by the Forest Oil Company against the several defendants, all of whom claimed title under the will of William Crawford. The circuit court, upon an agreed statement of facts, directed verdicts for the defendants, and the plaintiff brought the cases here on writ of error.

R. W. Cummins, for plaintiff in error.

J. H. Beal, for defendants in error.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, DistrictJudge.

DALLAS, Circuit Judge. In each of these cases the question is the same as that which was decided by this court in Oil Co. v. Crawford, 23 C. C. A. 55, 77 Fed. 106; but the right of the respective plaintiffs in the present actions to have that question again adjudicated is unquestionable, although, of course, the learned judge of the court below rightly held that the decision to which we have referred had, for that court, settled the law. We, however, being at liberty to consider the matter anew, have carefully done so; but attentive re-examination of the decisions of the supreme court of Pennsylvania has confirmed us in the opinion heretofore expressed as to their effect, and therefore, as we still think those decisions must upon the subject in hand be regarded as controlling, the judgment of the circuit court in each of the six cases designated at the head of this paper is affirmed.

FRENCH REPUBLIC et al. v. WORLD'S COLUMBIAN EXPOSITION.[1]

(Circuit Court, N. D. Illinois, N. D. November 8, 1897.)

1. BAILMENT—WORLD'S FAIR.

The management of a world's fair, to which all nations are invited to send their choicest products, is charged with the duty of safeguarding the exhibits of foreign nations and their citizens with the highest intelligence and protection compatible with the ephemeral character of the Fair buildings. This obligation cannot be avoided by the promulgation of regulations that precautions would be taken for the safe preservation of all exhibits, but

[1] Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

that the exposition company would not be liable for loss or damage, however occurring.

2. SAME—EXTENT OF LIABILITY—NOTICE.
The obligation to use such care continues after the close of the Fair until the exhibitors have had reasonable opportunity to remove their wares, and cannot be avoided by giving notice in advance denying liability for accidents.

3. SAME—NEGLIGENCE.
When a large exposition building has on its roof an extensive wooden sidewalk, and arrangements are made so that such sidewalk can be at once thoroughly soaked with water upon any danger of fire, it is negligence to allow such arrangements to be so neglected that the sidewalk cannot be soaked after the Fair has closed, but before the exhibitors have had a chance to remove their wares.

4. SAME—CORPORATIONS.
For such negligence, the local corporation which is charged with the duty of providing and preserving the physical side of the Fair, including the maintenance of the buildings, is responsible.

This was an action at law by the French republic and others against the World's Columbian Exposition.

William Burry, for plaintiffs.
Walker & Eddy, for defendant.

GROSSCUP, District Judge. On the evening of the 8th of January, 1894, a little before 6 o'clock, a fire of incendiary origin broke out on the grounds occupied by the buildings of the World's Columbian Exposition. When the fire department reached the scene, the fire had already taken hold of the Agricultural Building, the Casino Building, and was threatening the Peristyle and the Music Hall. All of these buildings, except the Agricultural Building, ultimately succumbed. The exhibits installed by the plaintiffs were still on the main floor of the Manufactures Building, a little ways north of these burning buildings. Immediately above them, on the main roof of the Manufactures Building, was a wooden walk, put there for promenading purposes, that entirely encompassed the central portion of the building. Some time about 8 o'clock, the wind changing to the south, sparks and burning brands were carried from the burning buildings to the roof of the Manufactures Building, igniting these wooden walks. Burning planks and sticks from these fell down among the plaintiffs' exhibits, greatly damaging them, and immediately causing the injuries complained of.

Nearly all the buildings, including the Manufactures Building, put up by the defendant to house the exhibits of the World's Columbian Exposition, were constructed with framework of iron, and with inclosing walls of glass, and wood, covered by staff. They thus presented an appearance of great solidity, but were, in fact, easily open to an attack by fire at places where the staff had fallen off. They were, however, during the period of the Fair, kept in thoroughly good repair. Thorough attention to repairs, however, was not the only precaution taken by the management of the exposition to ward off the dangers of fire. A fire department of eight companies, six of which were organized by the Exposition Company itself, was constantly upon the grounds. Babcock extinguishers were placed plentifully throughout

all the buildings. Guards to the number of 1,200, were kept on constant watch. Nor was this all. The frequent displays of fireworks, with their attendant droppings of sparks and brands upon the adjacent buildings, and the possibility of fire in any building on the grounds, were a menace to everything not absolutely fireproof. In view of this, the Exposition Company had constructed in the Manufactures Building a standpipe leading to the wooden walk upon the roof, 264 feet from the ground, and connected with the water main under the floor. This pipe was kept full of water by means of Worthington pumps, the water at the top of the pipe having a constant pressure of about 60 pounds. By this arrangement there was kept constantly at hand, on a level with these wooden walks, a sufficient supply of water, under 60 pounds pressure, to keep them thoroughly soaked throughout any period of danger from fire. The device was effectively used whenever there were displays of fireworks, and was especially useful on the occasion of the burning of the Cold-Storage Building, when firebrands, almost as many and dangerous as on the evening of the 8th of January, were flying over the Exposition grounds.

Under the statute granting the use of Jackson Park, the Exposition Company was compelled to surrender the control of the grounds, except the inside of the buildings remaining, January 1, 1894. Accordingly, on that date, the grounds were thrown open. Nearly all the guards were withdrawn, and the six fire companies organized by the Exposition Company were disbanded, leaving only the city companies, the nearest of which was at the Sixty-Second street entrance, —more than one-half mile away from the group of buildings burned on the night of the 8th. Some Babcock fire extinguishers remained—perhaps 100—in the Manufactures Building. The Worthington pumps had been dismantled, thereby leaving the standpipe which led to the top of the Manufactures Building without water. The staff on the buildings was no longer kept in repair, and tramps and vagrants nested within their walls. A fire, under these circumstances,—a fire widely extended,—was not only probable, but almost certain. The Manufactures Building was kept closed, and under guard, and would unquestionably, on the night of the 8th, have escaped all dangers from its burning neighbors, if the wood walks on the roof of the building could have been protected by water soakings. The building suffered at no other point. The damage was caused solely by sparks and firebrands falling upon these wooden walks. The fire companies at hand did all, probably, that reasonable firemen, under the excitement of the contest, could have done to extinguish the flames, once they were started. The companies had abundant work with the other buildings, and even when they turned to the walks on the Manufactures Building had great difficulty in reaching their high altitude. Indeed, before they could effectually reach them, the walks had so far burned that the damage from the droppings was already caused. One thing alone could and would have saved the French exhibits, namely, the soaking of these walks with water, by means of the standpipe, from the moment the fire broke out in the other buildings. Had water stood in this pipe, under the pressure furnished by the Worthington pumps, or even under such pressure as could have been imparted by a fire

engine, the presence of two or three guards on the roof, distributing the water over the walks, would have prevented the ignition, and thus totally prevented the injury to the French exhibits. The failure of the defendant to keep up the previous precaution in this respect—a precaution carefully observed throughout the lifetime of the Fair—was the immediate cause of the plaintiffs' injuries.

What was the duty of the management of the Exposition in this respect? The president of the United States had invited the nations of the earth to take part in commemorating the discovery of America by bringing such exhibits to the Exposition as would fitly and fully illustrate their resources, their industries, and their progress in intelligence and civilization. Subsequently, the director general promulgated certain general regulations, in which it was announced that the Exposition would take precautions for the safe preservation of all objects in the Exposition, but would in no way be responsible for damage or loss of any kind, by accident or other cause, however originating. The chief of the department of foreign affairs, in connection with the director general, also issued a circular directed to foreign exhibitors, in which a like exemption from liability for loss was stated, but accompanied with a note announcing that a thoroughly equipped fire department would protect the buildings and the exhibits, and a large police force would maintain order.

The first question is, what effect is to be given to these immunity clauses? Were the Exposition a common carrier or a warehouseman, such an effort to exempt itself from liability would not, under the best line of adjudications, be extended to injuries resulting from its own positive negligence. Public policy forbids giving effect to stipulations against liability for injuries resulting from want of ordinary care. Cooley, Torts, § 685, and cases cited in note. The law will not permit a party to obtain pardon or immunity, even by contract, anterior to the doing of the culpable act. A policy so emasculated would deliberately encourage recklessness. The legal relationship between the Exposition and its exhibitors is not, of course, that of common carrier or warehouseman. No legal relationship, hitherto judicially defined, exactly applies to the parties now before the court. The proffer and acceptance of the exhibits constitute, unquestionably, some character of bailment; but the rules relating to bailments, such as the varying degrees of care required of bailees for hire, bailees for accommodation of bailor, and bailees for mutual advantage, do not, satisfactorily to one's sense of the fitness of things, exactly point out the law applicable to the case under consideration. The relation is in many respects different in character, and in the just expectations entertained by mankind, from the ordinary private transactions that constitute the usual bailment. The Exposition was itself no ordinary event. It was intended to bring together the nations of the earth, that they might set forth, within a space compassable by ordinary human understanding, all that the industry, the fertility, and the genius of the globe has produced. It was a minature re-enactment, in a single park, of all the best things doing around the girdle of the earth. It was the summing up in panorama of the history of mankind in every field of useful endeavor up to the present time. It was

intended to bring into one collection the best things ever conceived by the mind, and the best things ever made by the hands of man. The exhibits were expected to be the prime choice of every exhibitor's product. They represented the best he could do. Many of them were unique, and could, by no effort, be replaced. Their loss would, in many instances, be a calamity, not only to the owner, but to commanding interests of the world at large. The exhibits of the French republic were especially unique. This republic, in aid of the useful arts, conducts governmental factories, in which are made, at no consideration of time or cost, examples of some of the finest tapestries, vases, and other things that minister to the wants of civilization. These factories are, in fact, national schools, in which the French artist and artisan finds the means both of instruction and encouragement. The products brought forth are each a text-book,—a text-book of which but one copy is extant. Their loss is irreparable; for it is the loss, not so much of a mere manufactured article as of the text and equipment wherewith the republic teaches her people how to reach fine results in a high and useful field. It is manifest that of the custodian of such a collection much is expected, and rightly expected. Nothing short of exhaustive carefulness, all the circumstances considered, can fully meet the moral and legal obligations imposed. The widest character of public policy—the progressive interests of mankind—re-enforces the rightfulness of this view. These expositions are not merely the world's play grounds or amusement parks. They are schools. They touch deeply the sensibilities of every people who come within their influence, and are among the powerful factors that give direction to national and individual character and civilization. As long as men and women learn more by example than by precept, the atmosphere of better living is chiefly striven for by those who have felt and seen what better living is. An exhibition of the world's best things brings this higher atmosphere into every life it touches. They are not only a distinct civilizing force among the people where held; they are equally potent and useful as a force making for peace and good understanding between the peoples of the earth. In every aspect seen, they merit public and national encouragement, and chiefly that encouragement that arises from confidence that their management will be held to strict accountability for any omission that brings insecurity either to the persons or exhibits in attendance. If exhibitions of this character bear a tithe of the good fruits that the common consent of mankind now attributes to them, the agencies in control should be so hedged around by salutary restrictions and responsibilities as would properly insure to the exhibitors, individual or national, security against loss. The good faith of the nation within which such an exhibition is held cannot be fulfilled under conditions less imperative. I hold, therefore, as the law of this case, that the management of the Exposition was under legal obligations to safeguard, by the highest intelligence and protection compatible with the ephemeral character of the buildings, the exhibits of the plaintiffs, the French republic and the French citizens, and that such obligation is not escaped by the exempting clauses contained in the regulations promulgated by the director general.

The next inquiry is, was such diligence observed in the particular matter causing the injuries? Was the Exposition bound to maintain on the 8th of January the practical fireproofing of the wooden walks, so effectually maintained during the Fair? It must be borne in mind that the arrangement to soak these walks was not so much in the nature of fire-extinguishing as of fire-proofing. Facilities for extinguishing the fire assume that ignition will take place; facilities for fireproofing look towards the prevention of ignition altogether. The first is a cure; the second is a prevention. In this, as in other regulations, a spray of prevention is worth a flood of cure. The removal of the Worthington pumps without the substitution of a fire engine, or some equivalent, whereby water was obtainable on the roof of the Manufactures Building the moment any spark or firebrand was liable to fall upon the wooden walks was, in effect, the taking away from this building of its fireproofing. It uncovered the building to an attack of fire, as effectually as would the removal of iron sheeting, had the wooden walks been previously fireproofed by means of such sheeting. With water present under pressure at the roof line, these walks were as uninflammable as steel; without such water, they were as inflammable as kindling wood. Had the water pressure been removed during the period of the Fair, and a fire, such as the one in question ensued, the liability could not, I think, be disputed. If, after the Fair, and until the occasion of this fire, the liability of the Exposition to these plaintiffs continued as before, the case is still more pressing; for after the Fair the dangers were, by the circumstances I have recited, greatly increased.

This brings me to the next question: Did the duty of fireproofing this building, as a protection to these plaintiffs, continue to the 8th of January, 1894? The answer to this question resides in the effect to be given to two sets of facts submitted in the evidence. The rules and regulations promulgated by the director general and the custom officers made it the duty of foreign exhibitors to deliver the original cases, upon the unpacking of their exhibits for installation, properly marked by serial numbers, to a bonded warehouse of the Exposition, with the view of repacking such exhibits, at the close of the Exposition, in their original cases. A bonded warehouse within the inclosure of the park was provided by the Exposition Company for that purpose, and the plaintiffs, along with other exhibitors, delivered to this warehouse the empty cases, taking receipts therefor. There is no doubt that at the close of the Fair there was considerable confusion in this warehouse, and that the plaintiffs were much delayed in receiving their boxes. Indeed, it is perfectly clear that many boxes were never returned, and that the French wares, some of which were injured in the fire, were packed in boxes especially built by carpenters hired for that purpose. The records of the custodian in charge of the warehouse indicate that no boxes were delivered to the French exhibitors after the 16th of December. But testimony, which I am compelled to believe, shows that as late as January the French exhibitors were still engaged in repacking in new cases made especially for that purpose. I am satisfied that through some miscarriage of this feature of the Exposition's arrangement, the plaintiffs

were so delayed that, all other things being at hand, they could not have been off before, or at least many days before, the 1st of January. But all other things were not at hand. The evidence is indisputable that, even had the cases been provided, and the exhibits packed, there were not cars enough furnished by the transportation companies to carry off these exhibits before the fire. Day after day individual exhibitors, in their desperation, stole cars that had been intended for others. The week ending January 6, 1894, witnessed the forwarding of 325 car loads from the Exposition grounds; almost as many as left the grounds during any week previously. The week ending January 20th—12 days after the fire—witnessed the forwarding from the grounds of 402 car loads of exhibits; the largest exodus, with one exception, during the whole period after the close of the Fair. Indeed, as late as February 17th 131 car loads went out in a single week. When one recalls the condition of things, after January 1st, in the park,—its openness to the public, the withdrawal of the guards, the inability to heat the buildings, the frequency of fires, and the complete withdrawal of public interest,—this procession of cars, extending almost to the opening of spring, attests beyond dispute the inability of the exhibitors to get their goods out earlier. They were compelled to remain simply because they could not get away. The Exposition Company it is true, was under no obligation, either of law or of contract, to furnish cars. But it still had control of the buildings, and was, in virtue of that fact, yet in custody of the exhibits. The obligation to safeguard the exhibitors did not necessarily end the day the Fair closed. The obligation unquestionably continued until the exhibitors could reasonably withdraw their goods. An ordinary warehouseman cannot end his duty or escape liability for affirmative negligence simply by giving notice to the owner to withdraw his goods, even though the owner have power to comply with the notice. As long as the goods remain, within at least reasonable limits the obligation to preserve continues. The agencies of a great national exposition, executing the good faith of a nation towards those who have placed their possessions within their custody, is under a no less strenuous obligation. Private justice and public faith both forbid, at least within reasonable limits, the withdrawal of protection so long as the exhibitors are helpless from any cause not of their own creation.

I hold that the Exposition was under legal obligation to maintain some arrangement by which the wooden walks at the top of the Manufactures Building would be effectually fireproofed until these plaintiffs, under all the circumstances of the situation, had had a reasonable time to take out their exhibits. I hold also, that in the conditions relating to the boxing of the exhibits, and their transportation from the grounds, the plaintiffs had had, before the 8th of January, when the fire occurred, no reasonable opportunity to withdraw their exhibits. It follows from all these facts that the management of the Exposition was guilty of negligence in permitting, during the period in which the fire occurred, the fireproofing arrangements to lapse, and that this negligence is the immediate cause of the injury from which the plaintiffs have suffered.

One question alone remains: Is the defendant, the Illinois corporation, the particular branch or agency of the Exposition upon which that duty was charged? There has been much difference of opinion respecting the relation borne respectively by the government, by the national commission, and by the local corporation to the affairs of the Exposition. I think there is, however, throughout the diversity of opinion upon the general question, this agreement of views: that the local corporation was under duty to provide and maintain the physical side of the Exposition, including the preparation of the grounds, the erection of the buildings, their maintenance, protection, etc. Whether the government, as a nation, inaugurated and controlled the Exposition, the local corporation being merely its arm to carry out the enterprise, or whether the local corporation was an independent entity, accepting aid from and co-working with the government and its commission, is, in its bearing upon the question under discussion, a matter of indifference. In either view, the local corporation was under direct obligation to safely house the exhibits during the period of the Exposition, and for such time thereafter as was reasonably required for their removal. Its failure to perform this duty in the respect pointed out creates a direct legal liability to the exhibitors injured. On the whole case, there must be a finding for the plaintiffs.

GODKIN v. MONAHAN.

(Circuit Court of Appeals, Seventh Circuit. November 8, 1897.)

No. 448.

1. PAROL EVIDENCE TO VARY WRITING.
   Whenever a written contract purports on its face to be a memorial of the transaction to which it relates, it supersedes all prior negotiations and agreements, and oral testimony will not be admitted of prior or contemporaneous promises on a subject so clearly connected with the principal transaction as to be a part and parcel of it, without the adjustment of which the parties cannot be considered as having finished their negotiations and finally concluded a contract.

2. SAME.
   Where the language of an instrument has a settled legal construction, parol evidence is not permissible to contradict that construction.

3. CONTRACTS—CONSTRUCTION.
   An engagement to perform an act involves an undertaking to secure the means necessary to the accomplishment of the object.

4. PAROL EVIDENCE—LOGGING CONTRACT.
   An agreement to fell timber, and to skid, haul, deliver, and bank it at a certain river, necessarily involves an agreement by the same party to obtain a place on which to bank it; and parol evidence is not admissible to show a prior agreement that the opposite party was to obtain a place for banking.

5. LOGGING CONTRACTS—CONSTRUCTION.
   Under a contract to deliver and bank logs by a specified date, "provided the logging season permit," the measure of the contractor's duty is not that of ordinary care and diligence, but his obligation is absolute, except as affected by the nature of the season.

6. SAME—ACCEPTANCE OF DELIVERY—QUESTION FOR JURY.
   Where there is a breach of a contract to haul and deliver logs by a specified date at a specified place, but the contractor delivers them at a

later date and at another place, where the other party accepts them, and takes from the contractor the cost of running them to the agreed place of delivery, it is proper to submit to the jury the question whether this constitutes a recognition of the contract as in force, and an acceptance of delivery.

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

This action was brought by John F. Monahan, the defendant in error, to recover of John Godkin, the plaintiff in error, the contract price for cutting and hauling certain logs under a written contract dated October 11, 1892. By this contract, Monahan agreed to cut and deliver in the Wisconsin river all the Norway and white pine timber suitable for saw logs standing and lying on the N. ½ of section 31 in township 42 N., range 11 E.; to cut and skid all down and lying timber before felling the standing timber; to cut all of such timber on or before January 1, 1893; and to have all logs banked on the Twin river in township 41, range 10 E., on or before the 20th day of March, 1893, provided the logging season permitted. Plaintiff in error agreed to pay for that service a certain proportion when 1,000,000 feet were skidded, a certain other proportion when the full amount was skidded, a certain further proportion when 1,000,000 feet were banked on the Twin river, a certain further proportion when the full amount was so banked, and the balance when the whole amount was run in the Wisconsin river. The answer charged that Monahan negligently failed to commence work under the contract until late in the season, or to employ sufficient force of men and teams to perform the work within the prescribed time; that the logs were not cut or skidded until January 17, 1893, and were not hauled until late in the season, and long after there was sufficient snow and cold weather to make the roads; that he delayed the commencement of the work of hauling for several weeks after he might have so done; that by reasonable diligence all of the logs could have been hauled and banked prior to March 20, 1893, the date named in the contract; that the season was in every way suitable and favorable for logging operations; and that, by reason of such failure in duty, about one-third of the cut was not skidded on the lands or hauled or banked until the next ensuing logging season, but was left in the woods, and, in consequence, became worm-eaten, sap-stained, and damaged, and depreciated in value.

At the trial it was disclosed that the contract was not performed according to its terms; that Monahan did not complete the felling of the timber until January 6, 1893; that he began operations on the land under the contract immediately after election day, in November, 1893, and some two or three weeks thereafter instituted inquiries touching a banking place on the Twin river, and found that all the available land for that purpose had been secured by others. He thereupon sent a messenger to Godkin, who resided in the state of Michigan, notifying him of failure to procure a banking place for the logs on Twin river, and received by mail a letter from Godkin to the following effect:

"November 27th, 1892. Mr. Alexander Roberts has just returned, and informed me that you say you cannot get banking ground on Twin river, in town 41, 10 E., which seems absurd, as you said you would not take the contract if you did not get the banking ground on Twin river, and that you would see about it at once. Now, I have no objection to your putting them in the Wisconsin river below [above?] where the Twin river empties in, as cheap as you can, but I do object to your doing anything that will interfere with the logs being delivered in the boom as early as if put in as the contract calls for."

Godkin visited the camp about the 9th day of December, and told Monahan he must get a landing wherever he could. Between that time and the 1st of January, Monahan hunted a landing place daily, and finally obtained one on the Wisconsin river, nine miles above the mouth of the Twin river. A road was already in existence from these lands to, or nearly to, the Twin river, at a point 2½ miles from its mouth; but, in order to get to the Wisconsin river, Monahan was obliged to construct a road a mile and a half or two miles in

length, and to bridge a creek, and occupied 14 days in so doing. The haul by this road was a half mile longer than that to the Twin river, and more difficult. Such of the logs as were banked on the Wisconsin river in the season of 1893 were so hauled and banked between January 16th and April 3d. 511,828 feet of logs were left over in the woods, and were not hauled and banked at the landing place until the next season.

There was contention at the trial with respect to the character of the season and the damage to logs which remained unhauled. These logs were hauled the next season by Monahan, and were run down the Wisconsin river by Godkin, Monahan paying the cost of running them to the mouth of the Twin river, but these logs were hauled by Monahan without the previous consent of Godkin. At the trial, under the objection and subject to the exception of Godkin, parol evidence was admited to prove that prior to the contract it was verbally agreed between the parties that Godkin should procure banking privilege on the Twin river. The plaintiff in error requested the court to charge in effect (1) that Monahan, if he had failed to exercise reasonable diligence to haul the logs during the season of 1892–93, could not recover any sum whatever for hauling the 511,000 feet of logs left over that season, and hauled the next season; (2) that the jury should disregard all parol testimony in respect to any agreement on the part of Godkin made prior to the execution of the written contract to furnish a banking ground; (3) that, by the terms of the written contract, Monahan was required to furnish such banking ground. These instructions were refused, and exceptions to such refusals duly preserved. The court submitted to the jury to find which party agreed to furnish the banking ground, and charged: (1) That if Godkin had so agreed, and had failed to provide it, Monahan was excused for any time reasonably occupied by him in looking up the banking ground, and in cutting his road to it, and was also entitled to credit for additional time or difficulties encountered in the way of running the road from the logging place to the bank,—to which charge an exception was reserved. (2) That, if Monahan agreed to furnish the banking ground, it was his duty to proceed at once to ascertain if he could have the banking ground on the Twin river, and, if that could not be obtained, he should proceed at once to find an available place, and make every effort in his power to make roads to that new place, and make all the provisions necessary to be made in view of the new location of the banking place, and, if he therein failed, he was negligent, and would be chargeable with the delay, if any, thereby occasioned. But also charged: (3) "And aside from that, gentlemen, I am satisfied that the change is not material to your consideration, and the simple fact that the logs were banked on the Wisconsin river instead of the Twin river, Godkin consenting thereto upon the condition that it should make no more delay, would not of itself be breach of the contract, which would defeat a recovery by the plaintiff, although it would be, as I have explained to you, taken into consideration for the purpose of determining whether or not plaintiff had exercised the diligence which he should exercise in the performance of the contract as so amended." To this part of the charge exception was duly reserved. (4) "The plaintiff assumed to exercise under the terms of the contract, and was required to use, such reasonable and proper diligence as a man of ordinary character and prudence would use in his own affairs. He would, in starting out on the work, be required and expected to make such provision as to the number of teams and the number of men and diligence of pushing the work as would ordinarily be required in ordinary seasons in that regard." To this instruction the proper objection and exception were reserved. A verdict was returned for the plaintiff below, and a writ of error is sued out to review the judgment entered on such verdict.

James G. Flanders and John Barnes, for plaintiff in error.

Charles W. Felker and George Hilton, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts). We have on several occasions spoken to the rule that excludes parol evidence of verbal negotiations to contradict or vary the terms of a subsequent

written contract. In Union Stock-Yards & Transit Co. v. Western Land & Cattle Co., 18 U. S. App. 438–453, 7 C. C. A. 660, and 59 Fed. 49, we declared the principle that the written agreement speaks, conclusively, the conclusion to which the parties to it have arrived, and all prior negotiations are merged in it, and that, where the language of an instrument has a settled legal construction, parol evidence is not admissible to contradict that construction. That ruling was approved and reasserted in Gorrell v. Insurance Co., 24 U. S. App. 188, 11 C. C. A. 240, and 63 Fed. 371; Union Nat. Bank of Oshkosh v. German Ins. Co. of Freeport, 34 U. S. App. 397, 18 C. C. A. 203, and 71 Fed. 473; Lumber Co. v. Comstock, 34 U. S. App. 414, 18 C. C. A. 207, and 71 Fed. 477. In the Comstock Case, following and approving the decisions in Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961, and Naumberg v. Young, 44 N. J. Law, 331, we further held that, "whenever the contract purports on its face to be a memorial of the transaction, it supersedes all prior negotiations and agreements, and * * * oral testimony will not be admitted of prior or contemporaneous promises on a subject so clearly connected with the principal transaction with respect to which the parties are contending as to be part and parcel of the transaction itself, without the adjustment of which the parties cannot be considered as having finished their negotiations and finally concluded a contract." We recognize the rule that parol evidence may be received of the existence of an independent oral agreement not inconsistent with the stipulations of the written contract in respect to which the writing does not speak, but not to vary, qualify, or contradict, add to, or subtract from, the absolute terms of the written contract. The collateral agreement which may be proven by parol evidence must relate to a subject distinct from that to which the written contract applies. We believe these principles to be fully in accord with the rulings of the ultimate tribunal. Specht v. Howard, 16 Wall. 564; Forsyth v. Kimball, 91 U. S. 291; Brown v. Spofford, 95 U. S. 474; Insurance Co. v. Mowry, 96 U. S. 544; Thompson v. Insurance Co., 104 U. S. 252, 259; Bast v. Bank, 101 U. S. 93, 96; Martin v. Cole, 104 U. S. 30, 38; Richardson v. Hardwick, 106 U. S. 252, 1 Sup. Ct. 213; Burnes v. Scott, 117 U. S. 582, 585, 6 Sup. Ct. 865; Falk v. Moebs, 127 U. S. 597, 8 Sup. Ct. 1319; De Witt v. Berry, 134 U. S. 306, 10 Sup. Ct. 536; Seitz v. Machine Co., 141 U. S. 510, 12 Sup. Ct. 46; Van Winkle v. Crowell, 146 U. S. 42, 13 Sup. Ct. 18; McAleer v. U. S., 150 U. S. 424, 14 Sup. Ct. 160; Harrison v. Fortlage, 161 U. S. 57, 63, 16 Sup. Ct. 488. These principles are also supported by the law of the state where this contract was made. Hei v. Heller, 53 Wis. 415, 418, 10 N. W. 620; Cliver v. Heil (Wis.) 70 N. W. 346.

We have not failed to consider the case of The Poconoket, 28 U. S. App. 600, 17 C. C. A. 309, and 70 Fed. 640, which was strongly urged to our attention. There the written agreement provided for the construction of a passenger steamer, payment therefor to be made at stated periods during the progress of the construction. A portion of such payment maturing before the completion of the vessel could be made in bonds of the company contracting for the building of the

vessel, to be secured by mortgage upon certain described premises, and also by mortgage upon a certain steamer then owned by that company, and upon the steamer to be constructed under the agreement. The court held that the contract did not embody the entire agreement, and that it was admissible to show an oral agreement to the effect that the title should vest in the company before delivery of possession. Without stopping to inquire whether the decision could not have been sustained upon the ground that the written agreement, in virtue of the clause providing for a mortgage of the vessel during the process of its construction, contemplated title in the purchaser, it is sufficient to say that the court bottomed its decision upon the assumption that the contract was silent upon the subject of title, and that by the law of this country (counter to that of England) the title was in the builders, and then held that the parol agreement with respect to the title was collateral and independent, and could be given in evidence. The lower court admitted the evidence upon the rulings of the supreme court of Pennsylvania, which court has gone to an extreme in the admission of evidence to vary written agreements. The court of appeals affirmed the decree upon the strength of those decisions, and of certain other cases cited, notably certain English cases, which are reviewed and disapproved in Naumberg v. Young, supra. The law of a contract at the time it is made inheres in and becomes a term of the contract, and, it is settled, cannot be changed by subsequent legislation. Still less, as it seems to us, can the law of the contract be changed by parol negotiations incident to the writing. Such a verbal agreement does not relate to a collateral subject, to one distinct from that to which the contract applies, but to that which inheres in, and, under the law, is a term of, the contract, and part and parcel of it. This decision seems to us to be directly opposed to the decision of the supreme court in Van Winkle v. Crowell, supra. With deference, we cannot permit the decision in The Poconoket to control our judgment, or avail with us to undermine or weaken a principle and a rule of evidence which we deem absolutely essential to the protection of rights of property.

It is also well settled with respect to the interpretation of contracts that an engagement to perform an act involves an undertaking to secure the means necessary to the accomplishment of the object, and that whatever is necessary to the performance of the undertaking is part and parcel of the contract, and, although not specified in the contract, is to be implied, and is in judgment of law contained in it. U. S. v. Babbitt, 1 Black, 61; Lawler v. Murphy, 58 Conn. 309, 20 Atl. 457; Currier v. Railroad, 34 N. H. 498; Savage v. Whitaker, 15 Me. 24; Rogers v. Kneeland, 13 Wend. 114; Johnston v. King, 83 Wis. 8, 53 N. W. 28; Manistee Iron Works Co. v. Shores Lumber Co., 92 Wis. 21, 65 N. W. 863.

The agreement here was to cut and deliver in the Wisconsin river certain logs; that these logs should be banked on the Twin river, which empties into the Wisconsin river, on or before the 20th day of March, 1893. The engagement of Monahan, therefore, was to deliver these logs in the Wisconsin river. The banking them upon

Twin river was merely a step in the performance of the contract. The specification of a date by which they were to be so banked was manifestly that advantage might be taken of early freshets, and a speedy delivery secured. We think it clear that under this contract it became the duty of Monahan to obtain a banking place upon Twin river for the logs. The law implies as a term of the contract that he was to do all things needful to complete delivery in the Wisconsin river; and, such banking being necessary in the progress of delivery, it became a term of the contract that he should supply the means of banking the logs. It is in evidence here that the road from the timber to the Twin river had previously been wholly or nearly completed, and that the contract was entered into in view of that fact. Had it been otherwise, it might with equal propriety be asserted that Monahan would be at liberty to show by parol (the contract being silent upon that subject) that Godkin agreed to make the road, or that he agreed to furnish the teams or provisions for the camp or the other means essential to the proper performance of the contract. The undertaking to fell, skid, haul, and deliver was the undertaking of Monahan, and it was his duty to supply all things needful to that end, and the banking of the logs was one of the needful things to be done. The requirement that it should be done demanded of him the obtaining of a place where it might be accomplished as fully as did the contract require him to supply the axes by which the trees might be felled. It was clearly, therefore, erroneous to permit evidence tending to establish a parol agreement by Godkin before the signing of the contract that would be in direct contravention of any term of the contract, whether specified therein or implied by law. This case seems to us on all fours with the case of Meekins v. Newberry, 101 N. C. 17, 7 S. E. 655. There was a written agreement to raft certain juniper mill logs for towing by steamer, and it was sought to be shown by parol that the other party was to furnish the necessary rafting gear for properly rafting the logs. Under the principles we have herein announced, it was held that the contract was complete; that its terms were not exceptive, nor had they suggested any omission, but were comprehensive and absolute; that the stipulation to raft the logs was unconditional,—not to occur upon the doing by the other party of some precedent act, not when he should supply the necessary rafting gear, but that the one undertaking the work should do whatever was necessary and incident to such service; and to permit such parol evidence would be to substantially change the agreement of the parties in respect to that which had been reduced to writing. It was therefore erroneous in the court below to allow the evidence complained of, or to submit the question to the jury. They should have been charged that it was the duty of the defendant in error to provide the necessary banking place for the logs, and that for any delay occasioned by failure to obtain a banking place, or arising from the necessity of making a road to a banking place on the Wisconsin river, Monahan was responsible.

The court also charged the jury that, assuming Monahan to be so liable, the change in the banking place was not material to their

consideration, and should only be considered for the purpose of determining whether Monahan had exercised the diligence which he should exercise in the performance of the contract as amended by the change in the banking place to which, as the court charged, Godkin was consenting, upon the condition that it should make no more delay. We cannot so construe the letter of Godkin. He had been informed by Monahan that a banking place on the Twin river, in township 41, could not be obtained. This was six weeks after the making of the contract. He writes, protesting that Monahan had undertaken to secure the banking ground:

"Now, I have no objections to your putting them [the logs] in the Wisconsin river below [above?] where the Twin river empties in, as cheap as you can, but I do object to your doing anything that will interfere with the logs being delivered in the boom as early as if put in as the contract calls for."

This is no consent to the banking of the logs on the Wisconsin river in the sense that it waives or condones Monahan's default. He simply recognizes the situation and the default, and consents to the employment of other means to be adopted by Monahan to put the logs in the Wisconsin river if such act does not interfere with the delivery of the logs within the time required by the contract. In other words, he says that he has stipulated for the banking of the logs on or before the 20th day of March, 1893, provided the logging season permit, so that advantage may be taken of the early freshets, and a speedy delivery assured. He recognizes the fact that Monahan has, through default, been unable to comply with one term of the contract, and procure the banking place upon the river designated, and states that he has no objection, under the circumstances, that the banking be done upon the Wisconsin river if it shall not interfere with the same early delivery which was contemplated by the banking of the logs upon the Twin river. We perceive here no waiver of any right to hold Monahan responsible for default; and in so far as that default operated to prevent him from making delivery within the time specified, and in so far as it operated to prevent delivery of the logs during that logging season, with the resultant injury, if any, to the logs left in the woods, Monahan must be held responsible.

We are also of opinion that the court erroneously stated the law in its charge that Monahan was required only to use such reasonable and proper diligence as a man of ordinary care and prudence would use in his own affairs; that, in starting upon the work, he would be required and expected only to make such provision as to the number of teams and men and diligence in pushing the work as would ordinarily be required in ordinary seasons. The contract was absolute to deliver and to bank the logs by the time stated, with the single limitation, "provided the logging season permit." The measure of the duty of Monahan under the contract was not that of ordinary care. His duty was absolute to do the things he had undertaken to do, and by the time stated, unless, and only unless, he was prevented therefrom by the nature of the logging season. Lumber Co. v. Chapman, 42 U. S. App. 21, 20 C. C. A. 503, and 74 Fed. 444. He was required to make delivery as he had agreed, and failure to deliver seasonably

could not be excused unless, by reason of the severity of the logging season, all proper efforts to fulfill the contract were unavailing, and he was bound to anticipate conditions of season which, though more severe than usual, were known in that region to be likely to occur.

With respect to the instructions requested and denied, that Monahan, failing to haul all the logs, during the logging season of 1892–93, could not recover for hauling the remaining logs during the ensuing season, we remark that the record states that these logs were hauled without the consent of Godkin, but were by him run down the Wisconsin river from the banking ground, and that Monahan paid the cost of running them from the banking ground to the mouth of the Twin river, the designated place of delivery under the contract. We understand this statement to mean that, while Godkin did not previously consent to the hauling of the logs, he took possession of them at the banking ground, and ran them down the river, and received and accepted from Monahan the cost of running them to the mouth of the Twin river. We do not gather from this statement that Godkin forbade the hauling of the logs, but simply that he had not actively consented thereto prior to hauling. Undoubtedly, the contract remaining executory, Godkin could stop performance by explicit direction to that effect, paying to Monahan the profits of hauling. Whether the contract could be held to be executory after the close of the logging season we need not now consider; but if Godkin, with knowledge that Monahan had hauled the logs, accepted them from him at the banking ground, and ran them down the river, and took from Monahan the cost of running them to the mouth of the Twin river (the designated place of delivery under the contract), it was, we think, proper to submit to the jury the question whether Godkin did not thereby recognize the contract as in force with respect to the obligation of Monahan to haul the logs, and whether he did not accept delivery of them. If such acceptance were found, it would not operate as a waiver of damages sustained by delay in delivery, but would avail to require compensation for the hauling. The instruction, being inconsistent with this view, was properly refused.

We cannot close this opinion without a word of commendation to counsel upon both sides for the admirable manner in which the bill of exceptions presented to our consideration has been prepared. The record of a trial continuing during four weeks is condensed, and the exceptions fully presented, in 16 printed pages of this record. The paper is a model that the bar should copy after. It has become much too common in the preparation of a bill of exceptions for the lawyer to abandon his function to the stenographer, and to reproduce as a bill of exceptions the stenographic report of the trial. This course may save counsel labor, but it is neither lawyer-like nor just to court or to client. It involves on the part of the former the wasteful expenditure of time in searching a mass of irrelevant testimony embodied in the bill, to ascertain the exact bearing of the errors assigned, and it imposes upon the latter the unnecessary expenditure of money in printing a mass of irrelevant testimony.

The judgment will be reversed, and the cause remanded, with directions to the court below to award a new trial.

BRENNAN et al. v. DELAWARE, L. & W. R. CO.

(Circuit Court of Appeals, Third Circuit. October 27, 1897.)

No. 18.

RAILROADS—INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

To stand or walk on a railroad track, or so near thereto as to be in the way of a passing train, is negligence such as to warrant the court in directing a nonsuit and in refusing to admit evidence of negligence on the part of the company.

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

This was an action at law by Lawrence Brennan and Ann Brennan against the Delaware, Lackawanna & Western Railroad Company to recover damages for personal injuries suffered by the said Ann Brennan. The circuit court directed a nonsuit, and the plaintiffs have appealed.

Harry E. Richards, for plaintiffs in error.

George M. Shipman and Flavel McGee, for defendant in error.

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

BUTLER, District Judge. The plaintiffs sue to recover damages for injuries inflicted on Ann Brennan by the defendant's train while she stood by the side of its track, with her shoulder and arm extended over. The circuit court, finding her guilty of contributory negligence, directed a nonsuit. To this direction, and also to the exclusion of testimony intended to show negligence of the defendant, in failing to signal, the plaintiffs excepted; and now assign the matters excepted to as errors.

Neither assignment can be sustained. To stand or walk on a railroad track, or so near thereto, as to be in the way of a passing train is negligence at common law. It would be waste of time to cite authority for this statement. The court was therefore right in finding Ann Brennan guilty of negligence. She was in the way of the train without excuse for being there. It was consequently unnecessary to inquire whether the defendant was also negligent; and the offer of testimony was therefore properly excluded. Its admission could not have benefited the plaintiffs. It may be remarked however that the offer did not tend to prove negligence. No crossing, in a legal sense, existed there; and the offer does not suggest that the ground indicated the existence of a custom such as the offer states, or that the defendant otherwise had knowledge of it. If however the custom existed and the defendant had knowledge of it, the plaintiff, Ann Brennan, would be without justification in standing there.

The judgment is therefore affirmed.

RATHBONE v. BOARD OF COM'RS OF KIOWA COUNTY, KAN.[1]

(Circuit Court of Appeals, Eighth Circuit. September 13, 1897.)

No. 788.

1. CONSTITUTIONAL LAW—SPECIAL LEGISLATION.
   Under the Kansas constitution (article 2, § 17), prohibiting special legislation unless necessary, it is for the legislature, and not the courts, to determine whether a special law is necessary.

2. COUNTY BONDS—VALIDITY—TIME OF ISSUANCE.
   The Kansas statute of March 1, 1876, providing for the organization of counties, townships, and school districts, as amended by the act of February 18, 1886 (Laws 1886, p. 123, c. 90), provides that no bonds of any kind shall be issued by any county within one year after the organization thereof; but the same section contains two provisos, the first of which declares that "none of the provisions of this act shall prevent or prohibit the county of Kiowa * * * from voting bonds at any time after the organization of said county." *Held*, that this proviso in favor of Kiowa county was valid, and authorized it to vote bonds as soon as it was organized. 73 Fed. 395, reversed.

3. SAME—EXCESSIVE ISSUES—CONSTITUTIONAL LIMITATIONS—ASSESSED VALUE.
   County bonds were issued under Laws Kan. 1876, p. 159, c. 63, as amended by Laws Kan. 1886, p. 123, c. 90. The act limited such issues to a certain proportion of the assessed valuation of county property. It was not contemplated that these bonds should be issued prior to December 31, 1887, and none were issued until August, 1887. *Held*, that the assessment for 1887, made as of March 1, 1887, was the one that controlled.

4. SAME—INNOCENT PURCHASERS—RECITALS.
   Kiowa county, Kan., had authority in 1887 to issue certain bonds, to the amount of $126,008, and no more. It issued two distinct series to two separate railroad companies,—each series for less than that amount, but together exceeding it. The total issue of each series, respectively, was recited in the bonds belonging thereto (but not in the coupons), and they contained broad recitals as to due compliance with legal requirements. Plaintiff bought coupons of one series from A., and of the other series from B., neither of whom had owned bonds of both series. *Held* that neither A. nor B. was charged with notice of the excess, and that plaintiff had acquired all their respective rights.

On Motion to Modify Judgment.

5. DECISION ON ERROR—REVERSAL—CASE TRIED ON AGREED STATEMENT—ENTRY OF JUDGMENT BELOW.
   When a jury has been duly waived, and the case tried to the court on an agreed statement of facts, and the damages recoverable are a liquidated sum, the appellate court, on reversing a judgment for defendant, will not award a new trial, but will direct a judgment to be entered against defendant.

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

This suit was brought by Charles D. Rathbone, the plaintiff in error, against the board of county commissioners of Kiowa county, Kan., the defendant in error, upon 92 coupons detached from 46 railroad aid bonds which were issued by Kiowa county, Kan. Thirty-two of the coupons were detached from 16 bonds, being a part of 60 bonds, of the denomination of $1,000 each, which were issued by said county on August 4, 1887, to the Kingman, Pratt & Western Railroad Company (hereafter termed the "Kingman Railroad Company"). The remaining 60 coupons were detached from 30 bonds, being a part of 85 bonds, of the denomination of $1,000 each, which were issued by said county on October 3, 1887, to the Chicago, Kansas & Nebraska Railway Company (hereafter termed the "Chicago Railway Company"). The county originally agreed

[1] Rehearing denied December 6, 1897.

to issue bonds to the amount of $115,000 to the Kingman Railroad Company, and bonds to the amount of $120,000 to the Chicago Railway Company; but under a subsequent arrangement it only issued 85 bonds, of the denomination of $1,000 each, to each of said companies. The bonds in question were issued under the provisions of an act of the legislature of the state of Kansas, which was approved February 25, 1876 (Laws 1876, p. 217, c. 107), the first and second sections of said act being as follows:

"Section 1. Whenever two-fifths of the resident tax-payers of any county, or two-fifths of the resident tax-payers of any municipal township, shall petition in writing the board of county commissioners, or whenever two-fifths of the resident tax-payers of any incorporated city shall petition the mayor and council of such city to submit to the qualified voters of such county, township or city, a proposition to subscribe to the stock of, or to loan the credit of such county, township or city to, any railroad company constructing or proposing to construct a railroad through or into such county, township or city, the county commissioners for such county or township, or the mayor and council for such city, shall cause an election to be held to determine whether such subscription or loan shall be made: provided, no county shall issue under the provisions of this act more than one hundred thousand dollars, and an additional five per cent. indebtedness of the assessed value of such county; and no township shall be allowed to issue more than fifteen thousand dollars, and five per cent. additional of the assessed value of the property of such township; and in no case shall the total amount of county, township and city aid to any railroad, exceed four thousand dollars per mile for each mile of railroad constructed in said county:

"Sec. 2. Before such subscription or loan shall be made, the question shall first be submitted to the qualified electors of such county, township or city, as provided by section one of this act, at a special or general election, as the same shall be specified in the petition; which petition shall also designate the railroad company, and the amount of stock proposed to be taken, or the amount for which it is proposed to lend the credit of such county, township or city, and the terms of payment, together with the conditions upon which it is proposed to make such subscription or loan, and the form of the ballots to be used at such election for and against such proposition."

Other provisions of the act authorized the board of county commissioners to order the county clerk to make a subscription for stock, and also authorized a subsequent issue of bonds in payment therefor, which were to be signed by the chairman of the board of county commissioners, and attested by the county clerk, under the seal of the county, if a majority of the qualified electors voting at an election duly called as aforesaid favored the subscription. The recitals contained in the bonds issued to the Kingman Railroad Company were as follows: "This bond is one of a series of sixty bonds, each of like tenor, date, and amount, issued to the Kingman, Pratt & Western Railroad Company in part payment of subscription by the county clerk of said Kiowa county, for and in behalf of said county, for eleven hundred and fifty shares, of one hundred dollars each, of the capital stock of said railroad corporation; said subscription to stock and issue of bonds in payment therefor being made by virtue of, and in full conformity and compliance with, the authority conferred by an act of the legislature of the state of Kansas entitled 'An act to enable counties, townships and cities to aid in the construction of railroads * * *,' approved February 25, 1876, and by acts of said legislature amendatory thereof and supplemental thereto, and by virtue of the authority of a special election duly, regularly, and legally called and held in said county on the 22d day of June, 1886. The provisions and requirements of said acts, and all the conditions precedent to the subscription aforesaid, and the lawful issue of this bond, have been in all respects fully and completely complied with and performed." The bonds issued to the Chicago Railway Company contained a representation that the total issue amounted to $120,000, and was "not in excess of the limitations prescribed by law." In other respects the recitals contained in the two series of bonds were substantially the same. The special election by virtue of which the bonds in suit were authorized to be issued to the Kingman Railroad Company and the Chicago Railway Company appears to have been ordered by the board of county commissioners on May 21, 1886, in obedience to a petition to that

effect which was presented to the board by the requisite number of taxpayers, and in all other respects the proceedings which culminated in a subscription for stock in the respective companies, and in an issue of bonds to each company, were strictly regular, and in conformity with the provisions of the act heretofore cited. Kiowa county was organized as one of the counties of the state of Kansas on March 23, 1886, on which date the governor of the state, in the mode provided by law, issued his proclamation appointing a board of county commissioners and a county clerk, and designating the town of Greensburg as the temporary county seat. The proceeding to organize said county was inaugurated, as it seems, on February 15, 1886, on which day the governor of the state, in compliance with a memorial that day filed, appointed a census taker for the unorganized territory constituting the county, pursuant to the provisions of an act relating to the organization of new counties, which was approved on March 1, 1876, and took effect on March 15, 1876. Laws Kan. 1876, p. 159, c. 63. Pending the taking of the census by the person thus designated by the governor, the act of March 1, 1876, pursuant to which the appointment of a census taker was made, was amended by the legislature by an act approved on February 18, 1886, which took effect on February 23, 1886. Laws Kan. 1886, p. 123, c. 90. The first section of the act of March 1, 1876, supra, contained a provision which was as follows: "Provided further that no bonds of any kind shall be issued by any county, township or school district within one year after the organization of such new county under the provisions of this act." The same section, as amended by the act of February 18, 1886, supra, contained two provisions, which were as follows: "Provided further, that none of the provisions of this act shall prevent or prohibit the county of Kiowa, or any township or school district therein, from voting bonds at any time after the organization of said county; and provided further, that no bonds of any kind shall be issued by any county, township or school district within one year after the organization of such new county under the provisions of this act." The assessed value of taxable property in Kiowa county, Kan., was $236,662 for the year 1886, $520,169 for the year 1887, and $1,647,580.10 for the year 1888. Under the contract existing between the respective railway companies and the county of Kiowa, in pursuance of which the stock was subscribed and the bonds in suit were executed, bonds to the amount of $60,000 were deliverable to each railroad company when its road was completed and in operation to Greensburg, the county seat of Kiowa county. The residue of the 115 bonds due to the Kingman Railroad Company were deliverable to it when its road was completed and in operation to the west line of Kiowa county, and the company bound itself to have its road completed both to the county seat and to the west line of the county by July 1, 1888. The residue of the 120 bonds due to the Chicago Railway Company were deliverable to it when its road was completed to the west or south line of Kiowa county; and that company bound itself to have its road completed and in operation to Greensburg by December 31, 1887, and to the west or south line of the county on or before May 1, 1888. Both companies duly completed their roads to the points above mentioned within the time limited. The plaintiff purchased 32 of the coupons in suit from H. W. Sage, for value, before maturity, and without actual notice of defenses existing against the same; the same being coupons which were detached from the bonds which were first issued to the Kingman Railroad Company. He purchased the remaining 60 coupons in suit under similar circumstances from George L. Williams; the same being coupons which were detached from the first bonds that were delivered to the Chicago Railway Company. The case was submitted to the trial court on an agreed statement, wherein the foregoing facts, in substance, were admitted. On such agreed statement the trial court rendered a judgment in favor of the defendant. 73 Fed. 395. The case comes to this court on a writ of error brought to reverse said judgment.

E. F. Ware (Charles S. Gleed, James W. Gleed, D. E. Palmer, and C. Hamilton on the brief), John F. Dillon, Harry Hubbard, and John M. Dillon, for plaintiff in error.

S. S. Ashbaugh and L. M. Day, for defendant in error.

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 for consideration which arises upon this record, is whether the first proviso contained in section 1 of the act approved February 18, 1886 (Laws Kan. 1886, p. 123, c. 90), was a valid enactment. That proviso expressly authorized Kiowa county to vote bonds "at any time after the organization of said county," and if it was a provision which the legislature of the state of Kansas had the power to inject into the act of February 18, 1886, it would seem to be wholly unnecessary to consider the further question which is elaborately discussed in the briefs, whether the prohibition against issuing bonds within one year after the organization of the county, which is found in the second proviso to the same section of the act, operated as a prohibition against voting bonds within one year after the organization of the county, as well as a prohibition against delivering them or putting them in circulation within that period. If the first of these provisos is a valid enactment, then it is obvious that the word "issued," which is found in the second proviso, cannot be so construed, in its application to Kiowa county, as to prevent that county from voting railroad aid bonds during the year succeeding the date of its organization, whatever may be the meaning of the word "issued," and the effect of the second proviso, as applied to other counties of the state. The validity of the first proviso is challenged on the ground that it was special legislation, such as falls within the prohibition of section 17, art. 2, of the constitution of the state of Kansas. That section of the constitution is as follows:

"All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable no special law shall be enacted."

The construction which has been placed on the foregoing provision of the constitution of the state by the supreme court of Kansas is binding upon the federal tribunals, and it is manifest that, as there construed, the legislature of the state is left at full liberty to determine whether, in any given case, a general law can be made applicable; and the legislative determination of that question is not subject to review either by the state or the federal courts. In two cases (Darling v. Rodgers, 7 Kan. 592, and Robinson v. Perry, 17 Kan. 248), a contrary view seems to have been expressed, but it is now well settled by a long line of adjudications in that state that it is competent for the legislature to enact special laws, or to ingraft exceptions upon general laws, if, for any reason, it sees fit to take such action. In a late case (Elevator Co. v. Stewart, 50 Kan. 378, 383, 32 Pac. 33, 34) the supreme court used the following language:

"The third contention of the plaintiff, that the new act is in contravention of section 17, art. 2, of the constitution, we think, is also untenable. Some good reasons may be urged in favor of the plaintiff's contention, and two decisions of this court seemingly, to some extent, favor it. Darling v. Rodgers, 7 Kan. 592; Robinson v. Perry, 17 Kan. 248. But some good reasons, and many decisions of this court, are against his contention. Commissioners of Norton Co. v. Shoemaker, 27 Kan. 77; Harvey v. Commissioners of Rush Co., 32 Kan. 159, 4 Pac. 153; Weyand v. Stover, 35 Kan. 545, 551, 11 Pac. 355; City of Wichita v. Burleigh, 36 Kan. 34, 12 Pac. 332; State v. Sanders, 42 Kan. 228,

21 Pac. 1073; Hughes v. Milligan, 42 Kan. 396, 22 Pac. 313; Commissioners of Linn Co. v. Snyder, 45 Kan. 636, 26 Pac. 21; Commissioners of Barber Co. v. Smith, 48 Kan. 332, 29 Pac. 565. It will be seen from an inspection of the decisions of this court, commencing with the case of State v. Hitchcock, 1 Kan. 178, that this court has uniformly held that the legislature has the power, in its discretion, to pass special laws, although adequate general laws upon the same subject might be enacted, and although in fact such general laws have already been enacted, and are at the time in full force and effect, and although such special acts might have the effect to limit the operation of existing general laws, or existing laws of a general nature then having a uniform operation throughout the state."

Still more pointed are some expressions found in the case of Eichholtz v. Martin, 53 Kan. 486, 488, 36 Pac. 1064, 1065. The court say:

"The old question so often raised is again presented: Was it competent for the legislature to determine whether a general law could be made applicable, and whether a special law was necessary? If the question were a new one, the writer of this opinion would be inclined to the view that the courts should determine in each case whether this constitutional restriction had been violated or not; but the question has been put at rest by a long series of decisions holding that the decision of the question is exclusively for the legislature, and not for the courts."

Some of the decisions above referred to were reviewed by this court in the case of Insurance Co. v. Oswego Tp., 19 U. S. App. 321, 328; 7 C. C. A. 669, and 59 Fed. 58; and we there held that the doctrine was well settled by local decisions that the legislature of the state of Kansas has power to pass special laws, notwithstanding the inhibition contained in section 17, art. 2, of the state constitution. The result is that the first proviso found in section 1 of the act of February 18, 1886, supra, was a valid enactment.

It is further suggested by the defendant in error that because the proceedings to organize Kiowa county were commenced under the provisions of the act of March 1, 1876 (Laws Kan. 1876, p. 159, c. 63), that act should alone be considered, in determining the power of the county to vote bonds during the first year of its organization, and, therefore, that the first proviso found in the amendatory act of February 18, 1886 (Laws Kan. 1886, p. 123, c. 90), has no application to the case in hand. Our attention is particularly invited to the fact that the first proviso found in the act of February 18, 1886, declares "that none of the provisions of this act shall prevent the county of Kiowa * * * from voting bonds at any time after the organization of said county," while "it does not * * * say that none of the provisions of any other act" shall have such effect. This is a very narrow and technical view of the language contained in the proviso, which, if adopted, would defeat the manifest purpose of the lawmaker. The legislature obviously intended, for reasons that were satisfactory to itself, that the first proviso in the act of February 18, 1886, should go into immediate operation, and that Kiowa county should have the power to vote bonds as soon as it was organized, no matter what might be the effect of the second proviso upon other newly-organized counties. If such was not its purpose, the first proviso was meaningless and futile.

The most important question presented by the record is whether the plaintiff below was prevented from recovering because the re-

citals contained in the two series of bonds from which the coupons in suit were detached showed that the total issue to the Kingman Railroad Company and the Chicago Railway Company amounted to $180,000, whereas the assessed value of county property for the year 1887 was only $520,169. We are of the opinion that because the agreement between the county and the respective railroad companies did not contemplate that bonds should be issued prior to December 31, 1887, and because none of the bonds were in fact issued until August, 1887, it is the assessment for that year (which, under the laws of Kansas, was made as of March 1, 1887) that must control in determining whether the issue was in excess of the amount allowed by law. The assessment for that year being $520,169, the act under which the bonds in suit were executed authorized an issue to the amount of $126,008, and no more. It was held, however, by the supreme court of Kansas, in Turner v. Commissioners of Woodson Co., 27 Kan. 314, that, if more bonds are authorized by a popular vote than can be issued lawfully, such vote is not a nullity, but confers power to issue bonds up to the amount that is authorized by law. If we apply that rule to the case in hand, it is manifest that the plaintiff was entitled to recover on the 32 coupons that were detached from the bonds issued to the Kingman Railroad Company on August 4, 1887, since the 60 bonds issued to that company did not exceed the statutory limit of indebtedness, and were therefore valid obligations of the county. We think, however, without applying that doctrine, that the right to recover extends to all the coupons in suit, and is not limited to the series last mentioned. The plaintiff is armed with all the rights of H. W. Sage and George L. Williams, from whom he purchased the two series of coupons; and he is entitled to rely on the title so acquired, without reference to the fact that he purchased coupons which had been detached from both series of bonds, and was thereby advised, by recitals contained in both series of bonds, that the total issue to both railroad companies amounted to $180,000. Rollins v. Commissioners of Gunnison Co., 26 C. C. A. 91, 80 Fed. 692; Commissioners of Marion Co. v. Clark, 94 U. S. 278, 286. There is no evidence contained in this record that Sage ever owned any of the bonds issued to the Chicago Railway Company, or that Williams ever owned any of the bonds issued to the Kingman Railroad Company; and in the absence of such evidence no presumption can be indulged that either of these parties purchased bonds belonging to both series, and in that way acquired knowledge that the total issue exceeded the amount authorized by law. The facts which Sage and Williams will be presumed to have known concerning the bonds are such as were disclosed by the bonds which they respectively purchased, and such further facts as the law made it their duty to ascertain by inquiry. Chaffee Co. v. Potter, 142 U. S. 355, 12 Sup. Ct. 216. In Dixon Co. v. Field, 111 U. S. 83, 95, 4 Sup. Ct. 315, and Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. 654, it was held that a purchaser of county bonds was charged with the duty of ascertaining the assessed value of county property, where the constitution of the state had limited the amount of county indebtedness that might be contracted to a certain per cent. of the assessed value of county property, and that in such

cases no recital contained in the bonds would relieve the purchaser from the performance of such duty. In Sutliff v. Lake Co. Com'rs, 147 U. S. 230, 13 Sup. Ct. 318, it was decided that a bond purchaser was likewise charged with the duty of examining statements of the county indebtedness for the purpose of ascertaining the amount of such indebtedness, and that knowledge of the amount as shown by the statements would be imputed to him, when such statements were required to be made at intervals, and published and spread upon the records of the county, by the provisions of the very act under which the bonds that he proposed to buy had been issued. Prior to these decisions, however, in Marcy v. Oswego Tp., 92 U. S. 637, where the bonds contained a recital, in substance, that they had been executed and issued by virtue of, and in accordance with, a certain act of the legislature of the state of Kansas, it was held that such a recital rendered it unnecessary for the purchaser of the bonds to ascertain the taxable value of township property, although the act under which the bonds were issued provided "that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest." And in a very recent case (Evansville v. Dennett, 161 U. S. 434, 16 Sup. Ct. 613), which was certified to the supreme court from the Seventh circuit, it was held, notwithstanding the fact that the bonds contained a recital that they were issued "in pursuance of an act of the legislature of the state of Indiana, and ordinances of the city council of said city passed in pursuance thereof," that a bond purchaser was not required to examine the ordinances therein referred to, and that knowledge would not be imputed to him of the facts which an examination of the city ordinances pertaining to the bonds would have disclosed. See, also, Wesson v. County of Saline, 34 U. S. App. 680, 20 C. C. A. 227, and 73 Fed. 917, 919.

In view of the broad recitals which the bonds in controversy contain, the result is, we think, that neither Sage nor Williams, nor the plaintiff, for that matter, were charged with the duty of examining the proceedings of the board of county commissioners of Kiowa county which culminated in the execution and delivery of the bonds, and that neither Sage nor Williams is chargeable with knowledge that the county voted, in the aggregate, to both companies, more bonds than it was entitled to issue, because an examination of the proceedings of the board would have disclosed that fact. The bonds which Sage is shown to have purchased advised him by their recitals that the issue amounted to $60,000,—a sum not in excess of the amount authorized by law,—while the bonds purchased by Williams advised him that the issue amounted to $120,000, which was not an excessive issue, when tested by the assessment for the year 1887, of which assessment, it may be conceded, both purchasers were bound to take notice. Chaffee Co. v. Potter, 142 U. S. 355, 12 Sup. Ct. 216. So far as this record discloses, therefore, Sage and Williams were both bona fide holders of the bonds which they respectively bought, and both were entitled to recover thereon against the county. The plain-

tiff has acquired their title to the coupons detached from said bonds, and, on the strength thereof, is entitled to recover on each series of coupons.

In conclusion, it is worthy of remark that the assessment of property in Kiowa county for the year 1888 was sufficient to warrant an issue of bonds by the county to the amount of $182,379, which is a sum somewhat in excess of the amount actually issued to both companies, and that the contract between the county and the respective companies contemplated a delivery of most of the bonds after the assessment for 1888 had become operative; that is to say, when both roads had been completed past the county seat to the west and south lines of the county. It is quite probable, therefore, that in issuing the bonds in controversy the board of county commissioners acted in good faith, upon the assumption that their validity would be tested by the assessment for the year 1888, rather than by the assessment for previous years. Moreover, the record shows that the county obtained what it bargained for; that it paid the interest on its bonds for five years after they were issued, without questioning their validity, and by doing so doubtless gave them a wide circulation in the market. These considerations, even if they do not alter the legal aspects of the case, to which we have before averted, will at least serve to demonstrate that the rules of commercial law, as applied on the present occasion, work no injustice. The judgment of the circuit court is accordingly reversed, and the cause is remanded to that court for a new trial.

Motion to Modify Judgment.

(October 25, 1897.)

PER CURIAM. A motion has been made in this case to modify the judgment heretofore entered in this court in pursuance of the opinion on file, and to modify the mandate to be issued thereunder so as to direct the circuit court to enter a judgment in favor of the plaintiff below, in lieu of granting a new trial. The motion is based on the ground that as a jury was duly waived, and the case was tried on an agreed statement of facts, and the damages recoverable are a liquidated sum, there is no occasion for a second trial. We are satisfied that the motion is well founded, on the following cases: Ft. Scott v. Hickman, 112 U. S. 150, 5 Sup. Ct. 56; Allen v. Bank, 120 U. S. 20, 7 Sup. Ct. 460; Rolling-Mill Co. v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882. Redfield v. Parks, 132 U. S. 239, 10 Sup. Ct. 83; Saltonstall v. Russell, 152 U. S. 628, 14 Sup. Ct. 733. Therefore the judgment will be modified as prayed, and the circuit court will be directed to enter a judgment against the defendant county in the sum $3,831.60, with interest thereon at the rate of 6 per cent. per annum from July 1, 1894, to the date of entry.

MIDDLESEX BANKING CO. v. SMITH.

(Circuit Court of Appeals, Fifth Circuit. June 21, 1897.)

No. 593.

1. LIMITATION OF ACTIONS—AMENDMENT TO PETITION—NEW CAUSE OF ACTION.
   Where an action is begun before expiration of the period of limitation, an amendment of the petition, after the expiration of such period, whereby the plaintiff, instead of suing for his own benefit, alleges that he sues by the authority and for the use and benefit of a third party, does not change the cause of action so as to subject the suit to the bar of the statute.
2. CROSS-EXAMINATION—REPETITION OF QUESTIONS—DISCRETION OF COURT.
   The refusal of the court to permit counsel on cross-examination to repeat a question which has already been asked and answered three or four times is not erroneous.
3. APPEAL AND ERROR—DECISION ON MOTION FOR NEW TRIAL.
   The refusal of a federal court to grant a new trial is not assignable as error.

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

This was an action at law by H. H. Smith against the Middlesex Banking Company, a corporation, and H. A. Kahler, to recover a sum of money alleged to have been wrongfully retained by defendant. The plaintiff's petition alleged, in substance, the following facts: One Frank Field, being the owner of a certain lot in the city of Dallas, Tex., on the 11th of July, 1890, executed a deed of trust thereon to secure the Middlesex Banking Company in the payment of two notes aggregating about $20,000, which were due in 1895. On the 3d of February, 1891, the said Field procured a policy of insurance from the Scottish Union National Insurance Company in the sum of $2,000 upon the house situated on the mortgaged lot and the fixtures and personal property therein. On the 12th of September, 1891, Field conveyed the lot and improvements to the plaintiff, Smith, subject to the incumbrances thereon, Smith not assuming the payment of such incumbrances; and on the same day the policy of insurance aforesaid was transferred to Smith, the loss, however, remaining payable to said H. A. Kahler, trustee. On December 10, 1891, the insured property was destroyed by fire, there being two other policies thereon, for $1,000 each, also payable to Kahler, as trustee. The petition then alleged that said Middlesex Banking Company and Kahler, on December 17, 1891, agreed with plaintiff that the money that might be collected on all the insurance policies should be used for the purpose of erecting a brick building upon the lot, "provided, that the building should be of such a character and value that the same will carry $4,000 of insurance." It was further alleged that the Scottish Union National Insurance Company refused to pay its policy, and that on December 17, 1891, it was agreed between plaintiff and defendants that plaintiff should proceed at once to erect the building, and that, when the insurance was collected, it should be turned over to him; that plaintiff did erect a building in accordance with this contract, which cost $5,000 when completed, May 1, 1892, and procured insurance thereon in the sum of $4,000, the policies being payable to said Kahler as trustee. It was further alleged that a suit was brought against the Scottish Union National Insurance Company in the name of plaintiff and defendants, wherein a judgment was recovered, and that in June, 1893, the sum of $2,103.70 was collected thereon by defendants. Plaintiff alleged that he had demanded this sum from defendants, but that they had refused payment, and had converted it to their own use.

The suit was originally instituted in a state court, but was removed into the court below by the Middlesex Banking Company, it being shown that defendant H. A. Kahler, though a resident of Texas, was a mere naked trustee, having no personal interest or liability, and that the said banking company was incorporated under the laws of Connecticut. On February 4, 1896, plaintiff filed his first amended original petition, repeating the allegations hereinbefore set

forth, except as to that portion in which was set out the character of the house plaintiff agreed to build upon the lot. On this point the amended petition was as follows: "That the money that might be collected on said three policies of insurance should be used for the purpose of erecting improvements on said lot, including a brick building, provided the improvements to be completed should be insured in the sum of $4,000, with the loss payable to said Kahler, trustee, to secure said note." On February 6, 1896, plaintiff filed his second amended original petition, in which the allegations were the same as before, except that, instead of suing for himself, plaintiff alleged as follows: "Your petitioner, H. H. Smith, sues herein by authority and direction and for the use and benefit of the North Texas National Bank of Dallas, a private corporation organized under the national banking laws of the United States," etc.

In its answer, defendant, among other defenses, set up that the change of capacity in which the plaintiff sued, as shown by the amendment of the second amended original petition, was the beginning of a new suit, and that more than two years had elapsed since the accrual of the cause of action in favor of the said North Texas National Bank, and that the action was, therefore, barred by the statute of limitation of two years. A trial was had at the January term, 1897, which resulted in a verdict for the plaintiff, and the court entered judgment accordingly. Thereafter a motion for new trial was made and denied, and defendant then sued out this writ of error. The first assignment of error was to the refusal of the court to give a requested instruction to the effect that the cause of action was barred by limitation, and that a verdict should be returned for defendant.

The second assignment of error was as follows: "The court erred in giving in charge to the jury the following special instructions at the request of plaintiff: 'Plaintiff requests the following charges, which I give: "The jury are instructed that the evidence shows that the proceeds of the insurance policy in question in this case were paid to H. A. Kahler by his attorneys on February 1, 1893. The evidence further shows that the North Texas National Bank consented at the time that the money should be so paid to and received by Mr. Kahler, but the jury are also instructed that this does not show that the bank waived its right to be paid the money by Mr. Kahler. The policy of insurance was payable to Mr. Kahler, trustee. It was his right and duty to receive the money in any event, no matter to whom the money really belonged, and it then became Mr. Kahler's duty to pay the money to the rightful owner; and, if the money belonged to plaintiff, it was his duty to pay it to plaintiff, notwithstanding the fact that the plaintiff or the bank may have consented that the money be paid to Mr. Kahler by the attorneys who collected it; and the mere fact that such consent may have been given will not of itself defeat the plaintiff's right to recover it if, under the testimony, plaintiff would otherwise be entitled to recover." ' And in this connection the court also erred in making the following statement to the jury as a part of his general charge, to wit: 'Gentlemen of the Jury: It seems to the court, and I have no hesitation in saying to you, that Mr. Dabney and his partner had no alternative than to pay the money to Mr. Kahler; and, if Mr. Kahler had gotten ugly about it, he could have compelled them to turn it over to him right quick. They were his counsel. This was an insurance policy held by him for his company, and the counsel, when they got the money, they had no right to hold it. It was their client's money. The North Texas National Bank had no right to object to the first disposition of the fund. But you will distinguish in this case the difference between the North Texas National Bank agreeing or permitting Mr. Dabney and Edmonson to give over the money to their client in the first instance, and of the other question of making an agreement or contract by which they proposed to relinquish all claims thereto. That is a different question. That is for the jury to say. I don't dispose of the question, but merely call your attention to the difference of the two questions,'—which action of the court in giving said charges was at the time excepted to by defendant, as shown by bill of exceptions No. 2."

The third assignment of error was in the following language: "The court erred upon the trial of this case by interfering with defendant's counsel in their cross-examination of H. H. Smith, plaintiff in the case, in this, to wit: 'The said Smith, being upon the witness stand, testified in his own behalf,—testified that he had made a contract with H. A. Kahler, manager of the Middlesex

Banking Company, as alleged in plaintiff's petition; that is, he stated it was agreed that the money that might be collected on the insurance policies should be used for the purpose of erecting improvements upon the lot in controversy, including a brick building, provided the improvements to be completed should be insured in the sum of $4,000.' And upon cross-examination, said witness, being asked the question if he did not, on the former trial of this case, testify that the contract was that the improvements to be made on said lot should be of such a character and value that the same would carry $4,000 insurance, to which question he answered that he did not know what his exact language was as to this point on the former trial of the case, but that he considered it amounted to the same thing, thereupon defendants' counsel asked witness to state as nearly as he could the exact language of the contract, but the witness answered the question substantially in the same way, saying he did not remember the language used by him on a former trial, but that he considered that to say the building to be insured for $4,000, and to say that the building should be of such a character and value as would carry $4,000, was substantially the same thing. After this question had been repeated to the witness three or four times, and answered substantially in the same way by him, the court stopped defendants' counsel, and put an end to the cross-examination of said witness upon that point, and at the same time stated in the presence and hearing of the jury that he would not permit a repetition of the question, as counsel would have an opportunity to argue the difference between the two forms of expression to the jury, but stated that the court agreed with the witness that it amounted to the same thing whether the language used was that the house would be insured for $4,000, or that it would be a house of such a character and value as to carry $4,000 insurance; and the court afterwards erred in stating, among other things, in his general charge to the jury as follows: 'Gentlemen of the jury: About this language used by Mr. Smith, on one occasion or another, that it must be a building that would insure for $4,000, or would carry $4,000, the court apprehends that you will understand that was all the same language. It would be puerile for the contract to mean that the building might be insured for $4,000 for five minutes or a day, through friendship or fraud, and thereby comply with the meaning of the contract; and, if you find that a contract existed, you will find that it was a contract for a building that would not only insure for $4,000, but that would carry the insurance at the time, under the rules of the insurance companies under ordinary circumstances. As Mr. Smith testified, according to his understanding, it was all the same thing. It is true that the pettifogger might contend that it was insured for $4,000 for one day; therefore they had complied with the contract. There has been no such contention. There can be none by any reasonable man.' Defendant's evidence tended to show that no such contract was made on the trial of this case. Harry A. Kahler and H. H. Smith were the only witnesses who testified to the language of the conversation between Smith and Kahler in which the contract sued on was alleged to have been made."

The fourth assignment of error was that the court erred in overruling the motion for a new trial.

Hill, Dabney & Edmonson, for plaintiff in error.

William J. Moroney and Joseph M. Dickson, for defendant in error.

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

PER CURIAM. The second amended original petition filed by the plaintiff in the court below does not make new parties, nor introduce any new cause of action. Construed most unfavorably to the pleader, and as compared with the original petition, it can only be held to have more clearly defined and described the cause of action upon which the plaintiff originally sued, and continued to sue. It follows that the charge to the jury requested by the defendant in the court

below on the trial of the case with reference to the statute of limitation was properly refused.

From the statement of the evidence as contained in the bills of exception, we do not find any error in the special instruction given to the jury at the request of the plaintiff, or in that portion of the court's charge recited in the bill of exceptions. The refusal of the trial judge to permit counsel for defendant in the court below on cross-examination of the witness to repeat a question which had already been asked and answered three or four times, is certainly not erroneous, but rather has the appearance of having been eminently proper and commendable.

We again announce that the refusal of the trial court to grant a new trial is not assignable as error. From a careful examination of the whole record in this case, we are not satisfied that there was any reversible error in the rulings of the trial judge on the trial. The judgment of the circuit court is affirmed.

UNITED STATES v. GUE LIM.

(District Court, D. Washington, N. D. October 28, 1897.)

EXCLUSION OF CHINESE — WIFE OF MERCHANT — CERTIFICATE OF RIGHT TO ENTER.

The wife of a Chinese merchant residing in this country, not belonging to the laboring class, is not a person excluded by the laws, and upon arrival here is entitled to enter and take up her residence with her husband, without producing the certificate prescribed by 1 Supp. Rev. St. (2d Ed.) p. 459, § 6. In re Li Foon, 80 Fed. 881, disapproved.

Wm. H. Brinker, U. S. Atty.
George S. Bush, for defendant.

HANFORD, District Judge. The defendant is the wife of a Chinese merchant lawfully domiciled and doing business as a merchant in this state. Upon her arrival a few months ago, the collector of customs at the port of her arrival, upon proof, which he considered sufficient, that she is not a laborer, nor a person excluded by the laws of the United States from coming to this country, and that she is the lawful wife of a Chinese merchant, permitted her to land, and take up her residence with her husband; but her right to enter was not evidenced by the certificate prescribed by the sixth section of the act of July 5, 1884 (1 Supp. Rev. St. [2d Ed.] p. 459), which reads as follows:

"Sec. 6. That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family and tribal name in full, title or official rank, if

any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States. If the person so applying for a certificate shall be a merchant said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid. * * *"

The present proceeding was initiated by a complaint sworn to by an officer whose duty is to see to the enforcement of the statutes excluding Chinese laborers, alleging that the defendant is a Chinese laborer, not registered, and not having possession of a certificate of registration, as required by the act of May 5, 1892 (2 Supp. Rev. St. p. 13). Upon said complaint a warrant was issued, and the defendant has been brought before the court for the purpose of obtaining an order for her deportation.

As the defendant does not belong to the laboring class, she is not required to be registered, and her arrival in this country was not in time to have entitled her to be registered as provided in the last-mentioned act. The question in the case is whether she was entitled to be admitted upon her arrival, without producing the certificate required of Chinese persons privileged to enter, by the sixth section of the act of 1884, above quoted. In a case similar to this, which came before Judge Deady, at Portland, in 1890, that eminent judge considered the question in all its phases, and held that the wife and minor child of a Chinese merchant lawfully dwelling in the United States were not of the laboring class, and therefore not excluded from entering; and held section 6 of the act of 1884 to be not applicable to such a case, for the reason that it is impracticable for such persons to comply with the requirements of that section, and the effect of the statute, if applicable to such cases, must necessarily be to exclude them, and deprive them of rights guarantied by the treaty of 1880. In re Chung Toy Ho, 42 Fed. 398. I find support for this decision in the opinion of Judge Sawyer in the Case of Ah Moy, 21 Fed. 785, wherein he shows that the Chinese exclusion acts were intended to apply to laborers as a class, and that the wife of a Chinese person has the same status as her husband, and belongs to the class to which he belongs, whether she is in fact a laborer or not. Also in the decision of the supreme court in the case of Lau Ow Bew v. U. S., 144 U. S. 47-64, 12 Sup. Ct. 517, 520, wherein it was held that a Chinese merchant having an established mercantile business in the United States, and maintaining therein a commercial domicile, upon returning from a temporary absence, was entitled to enter and remain in this country without producing the certificate required by section 6 of the act of 1884. Chief Justice Fuller, in the opinion of the court, says:

"The amendatory act of July 5, 1884, enlarged the terms of the certificate, and provided that it should be the sole evidence permissible on the part of the person producing the same to establish a right of entry into the United States. This rule of evidence was evidently prescribed by the amendment as a means of effectually preventing the violation or evasion of the prohibition against the coming of Chinese laborers. It was designed as a safeguard to prevent the unlawful entry of such laborers under the pretense that they be-

longed to the merchant class, or to some other of the admitted classes. But the phraseology of the section, in requiring that the certificate of identification should state not only the holder's family and tribal name in full, his title or official rank, if any, his age, height, and all physical peculiarities, but also his former and present occupation or profession, when and where and how long pursued, and his place of residence, and, if a merchant, the nature, character, and estimated value of the business carried on by him prior to and at the time of his application for such certificate, involves the exaction of the unreasonable and absurd condition of a foreign government certifying to the United States facts in regard to the place of abode and the business of persons residing in this country, which the foreign government cannot be assumed to know, and the means of information in regard to which exist here, unless it be construed to mean that congress intended that the certificates should be produced only by Chinese residing in China or some other foreign country, and about to come for the first time into the United States for travel or business or to take up their residence. * * * By general international law, foreigners who have become domiciled in a country other than their own acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicile of choice, or commercial domicile, is to be presumed; while by our treaty with China, Chinese merchants domiciled in the United States have, and are entitled to exercise, the right of free egress and ingress, and all other rights, privileges, and immunities enjoyed in this country by the citizens or subjects of the 'most favored nations.' There can be no doubt, as was said by Mr. Justice Harlan, speaking for the court, in Chew Heong v. U. S., 112 U. S. 536-549, 5 Sup. Ct. 255, 259, that, 'since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputed to congress an intention to disregard the plighted faith of the government; and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty.' Tested by this rule, it is impossible to hold that this section was intended to prohibit or prevent Chinese merchants having a commercial domicile here from leaving the country for temporary purposes, and then returning to and re-entering it; and yet such would be its effect if construed as contended for on behalf of appellee."

In reason, it seems to me that this statute could not have been intended by congress to apply to cases like the one now being considered. Its nonapplicability is shown by the fact that compliance with its requirements on the part of persons in the situation of this defendant is impossible; and it is unreasonable to presume that congress intended to exact of persons whose right to dwell in this country has been secured by treaty stipulations performance of impossible conditions, or to deprive them of the right to come into this country for nonperformance of such conditions. If it was intended to abrogate the treaty, congress would have so declared in explicit terms.

I would not have felt called upon to write an opinion in this case if it were not for the fact that recently Judge Lacombe, in the Li Foon Case, 80 Fed. 881, has given effect to this statute as a barrier to the admission into the United States of an infant child of a Chinese merchant lawfully residing therein, and upon the authority of his decision the officers of the government insist that the defendant in this case must be separated from her husband, and returned to China. In his opinion the learned judge seems to have been led to his conclusion by consideration of what he supposed to be the weight of authority, and yet he ignores entirely the decision by Judge Deady in the Chung Toy Ho Case and the decision of the supreme court in the Lau Ow Bew

Case. He says the only authority cited in support of the right of a child of a Chinese merchant residing here to come into the United States is the Chung Shee Case, 71 Fed. 277, but "apparently in that case the betrothed bride held a certificate." As a matter of fact, the Chung Shee Case, as reported in 71 Fed., is not an authority on that point at all. The decision in that case by Judge Wellborn was to the effect that the right of the woman to come into the United States, and remain, had been finally adjudicated by Judge Bellinger, and that the judgment in her favor, rendered at Portland, Or., was final and conclusive, and he therefore declined to consider the question as to the right of a wife or child of a Chinese merchant in this country to come into the United States without producing the certificate required by the act of 1884. Further, in his opinion, Judge Lacombe says:

"The clear weight of authority is against petitioner's contention (In re Ah Quan, 21 Fed. 182; In re Chinese Wife, Id. 786; In re Wo Tai Li, 48 Fed. 668), and there is nothing in the language of the statute warranting any such construction. As was held by the supreme court in Wan Shing v. U. S., 140 U. S. 424, 11 Sup. Ct. 729."

In the Ah Quan Case, 21 Fed. 182, Judge Sawyer and Judge Hoffman gave an interpretation of the statutes harmonious with the conclusions of the supreme court in the Lau Ow Bew Case; that is to say, they held the requirements as to certificates required of Chinese laborers returning to the United States to be not applicable to cases of Chinese laborers entitled to return after temporary absences from the United States, whose departure had been prior to any time when return certificates could have been issued pursuant to the statutes; nor to cases of merchants or Chinese persons other than laborers, who were en route to enter the United States prior to July 5, 1884. The reason given for excusing such persons from compliance with the letter of the statute, as I gather from the opinion, is that conditions impossible of performance are not to be presumed to have been intended by congress. The report of the decision contains no statement of facts in the case which Judges Sawyer and Hoffman were called upon to consider, but it is apparent from the opinion that they did not consider the case of a wife or minor child of a Chinese merchant, having an established business and domiciled in the United States previous to the coming of such wife or minor child.

In the Chinese Wife Case, 21 Fed. 785, the woman in the case was the wife of a Chinese laborer, and belonged to the class of persons which the statutes prohibit from entering the United States, and Judge Sawyer placed his decision against the right which she claimed on that ground. The opinion by Mr. Justice Field, however, in that case, does hold that a Chinese wife must be regarded as a distinct person, and that, to be entitled to admission, she must furnish a certificate, as required either by section 4 or by section 6 of the act of 1884; and his opinion is an authority supporting Judge Lacombe's decision, entitled to due respect. The only comment upon it which I deem proper to make is that it was rendered prior to the decision of the supreme court in the case of Chew Heong v. U. S., 112 U. S. 536-580, 5 Sup. Ct. 255, in which the court held that the fourth section of the act of May 6, 1882, as amended by the act of July 5, 1884, prescribing the cer-

tificate which shall be produced by a Chinese laborer as the only evidence permissible to establish his right to re-enter into the United States, is not applicable to Chinese laborers who, residing in this country at the date of the treaty, on November 17, 1880, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884, reversing the judgment of the circuit court of the United States for the district of California, given in accordance with the opinion of Mr. Justice Field, and contrary to the opinion of Judge Sawyer.

In the Wo Tai Li Case, Judge Hoffman held that the wife of a Chinese actor was not entitled to admission without producing the required certificate, but there is nothing in the report of the case to show that her husband was domiciled in this country, or that Judge Hoffman considered the question as to the right of Chinese persons not laborers, having a domicile in the United States, to bring their wives and minor children to dwell with them.

The Wan Shing Case, 140 U. S. 424, 11 Sup. Ct. 729, is not an authority in point. The case is distinguished by the fact than Wan Shing did not, at the time of his proposed return to the United States, have an established business or domicile in the United States. Emphasis is given to these important facts in the opinion of Chief Justice Fuller in the Lau Ow Bew Case.

Recurring to the decision by Judge Lacombe in the Li Foon Case, he states that apparently the betrothed bride referred to in the Chung Shee Case held a certificate, as if that fact might be considered the basis for the decision in favor of her right to enter. It appears, however, by the report of Judge Bellinger's decision, that the only certificate which was considered in the case was a certificate identifying the husband, and setting forth that the petitioner was his wife, and that such certificate was intended to evidence her right to land by virtue of such relation, which certificate was prepared at Portland, Or., and forwarded to China. Certainly, this was not the certificate contemplated or required by section 6 of the act of 1884. In re Lum Lin Ying, 59 Fed. 682. I consider that it may be fairly claimed that the weight of authority is not as supposed by Judge Lacombe, but the contrary.

Looking now to the reasons for and against the rule contended for by the officers of the government, I agree with Judge Deady that the admission of Chinese merchants with their families is not to be regarded as a mischief which the Chinese restriction and exclusion acts were intended to remedy. This is a commercial nation. The maintenance and extension of American commerce with the Oriental countries must redound to the benefit of the American people as a whole. Chinese merchants in this country are doing an important part in fostering this important interest, and no benefit whatever can accrue to the people of this country by depriving them of liberty to dwell within our borders, with their families, under the protection of our laws. The argument that Chinese laborers will come to the United States in great numbers under pretense of being members of families of merchants already living here, does not have very great force. The law has been administered as interpreted by

Judge Deady since the date of his decision in the Chung Toy Ho Case in 1890, and the evils supposed to follow such a decision have not come to pass. But, against all argument opposed to liberality towards Chinese of the merchant class, it must be said that it is the duty of the court to declare the law as congress has made it, and harmonious with the established rules for the construction and interpretation of statutes. By this test I am constrained to hold that the defendant is entitled to be discharged.

In re GUT LUN.

(District Court, N. D. California. November 1, 1897.)

No. 11,348.

1. DEPORTATION OF CHINESE—VALIDITY OF JUDGMENT—SUPERFLUOUS FINDING
 A complaint for the deportation of a Chinese laborer alleged merely that she had been and remained in the United States without procuring the certificate of residence required by the acts of May 5, 1892, and November 3, 1893. On the trial the court found that defendant was unlawfully within the jurisdiction of the United States, and, further, that she had entered the United States in violation of law, and gave judgment of deportation. *Held*, that the general finding that defendant was unlawfully in the United States was sufficient to support the judgment, though the further finding of an unlawful entry was not within the issues made by the pleading.
2. SAME—COLLATERAL ATTACK—HABEAS CORPUS.
 A judgment of deportation of a Chinese person by a court having jurisdiction of the controversy and the parties cannot be impeached on habeas corpus by proof of a different state of facts from that on which the judgment was based; and where the court found that the Chinese person unlawfully remained in the United States without procuring the certificate of residence required by the acts of May 5, 1892, and November 3, 1893, such a certificate cannot be received in evidence in the habeas corpus proceeding.

This was a petition by Gut Lun, a Chinese person, for a writ of habeas corpus to release her from confinement under a judgment of deportation.

Lyman I. Mowry and J. C. Judkins, for petitioner.
Bert Schlesinger, Asst. U. S. Atty.

DE HAVEN, District Judge. The petitioner, Gut Lun, is restrained of her liberty for the purpose of deportation by virtue of a judgment of the district court of the First judicial district of the territory of Arizona. The record shows that the complaint in the proceeding in which that judgment was rendered charged that the petitioner here is a Chinese laborer, and had, since May 5, 1892, "been and remained, and now is, within the limits of the United States, and is at present within the limits of the city of Tucson, county of Pima, territory and district of Arizona, without procuring the certificate of residence as required by the provisions of the act of congress entitled 'An act to prohibit the coming of Chinese persons into the United States,' approved May 5, 1892, and the act of congress amendatory thereof, approved November 3, 1893. Upon the trial in that proceeding the petitioner appeared in person and by

counsel, and the court found, among other things, as appears from the recitals contained in its judgment, that the said Gut Lun is a Chinese person, and a subject of the empire of China, and was found unlawfully within the jurisdiction of the United States of America, in the city of Tucson, territory of Arizona; and that she was "guilty of having entered the United States of America from the empire of China in violation of the act of congress in such cases made and provided, and that she, the said Gut Lun, is unlawfully within the United States of America"; and thereupon judgment was given to the effect that she be deported to the empire of China.

1. It is claimed by the petitioner that the finding of the district court of Arizona to the effect that petitioner was "guilty of having unlawfully entered the United States" was not within the issues involved in the proceeding before that court, and that its judgment is, for that reason, void. This contention is, in effect, nothing more than a claim that there is a variance between this finding of the court and the facts alleged in the complaint. If it should be conceded that such a variance exists, still that fact would not affect the jurisdiction of the court to render the particular judgment under which the petitioner is held. The judgment rendered by the district court of Arizona was one which the law authorized it to pronounce in that proceeding, upon its general finding that this petitioner was found unlawfully within the jurisdiction of that court.

2. Nor did the special referee in the proceeding now before this court err in refusing to permit the petitioner to introduce in evidence a certificate of residence, such as is required by section 6 of the act of congress of May 5, 1892, and the act of congress amendatory thereof, approved November 3, 1893. This certificate purported to have been issued to her by the collector of internal revenue for the First district of California, prior to the commencement of the proceeding which resulted in the judgment of deportation under which she is now held. This offered evidence undoubtedly tended to show that the petitioner has fully complied with the acts of congress above referred to, but in its judgment above referred to the district court of the territory of Arizona determined the fact to be otherwise than as is shown by such certificate, and this court is not authorized to retry that question. In re Tsu Tse Mee, 81 Fed. 702. The judgment of the district court of the territory of Arizona being valid, it cannot be reversed or set aside in this collateral proceeding by proof showing a different state of facts from that upon which that court based its judgment. The proposition that the judgment of a court having jurisdiction over the controversy and the parties to it cannot be impeached for error, either of law or fact, except in a direct proceeding for that purpose, is so well settled that it may be considered one of the maxims of the law. Cooper v. Reynolds, 10 Wall. 308. Exceptions overruled, writ discharged, and petitioner remanded to the custody whence she was taken, to be deported to China in accordance with the judgment of the district court of the territory of Arizona. So it is ordered.

UNITED STATES v. CHUNG KI FOON.

(District Court, N. D. California. October 27, 1897.)

No. 3,419.

1. CHINESE LABORERS—CERTIFICATE OF RESIDENCE—RESTAURANT AND LODGING-HOUSE KEEPER.
The words "Chinese laborers," in the act of November 3, 1893 (28 Stat. 7, § 1), amending the act of May 5, 1892 (27 Stat. 25, § 6), and relating to certificates of residence, include a Chinaman engaged in the business of keeping a restaurant and lodging house, and all Chinese persons, dependent upon their labor for self-support, whether actually employed as laborers or not.

2. SAME.
The status of a Chinese "laborer" under the acts relating to deportation was not changed by his arrest upon a criminal charge, and his subsequent enforced idleness in jail.

This was a proceeding for the deportation of one Chung Ki Foon, alleged to be a Chinese laborer.

Bert Schlesinger, Asst. U. S. Atty.
George K. French, for defendant.

DE HAVEN, District Judge. This is a proceeding brought by the United States for the deportation of a Chinese laborer. As I construe the agreed statement of facts, the defendant was born in, and is a subject of, the empire of China. He arrived at the city of Portland, Or., in 1876, and engaged in the general merchandise business, in which he continued until some time in the year 1892, when he came to San Francisco, and, after remaining in that city for three months, went to Bakersfield, Cal., and opened a restaurant and lodging house as the proprietor thereof. The date when he commenced to conduct the business of restaurant and lodging-house keeper does not appear, but, from whatever date, he continued in such business until November, 1892, when he was arrested upon a charge of having committed the crime of robbery, and confined in the county jail of Kern county. He remained in this jail until January 25, 1894, and then, having been convicted of the crime with which he was charged, he was placed in the state prison at San Quentin, and served therein under such judgment of conviction for the term of five years. The defendant is without the certificate of residence required of Chinese laborers by section 6 of the act of congress of May 5, 1892 (27 Stat. 25); and the act amendatory thereof, dated November 3, 1893 (28 Stat. 7, § 1). Upon these facts, United States Commissioner Heacock, to whom the matter was referred, found that the defendant was not lawfully entitled to remain in the United States, and recommended his deportation to China. The defendant has filed exceptions to the report of the commissioner, and contends that upon the foregoing facts a judgment for his deportation from the United States would not be warranted by law. In passing upon the question thus presented, I do not deem it necessary to determine whether defendant was a merchant on May 5, 1892, as it clearly appears from the agreed statement of facts that he had ceased to be a merchant before his arrival in California, in 1892, and thereafter was the keeper of a restaurant and

lodging-house proprietor until his subsequent arrest and confinement in jail, in November, 1892. By the terms of the act of November 3, 1893, amending section 6 of the act of May 5, 1892, it was made the duty of all Chinese laborers entitled to remain in the United States, before the passage of the act thus amended, to apply to the collector of internal revenue of their respective districts, within six months thereafter, for a certificate of residence; and if, at the date of the passage of such amendatory act of November 3, 1893, the defendant was a laborer, within the contemplation of that act, it was his duty to provide himself with the certificate therein required; and, if he has not done so, nor shown that his failure so to do was occasioned by accident, sickness, or unavoidable cause, within the meaning of the law, he is not entitled to remain in the United States.

This brings me to the consideration of the question whether the defendant was, at the date of its passage, a laborer, within the meaning of the act of November 3, 1893. Upon that date he was, as above stated, in jail, awaiting his trial upon a criminal charge, and had been so confined for about one year; but at the time of his arrest his ostensible occupation was that of keeping a restaurant and lodging house. It was held, and I think correctly, in the case of In re Ah Yow, 59 Fed. 561, that a restaurant keeper is to be classed as a laborer under a proper construction of the act of congress under consideration, and I do not think that defendant's status as a laborer was changed by the fact of his arrest, and subsequently enforced idleness in the county jail. A person may be properly referred to as a laborer, or as belonging to the laboring class, although at the particular time to which such reference is made he may, by reason of inability to obtain work, sickness, or other cause, not be actually employed as a laborer; and, in my opinion, the words "Chinese laborers," as used in section 1 of the act of November 3, 1893 (28 Stat. 7), refer not only to those actually engaged in manual labor at the date of the passage of that act, but were intended to include all Chinese persons dependent upon their manual labor as a means of securing an honest livelihood and self-support, and those who are not "officers, teachers, students, merchants, or travelers for curiosity," within the meaning of the treaty of November 17, 1880, between the United States and China. This I understand to be, in effect, the construction given these words by Ross, district judge, in his elaborate and well-considered opinion in the case of U. S. v. Ah Fawn, 57 Fed. 591, in which it was held that the words "Chinese laborers," as used in the act of May 5, 1892, are broad enough, when read in connection with the treaty made between the United States and China on November 17, 1880, to include Chinese gamblers and "highbinders." My conclusion is that the defendant was a laborer on November 3, 1893, within the meaning of the act of congress of that date, before referred to, although he was then in the county jail, awaiting trial upon a criminal charge. He was a laborer at the time of his arrest, and his status as such was not changed by his subsequent imprisonment. Exceptions overruled, and judgment that the defendant be deported from the United States to China.

In re YEE GEE.

(District Court, D. Washington, N. D. October 19, 1897.)

1. OFFER TO BRIBE OFFICER—INTERPRETER OF CHINESE LANGUAGE.
An interpreter of the Chinese language, appointed by the secretary of the treasury, is not acting within the scope of his official duty under such appointment while serving as interpreter of such language at a hearing of a criminal charge before the United States commissioner, within the meaning of Rev. St. § 5451, making it a criminal offense to offer to bribe any person acting for or on behalf of the United States in any official function.

2. SAME—CONTEMPLATED EXERCISE OF OFFICIAL FUNCTION.
An offer made to a person in contemplation of a mere probability that he may be called to perform official functions, and intended to influence his conduct in the performance of such functions if he shall be so called, does not violate Rev. St. § 5451, making it a criminal offense to offer to bribe a person exercising any official function, with intent to influence his action in his official capacity.

This was a proceeding in habeas corpus in behalf of one Yee Gee, who was committed to await the action of the grand jury on a charge of offering to bribe, etc.

Ballinger, Ronald & Battle and Thomas Burke, for petitioner.
Wm. H. Brinker, U. S. Atty., for respondent.

HANFORD, District Judge. The petitioner having been committed, in default of bail, to await the action of the grand jury upon a charge made against him of violating section 5451, Rev. St., he now seeks to be discharged on the ground that the facts alleged in the sworn complaint filed against him, and shown by the testimony for the prosecution, do not constitute an offense for which he can be punished under the laws of the United States. The testimony taken before the United States commissioner at the preliminary examination of the petitioner tends to prove that he offered to bribe one J. E. Gardner to secure from him a translation favorable to the petitioner of certain Chinese letters and documents, which he expected would be offered in evidence at a hearing to take place before the said United States commissioner of a criminal charge then pending against the petitioner, and which letters and documents were supposed to contain evidence material to be considered upon said hearing; the said J. E. Gardner being competent to translate from the Chinese to the English language, and holding at the time an appointment from the secretary of the treasury as an interpreter of the Chinese language for an indefinite term, and with fixed compensation, provided to be paid from the treasury of the United States, pursuant to appropriations for the purpose made by acts of congress. Section 5451, Rev. St., makes it an offense for any person to promise, offer, give, or cause or procure to be promised, offered, or given, any money or other thing of value, or to make or tender any contract * * * for the payment of money * * * to any officer of the United States, or to any person acting for or on behalf of the United States, in any official function, under or by authority of any department or office of the government thereof, * * * with intent to

influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit, or aid in committing, or to collude in or allow any fraud, or make opportunity for the commission of any fraud on the United States, or to induce him to aid, do, or omit to do, any act in violation of his lawful duty.

To make out a case under this section, it is necessary for the prosecution to prove: (a) An offer to bribe; (b) that such corrupt offer was made to an officer of the United States, or a person at the time acting for or on behalf of the United States in an official function; (c) that the offer was made to influence the officer or person in the doing of some act or performance of some duty in his official capacity. For the sake of brevity, and to bring the case within the narrowest compass, I will assume that elements (a) and (b) are shown by sufficient evidence to make a prima facie case. It remains then to be determined whether, in serving as an interpreter of the Chinese language at the hearing of a criminal case before a United States commissioner, Mr. Gardner can be regarded as acting within the scope of his official duty under the appointment which he holds from the secretary of the treasury. The letter of appointment does not define nor prescribe his duties, except in this: that he is directed to report for duty to the supervising special agent of the treasury department; nor do the statutes of the United States prescribe the duties of a Chinese interpreter. The most that can be inferred from the appointment and the appropriation acts providing for the payment of Chinese interpreters is that the persons holding such appointments are to assist the agents of the treasury department and customs officers by interpreting and translating from the Chinese to the English language and from English to Chinese. The secretary of the treasury has no authority to select interpreters to assist the courts in judicial proceedings, and it would be expanding the scope of Mr. Gardner's official functions too far to assume that his appointment constitutes him an officer of the United States, whose translation of a Chinese document could be received in a judicial proceeding as authentic, by reason of the official character of the translator, or that in making a translation of the testimony or papers to be used at a hearing before a United States commissioner he would be acting in the discharge of his official duty under said appointment. He could not be accepted as an interpreter at the hearing of Yee Gee's case without the approval and authorization of the commissioner presiding at the hearing. Therefore, if, in acting as an interpreter at such hearing, he may be regarded as performing in any sense an official function, his official character would be derived from his appointment or designation to act in that capacity by the commissioner, and not from his general appointment from the secretary of the treasury. It is my opinion that the offer to bribe, alleged to have been made by Yee Gee, does not amount to a completed offense, within the provisions of section 5451, for the reason that it was not intended to influence Mr. Gardner in the manner of performing his duty under his appointment from the secretary of the treasury, and he had not at that time

been appointed or designated by the commissioner to serve as an interpreter at the contemplated hearing, and held no relation to the government by reason of any appointment to act as an interpreter in any judicial proceeding. An offer made to a person in contemplation of a mere probability that he may be called to perform official functions, and intended to influence his conduct in performance of such functions if he shall be so called, does not violate this statute. An order will be entered directing that the petitioner be discharged.

In re WONG SING.

(District Court, N. D. California. October 21, 1897.)

No. 11,361.

1. TRIAL—OBJECTIONS TO EVIDENCE.
   An objection that the proper foundation has not been laid for the introduction of evidence otherwise relevant and competent should point out the particular and specific ground on which such general objection rests, so as to apprise the court and the party offering the evidence of the precise ground of objection.
2. SAME—APPEAL AND ERROR.
   The technical objection that the proper foundation was not laid for impeaching evidence, consisting of inconsistent statements made by the witness on a former occasion, cannot prevail on appeal, when it is apparent that the witness fully understood the particular occasion on which his former statements were made, and it is not claimed that he did not have full opportunity to explain the alleged discrepancies.
3. SAME—EXCLUSION OF CHINESE—EXAMINATION BY CUSTOMS OFFICERS.
   The customs officers have the right to question Chinese laborers seeking to land in this country to ascertain whether they are entitled to do so; and such an examination, if properly conducted, does not violate their rights, though they may, in fact, have been born in the United States. Therefore evidence of statements made during such examination, if in conflict with subsequent testimony of the same persons, may be received for the purpose of impeachment.

This was a petition for a writ of habeas corpus by Wong Sing, a Chinese person. The cause was heard upon exceptions to the report of a special referee.

Wal. J. Tuska, for petitioner.
H. S. Foote, for the United States.

DE HAVEN, District Judge. Upon consideration of the evidence returned to this court by the special referee, I concur in the conclusion reached by him that there is such a conflict between the testimony given by the petitioner and his witnesses in this proceeding, and the statements made by the same witnesses when questioned by the officers of the custom house at the time of petitioner's arrival at this port, that such testimony is not sufficient to justify a finding that the petitioner is, as claimed by him, a native-born citizen of the United States. Nor do I think the special referee committed any error in overruling the several objections made by petitioner's attorney to the questions relating to such statements asked by the district attorney upon the cross-examination of the several witnesses who

testified in behalf of the petitioner, nor in overruling objections made to the questions asked the witness Gardner for the purpose of impeachment. It may be that the district attorney did not strictly comply with the requirement of the law in laying the foundation for such impeaching evidence, but the general objection that such evidence was incompetent, irrelevant, and immaterial, and that no foundation had been laid for its introduction, was not sufficiently specific. An objection that the proper foundation has not been laid for the introduction of evidence otherwise relevant and competent should point out the particular and specific grounds upon which such general objection rests, so as to apprise the court and the party offering the evidence of the precise ground of objection to it. Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271. But, were the rule otherwise, such technical objection could not prevail here, when it is apparent that the witnesses fullv understood the particular occasion upon which their former statements were made, and it is not claimed that they did not have full opportunity to explain the alleged discrepancy between such statements and their testimony given upon the hearing. The customs officers have the right to question Chinese laborers seeking to land at a port of the United States for the purpose of ascertaining whether they are entitled so to do; and such an examination, if properly conducted, does not violate any rights of such persons, although they may, in fact, have been born in the United States; and evidence of statements made during such an examination, if in conflict with subsequent testimony of the same person, may be received for the purpose of impeaching such subsequent testimony. Of course, the court should, before rejecting the testimony of a witness upon the ground of contradictory statements made by him to the customs officers upon such examination, be satisfied that the witness fully understood the questions asked him by such officers, and that his answers thereto, as appearing in such statement, were correctly interpreted. There is nothing in this record tending to impeach the fairness of the examination conducted by the customs officers, nor any suggestion that the official interpreter did not correctly state the substance of the answers given by the petitioner and his witnesses upon the occasion of such examination. The exceptions to the report of the special referee are overruled, and the writ is discharged, and the petitioner remanded to the custody whence he was taken, for the purpose of deporting him out of the United States, and transporting him to the port whence he came.

In re WILLIS.

(Circuit Court, S. D. New York. September 15, 1897.)

1. FEDERAL CONVICTS IN STATE PRISONS—RULE OF CREDITS.

A prisoner confined in a penitentiary of New York state for an offense against the United States is not entitled to an unconditional allowance for good behavior, under Rev. St. § 5543, but to the same rule of credits applicable by the law of the state to other prisoners in the same penitentiary, under section 5544.

2. SAME—CONDITIONAL COMMUTATION—SECOND OFFENSE.
If the sentence of such a prisoner be commuted, and between the date of his discharge and the date of expiration of his full original term he is convicted of any felony, even though not for an offense against the United States, he must, under Rev. St. § 5544, incorporating, by reference, Laws N. Y. 1886, c. 21, serve in the place where confined for the later felony the unexpired term of his original sentence.

William N. Runyon, for the motion.
W. E. Kesselburgh, Jr., opposed.

LACOMBE, Circuit Judge. The petitioner here is clearly not covered by the provisions of Rev. St. U. S. § 5543, which lays down the general rule that convicts against the laws of the United States shall be entitled to an unconditional allowance for good behavior of one month in each year. He is one of the class referred to in section 5544, which provides that "all prisoners now or hereafter confined in the jails or penitentiaries of any state for offences against the United States shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary." The "rule of credits" in this state (chapter 21, Laws 1886) provides, among other things, that, whenever he shall commute sentence, the governor "shall * * * annex a condition to the effect that if any convict so commuted shall, during the period between the date of his or her discharge by reason of such commutation and the date of the expiration of the full term for which he or she was sentenced, be convicted of any felony, he or she shall * * * be compelled to serve in the prison or penitentiary in which he or she may be confined for the [later] felony * * * the remainder of the term without commutation which he or she would have been compelled to serve but for the commutation," etc. The state statute provides for a conditional commutation by instructing its officer (the governor) to insert such condition whenever he may commute sentence. That a commutation shall be invariably coupled with this condition is the "rule of credits for good behavior" which is applicable to state prisoners. The federal government does not undertake to instruct the governor of the state as to what he shall or shall not do touching federal prisoners; nor is it at all material to the case at bar that the governor did not personally commute Willis' sentence, nor "annex any conditions." The statute (section 5544) is self-executing so far as the annexing of the invariable condition to commutation is concerned. Good-conduct prisoners, by virtue of its provisions, earn a conditional commutation only, which becomes forfeited upon conviction of felony within the period of original sentence. Willis, therefore, assuming that he has failed to observe the condition, would be a federal convict who has not served the term of his imprisonment, and who has not succeeded in having his term shortened for good conduct, since his conditional commutation has become forfeited; and the remainder of such term he should be "compelled to serve in the prison * * * in which he may be confined for the [later] felony"; and such service for the remainder of the

original time is in obedience, not to any state authority, but to the original conviction in the federal court.

It is urged that the condition has not been broken, since he has committed no second offense against the laws of the United States. The language of the state statute, however, is "any felony," and the context shows that the words refer to crimes, convictions for which would bring the offender into the state prison or penitentiary. The court is referred to no state authority defining these words "any felony," and determining the question whether the provisions of the statute apply to one who, being under conviction for offense against the state laws, has had his original sentence commuted under the act of 1886, and who thereafter, and within the prescribed period, comes again into confinement in a state prison or penitentiary under conviction in a federal court of a felony against the United States. But that the words "any felony" include felonies under the state laws is self-evident, and there seems no good reason for holding that congress, when it adopted the "rule of credits" prescribed by the state, intended to change the meaning of the most important terms in which that rule is expressed. No question of jurisdiction or deprivation of rights requires any such interpretation. Having jurisdiction to impose the penalty of the full original term, the federal government had undoubted authority to couple any curtailment of that term with any conditions it chose to prescribe. It might have restricted such conditions so as to require abstention from offense against its own laws only, or it might, as it has done, require the convict who is thus enlarged, ex gratia, to continue to be a law-abiding member of the community, offending against no laws, state or federal, which he is bound to obey.

The relator, therefore, is rightly held at the expense of the federal government until he shall have filled out the full term of his conviction in the United States district court (May 13, 1885), for five years, of which he served in the Erie Penitentiary, the place of original confinement, three years and seven months only. He has not served out that full term of five years, nor is it subject to reduction under section 5543, nor has he succeeded in securing any commutation of it under the rule of credits prescribed by the state, and which, by section 5544, is made a part of the federal law. His condition is precisely the same as if he had escaped before serving out his term and been retaken. In the latter contingency there might be some question as to whether he should be held in this particular prison (Sing Sing); but, by adopting the state rule of credits without any qualification, the federal government has designated the place of his confinement as specifically as if it had been named in the sentence imposed upon him by Judge Coxe. He is not to serve out the residue of his term in Erie Penitentiary, but in the prison where his later conviction leaves him. The writ is dismissed.

UNITED STATES v. DUNBAR et al.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 360.

1. Costs—Liability of Government.
Where, in a suit by the government, a demurrer to the complaint is sustained, and judgment entered dismissing the suit, costs are not to be allowed against the government.

2. Bail—Obligation of Sureties.
In an action upon an undertaking of bail, the obligation of the sureties is in no way affected by the question whether the prosecution of the offense was barred by the lapse of time.

3. Same—Authority of United States Commissioners.
Any United States commissioner is empowered, by Rev. St. § 1014, to take bail for the appearance for trial before the proper court of one charged with any crime or offense against the United States.

4. Same—State Practice.
Under Rev. St. § 1014, relating to arrest, imprisonment, and bail in case of crimes against the United States, the purpose of the words, "agreeably to the usual mode of process against offenders in such state," was to assimilate all the proceedings for holding accused persons to answer before a court of the United States to those for similar purposes under the laws of the state where the proceeding should take place.

5. Same.
The Oregon statute declaring that, "after an indictment found and upon an appeal," a defendant cannot be admitted to bail, except by the judge or court where the action is pending, or in which the judgment appealed from is given (Hill's Ann. Laws Or. § 1463), does not impair the power of any officer designated by the United States statutes (Rev. St. § 1014) to admit a defendant to bail after indictment and before trial.

6. Same—Requisites of Bail Bond.
An undertaking of bail, taken before a United States commissioner in Oregon, and setting forth in general terms the nature of the offense charged in the indictment, failed to recite that the defendant had been indicted or ordered admitted to bail, and omitted the number of the section of the Revised Statutes alleged to have been violated, and the date of alleged commission of the offense. *Held*, that these defects were not fatal.

7. Same—Description of Offense.
Under Hill's Ann. Laws Or. § 1470, relating to bail, a charge, in an undertaking taken under Rev. St. § 1014, by a United States commissioner in Oregon, that the defendant "conspired to defraud the United States," is a sufficient statement of his crime.

8. Same—Conspiracy to Defraud.
In a bail recognizance taken under Rev. St. § 1014, and charging "conspiracy to defraud the United States," it is not essential to state the person or persons with whom defendant conspired, nor the acts done.

9. Same—Unlawful Landing of Chinese.
Under Hill's Ann. Laws Or. § 1470, relating to bail, a charge in an undertaking taken under Rev. St. § 1014, by a United States commissioner in Oregon, that defendant "unlawfully aided and abetted the landing of Chinese laborers in the United States," is a sufficient statement of his offense. Act July 5, 1884 (23 Stat. 115; 1 Supp. Rev. St. [2d Ed.] 460.)

10. Same—Production of Accused by Sureties.
Where sureties on an undertaking of bail are thereby required to produce the defendant "whenever requested to do so," no request or notice is required to bind them, except that duly given in open court at the time regularly set for his trial.

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

Dan'l R. Murphy, U. S. Atty., and Chas. J. Schnabel, Asst. U. S. Atty.

Richard V. Nixon and Chester V. Dolph, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was a suit upon two certain undertakings of bail. The court below having sustained a demurrer interposed by the defendants to the amended complaint, and the plaintiff declining to further amend, a judgment was entered dismissing the suit, with costs in favor of the defendants against the plaintiff. In so far as the judgment for costs is concerned, it was, no doubt, given through inadvertence, since in such a suit judgment for costs against the government is not allowed.

The recognizances were taken and acknowledged before a commissioner of the circuit court of the United States for the district of Oregon, and were filed with the clerk of that court, and accepted by the court, on the 17th day of July, 1893. The complaint, as amended, shows that theretofore, in the month of July, 1893, one William Dunbar was by the grand jury of the United States for the district of Oregon indicted for a violation of section 5440 of the Revised Statutes of the United States, and that on the same day there was issued out of that court, upon the indictment, a bench warrant for the apprehension of Dunbar, upon which he was on the 17th day of July, 1893, arrested by, and taken into the custody of, the marshal of the district; that, in order to secure the release of the prisoner, the defendants James S. Dunbar and Seid Back made, executed, and acknowledged before R. H. Lamson, commissioner of the circuit court of the United States for the district of Oregon, the following undertaking for the appearance of William Dunbar, to wit:

"United States of America, District of Oregon, City of ——, ss.:

"Be it remembered that on this 17th day of July, A. D. 1893, before me, a commissioner duly appointed by the circuit court of the United States for the said district of Oregon, personally came William Dunbar, James S. Dunbar, and Seid Back, and jointly and severally acknowledged themselves to owe the United States of America the sum of one thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit: The condition of this recognizance is such that if the said William Dunbar shall personally appear before the district court of the United States in and for the district aforesaid, at Portland, Oregon, whenever requested to do so, and then and there to answer the charge of having, on or about the —— day of ——, 189–, within said district, in violation of section —— of the Revised Statutes of the United States, unlawfully conspiring to defraud the United States, and then and there abide the judgment of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

W. Dunbar. [Seal.]
"James S. Dunbar. [Seal.]
"Seid Back. [Seal.]"

The complaint, as amended, alleges that upon the acceptance by the court of the above recognizance, on July 17, 1893, William Dunbar was discharged from the custody of the marshal; that thereafter, to wit, on the 7th day of May, 1895, the trial of the said William Dunbar was set for May 21, 1895, at which last-mentioned date, in the district

court of the United States for the district of Oregon, he was duly called to appear for trial; that he failed and neglected to appear at that or at any other time; and that the defendant sureties, after having been thrice called so to do, failed to produce the said William Dunbar in the said court for trial, or to furnish any excuse for his absence and failure to appear therein, whereupon the said district court declared the said recognizance forfeited. For a further and separate cause of action, the complaint, as amended, alleges that on or about the ——— day of July, 1893, the said William Dunbar was by the grand jury of the United States for the district of Oregon indicted for a violation of section 11 of the act of congress approved July 5, 1884, and that on the same day, and upon that indictment, there was issued out of that court a bench warrant for the apprehension of the said William Dunbar; that thereafter, and on the 17th day of July, 1893, pursuant to the said warrant, the said William Dunbar was arrested by, and taken into the custody of, the marshal of the United States for the district; that in order to secure the release of the said William Dunbar from the custody of the marshal the defendants James S. Dunbar and Seid Back made, executed, and acknowledged a certain other undertaking for the appearance of the said William Dunbar, in words and figures as follows, to wit:

"United States of America, District of Oregon, City of ——, ss.:

"Be it remembered that on this 17th day of July, A. D. 1893, before me, a commissioner duly appointed by the circuit court of the United States for the said district of Oregon, personally came William Dunbar, James S. Dunbar, and Seid Back, and jointly and severally acknowledged themselves to owe the United States of America the sum of five thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit: The condition of this recognizance is such that if the said William Dunbar shall personally appear before the district court of the United States in and for the district aforesaid, at Portland, Oregon, whenever required to do so, and then and there to answer the charge of having, or on about the —— day of ——, 189–, within said district, in violation of section —— of the Revised Statutes of the United States, unlawfully aiding and abetting the landing of Chinese laborers in the United States, and then and there abide the judgment of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

"W. Dunbar. [Seal.]
"James S. Dunbar. [Seal.]
"Seid Back. [Seal.]

"Taken and acknowledged before me on the day and year first above written.

"R. H. Lamson, [Seal.]

"Commissioner of the Court of the United States for the —— District of Oregon."

The complaint, as amended, alleges that the undertaking last set out was taken and acknowledged before a commissioner of the circuit court for the district of Oregon, and accepted by the court, on the 17th day of July, 1893, whereupon the said William Dunbar was discharged from the custody of the marshal; that thereafter, to wit, on the 7th day of May, 1895, the trial of the said William Dunbar was set for May 21, 1895, at which time, in the said court, he was duly called to appear for trial, but that he failed and neglected to appear at that or any other time; and that the defendant sureties, after having been thrice called to do so, failed to produce the said William Dunbar

in the said court for trial, or to furnish any excuse for his absence and failure to appear therein, in consequence of which the said district court declared the said last-mentioned recognizance forfeited. The prayer is for judgment against the defendants for the respective amounts of the two recognizances sued on, together with costs of suit.

It is contended by the appellees in support of the judgment given below (1) that the recognizances sued upon were not taken and acknowledged before any officer authorized to take or acknowledge bail in criminal cases; (2) that it does not appear from the complaint, as amended, that the defendants were ever notified to produce their principal in accordance with the terms of their undertaking; (3) that the proceedings concerning the recognizances sued on were not in accordance with the laws of the state where the recognizances were executed and the court was held; and (4) that, if the recognizances sued on show that any criminal offenses were charged against the principal, the statute of limitations had run against them.

Whether the offenses with which William Dunbar was charged were barred by lapse of time could only be determined in the prosecutions against him. The undertaking of the sureties was to answer for his appearance. That obligation did not at all depend upon or involve the question whether the prosecution of the respective offenses was barred by lapse of time. The power to take bail for the appearance for trial before the proper court of one charged with crime against the United States is expressly conferred upon—among other officers—any commissioner of a circuit court of the United States. Section 1014 of the Revised Statutes is as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, 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, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into 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 offense 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 of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

The purpose and effect of the use by congress of the words in the foregoing provision, "agreeably to the usual mode of process against offenders in such state," was to assimilate all the proceedings for holding accused persons to answer before a court of the United States to the proceedings had for similar purposes by the laws of the state where the proceeding should take place. A United States commissioner, acting under this statute, is simply a committing magistrate. U. S. v. Rundlett, 2 Curt. 41, Fed. Cas. No. 16,208; U. S. v. Horton, 2 Dill. 94, Fed. Cas. No. 15,393; U. S. v. Case, 8 Blatchf. 250, Fed. Cas. No. 14,742; U. S. v. Martin, 17 Fed. 150; U. S. v. Sauer, 73 Fed. 671. The real question, therefore, is whether the recognizances sued on are valid when tested by the requirements of the Ore-

gon statute in regard to bail. The suggestion on behalf of the appellees, that after indictment a defendant, under the Oregon statute, can only be admitted to bail by the court or judge, is not supported by the language of the statute, which is as follows:

"After an indictment found and upon an appeal a defendant cannot be admitted to bail except by the court or judge thereof where the action is pending or in which the judgment appealed from is given." Hill's Ann. Laws Or. § 1463.

This statutory provision denying to any officer or court the right to admit to bail a defendant against whom judgment has been given, and from which an appeal is pending, other than the court by which such judgment was rendered, or the judge thereof, furnishes no warrant for saying that after indictment, and before trial, the defendant may not be admitted to bail by any officer designated in section 1014 of the Revised Statutes.

Sections 1304 and 1309 of the Oregon Statutes are as follows:

"Sec. 1304. When an indictment is filed in court, if the defendant has not been arrested and held to answer the charge, unless he voluntarily appear for arraignment, the court must order the clerk to issue a bench-warrant for his arrest."

"Sec. 1309. When the crime is bailable, and the defendant require it, the officer making the arrest must take him before a magistrate of the county wherein the arrest is made or the action is pending, for the purpose of putting in bail, and thereupon such magistrate must proceed in respect thereto, according to the provisions of chapter XXIII. (XXIV.) of this Code, entitled 'Bail.'"

By section 1470 of the same statute it is provided:

"Sec. 1470. Bail is put in by a written undertaking executed by two sufficient sureties, and acknowledged before the court or magistrate taking the same. It may be substantially in the following form:

"(1) Before indictment:

"An order having been made on the —— day of ——, 18—, by A. B. (adding his official title and place of jurisdiction) that C. D. be held to answer upon a charge of (stating briefly the nature of the crime) upon which he has been duly admitted to bail in the sum of —— dollars;

"We, E. F., of (stating his place of residence and occupation) and G. H., of (stating his place of residence and occupation) hereby undertake that the above-named C. D. shall appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court; and if convicted, shall appear for judgment and render himself in execution thereof; or if he fail to perform either of those conditions, that we will pay to the state of Oregon the sum of —— dollars (inserting the sum in which the defendant is admitted to bail).

"(2) After indictment and before judgment:

"An indictment having been found on the —— day of ——, 18—, in the circuit court for the county of ——, charging A. B. with the crime of (designating it generally), and he having been duly admitted to bail in the sum of —— dollars (the remainder of the undertaking may be in the words of the form No. 1, substituting the word 'indictment' for the word 'charge') * * *."

As will be seen, the provision of the Oregon statute is not that the bond shall be in the precise form therein prescribed, but that it may be in substantially that form. The failure of the recognizances sued on to recite the fact that the defendant, William Dunbar, had been indicted, and that he had been ordered admitted to bail, as well as the omission therefrom of the number of the section of the Revised Statutes of the United States alleged to have been violated,

may, we think, be treated as immaterial. Nor do we regard as fatal the failure to insert in the bonds the precise date upon which the defendant, William Dunbar, was by the indictments alleged to have committed the respective offenses. True, these omissions evince gross carelessness on the part of the commissioner, but they are not, in our opinion, fatal.

It is further insisted upon the part of the appellees that neither of the recognizances sued on contains such a description of the offense with which the principal was charged as the statute requires. That requirement is that the bond shall designate the offense "generally." The supreme court of Oregon, in the case of Belt v. Spaulding, 17 Or. 130–134, 20 Pac. 827, held that section 1470 of the Oregon Statutes "introduced no new rule, but left the law just as it was before its enactment. In other words," said the court, "it is declaratory of the common law on that subject," which the court declared to be that the undertaking "must on its face indicate briefly the nature of the offense charged, and unless it does so it is not binding"; that this may be done by name, when the offense charged has a technical name, and, if not, then enough must be stated in the undertaking to point out clearly that a particular crime known to the law is charged. That that is the general rule is shown by the authorities cited by the court in Belt v. Spaulding. Turning to the recognizances in suit, it is seen that in one the offense charged against the principal is "unlawfully conspiring to defraud the United States," and in the other "unlawfully aiding and abetting the landing of Chinese laborers in the United States." Counsel for appellees are mistaken in saying that there is no such crime as conspiring to defraud the United States. By section 5440 of the Revised Statutes it is declared that:

"If two or more persons conspire, either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

A conspiracy, ex vi termini, imports the participation of at least two persons. In the indictment, the person or persons with whom the defendant conspires, as well as the acts done, must, of course, be stated. But no such particularity is essential in a recognizance, which need only state the general nature of the charge. In respect to the other charge, the law prohibited the landing of any Chinese laborer in the United States, and also made it a misdemeanor, subject to certain prescribed punishment, for any person to aid or abet the landing therein of any such laborer. Act July 5, 1884. That was the general nature of the second charge, as shown by the recognizance, and was, in our opinion, a sufficient designation of it.

The failure of the sureties to produce their principal for trial when called upon to do so at the time regularly set for trial was sufficient notice to them. No other notice was required.

While each of the recognizances shows upon its face a decided lack of care upon the part of the commissioner, we are of opinion that each is good in substance. Accordingly the judgment of the court

below must be reversed, and the cause remanded, with directions to overrule the demurrer to the amended complaint, with leave to defendants to answer if they shall be so advised. It is so ordered.

In re CONSIDINE.

(Circuit Court, D. Washington, N. D. October 20, 1897.)

INTOXICATING LIQUORS—CONSTITUTIONAL LAW—EMPLOYMENT OF WOMEN WHERE LIQUOR IS SOLD.

A state statute forbidding the employment of women in any saloon, beerhall, barroom, theater, or other place of amusement where intoxicating liquors are sold as a beverage (Laws Wash. 1895, p. 177), does not abridge the privileges and immunities of citizens, or deny the equal protection of the laws, within the meaning of the fourteenth amendment to the federal constitution, but is a valid exercise of the police power of the state.

This was an application by John W. Considine for a writ of habeas corpus.

Harrison Bostwick, for petitioner.

Patrick Henry Winston, Atty. Gen., for respondent.

HANFORD, District Judge. The application for a writ of habeas corpus in this case presents for decision the question whether the following statute of the state of Washington is repugnant to the constitution of the United States:

"No female person shall be employed in any capacity in any saloon, beer hall, bar room, theatre, or place of amusement, where intoxicating liquors are sold as a beverage, and any person or corporation convicted of so employing, or of participating in so employing, any such female person shall be fined not less than five hundred dollars; and any person so convicted may be imprisoned in the county jail for a period of not less than six months." Laws Wash. 1895, p. 177.

The petitioner was convicted in the superior court for Spokane county of a violation of this statute, and the judgment against him has been affirmed by the supreme court of the state of Washington. State v. Considine, 16 Wash. 358–365, 47 Pac. 755. After the judgment of the supreme court had been rendered, and the petition for a rehearing denied, he filed his petition herein for a writ of habeas corpus, alleging that he was unlawfully imprisoned under said judgment for nonpayment of the fine imposed. This court has no jurisdiction to review decisions of the supreme court of the state, upon questions of procedure in the state courts under state laws, or questions involving the interpretation or application of the provisions of the state constitution. Therefore I will only say, in answer to the argument of counsel for the petitioner, as to those questions, that the decision of the supreme court of the state is final and conclusive.

The contention of the petitioner is that, in contravention of the provisions of the fourteenth amendment to the constitution of the United States, the statute under which he was convicted does abridge the privileges and immunities of citizens of the United States; and does deny to persons within the jurisdiction of this state the equal protec-

tion of the laws, in this, that it deprives persons lawfully engaged in the liquor business of the privilege or right of employing women who are competent to contract with reference to their own services; and in this, that it deprives women of freedom in their choice of vocations, and makes it unlawful for them to engage in employment which is lawful for men.

In the opinion of the supreme court of the United States by Chief Justice Fuller in the case of Giozza v. Tiernan, 148 U. S. 657–662, 13 Sup. Ct. 723, it is declared that:

"The amendment does not take from the states those powers of police that were reserved at the time the original constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all, under like circumstances, in the enjoyment of their rights; but it was not designed to interfere with the power of the state to protect the lives, liberty, and property of its citizens, and to promote their health, morals, education, and good order. Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. 357; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930."

The following paragraph from the opinion of the supreme court by Mr. Justice Harlan, in the case of Plumley v. Massachusetts, 155 U. S. 461–482, 15 Sup. Ct. 161, also bears directly upon the question in this case:

"We are not unmindful of the fact—indeed, this court has often had occasion to observe—that the acknowledged power of the states to protect the morals, the health, and safety of their people by appropriate legislation sometimes touches, in its exercise, the line separating the respective domains of national and state authority. But in view of the complex system of government which exists in this country, 'presenting,' as this court, speaking by Chief Justice Marshall, has said, 'the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union,' the judiciary of the United States should not strike down a legislative enactment of a state,—especially if it has direct connection with the social order, the health, and the morals of its people,—unless such legislation plainly and palpably violates some right granted or secured by the national constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern."

This statute is general in its scope, and applies equally to all persons similarly situated; it is not, therefore, in any sense, partial or arbitrary. It was not enacted to do injury or work injustice. On the contrary, the intent of the legislature is manifest to check the tendency towards immorality of the association of the sexes in places of resort where intoxicating beverages are sold and where the worst passions are aroused.

It is true that the statute does not appear to be aimed in the most direct manner at the evil tendencies of association of the sexes in drinking places. Criminality, under the statute, consists in the employment of female persons in such places, and it forbids the employment of women for any service, going to the extent of forbidding the engagement of actresses in theaters wherein liquor is sold, although the players may have nothing whatever to do with the business of serving drinks; and a point is made by petitioner that the legislature has failed to touch the evil thing, for there is no prohibition in the law against women resorting to such places, or consorting with men

therein. This criticism appears to be just, and yet it may be said, in defense of the law, that it has been customary from time immemorial for legislatures, in enacting new laws, to have in mind existing and known evils, and to construct statutes with reference to particular forms of wrongdoing which have attracted public attention. There can be no doubt that this statute was contrived because the particular resorts where bar-maids and box-rustlers find regular employment, and may be found in habitual attendance, have offended the moral sensibilities of the people. If, in its result, the statute does not effect the reformation intended, it is for the legislature to consider whether it will enact a more drastic law. But the constitutionality of a law is not to be tested by questioning its efficacy. Whether well designed to accomplish the purpose intended or otherwise, the law is a police regulation, and clearly within the police power of the state, which has not been taken away by the fourteenth amendment. Petition denied.

In re LEWIS et al.

(District Court, D. Washington, N. D. October 23, 1897.)

1. OFFICER EXCEEDING HIS AUTHORITY — TO WHOM ANSWERABLE — CRIMINAL LIABILITY.
   An officer who, in the performance of what he conceives to be his official duties, transcends his authority, and invades private rights, is answerable therefor to the government under whose appointment he acts, and to individuals injured by his action; but where there is no criminal intent he is not liable to answer the criminal process of another government.
2. HABEAS CORPUS—WRIT AGAINST STATE OFFICER—FEDERAL COURT—EXTENT OF INQUIRY.
   Federal courts have authority in habeas corpus proceedings to inquire into the guilt or innocence of persons committed on preliminary examination by a state tribunal on a criminal charge for acts done in the service of the United States, so far as to determine whether the acts were done wantonly and with criminal intent.
3. CHARGE OF ROBBERY—SUFFICIENCY OF EVIDENCE.
   A charge of robbery cannot be sustained by evidence that the defendants participated in a search of premises and seizures made under a warrant technically insufficient, and that they acted in excess of the authority given by the warrant.

The petitioners, being special employés of the treasury department of the United States, assisted in searching the premises of one Yee Gee, at Port Townsend, under a search warrant issued by a United States commissioner. At the time of the search, certain papers, supposed to contain incriminating evidence against Yee Gee, were seized. Afterwards the petitioners were arrested on a charge of robbery, and upon a preliminary examination were committed on that charge in default of bail. The United States district attorney sued out a writ of habeas corpus in their behalf. Upon the facts appearing by the sheriff's return and testimony, ordered that the petitioners be discharged from custody.

Wm. H. Brinker, U. S. Atty., for petitioners.

A. R. Colman and R. W. Jennings, for respondent.

HANFORD, District Judge. The motion in behalf of the respondents to remand will be denied, and I shall order that the petitioners be discharged from custody. In deciding this case, I do not mean to say that the warrant which Mr. Kiefer issued was a lawful warrant, nor that the proceedings under it were proper proceedings. I do not mean to say that the petitioners were lawfully discharging their official duties in what they did. In my opinion, the warrant itself was improvidently and erroneously issued, and the proceedings were all ill-advised, and conducted with bad judgment. But where an officer, from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority, and invades the rights of individuals, he is answerable to the government or power under whose appointment he is acting, and may also lay himself liable to answer to a private individual who is injured or oppressed by his action; yet where there is no criminal intent on his part he does not become liable to answer to the criminal process of a different government. With our complex system of government, state and national, we would be in an intolerable condition if the state could put in force its criminal laws to discipline United States officers for the manner in which they discharge their duties. Or, take it the other way, if the government of the United States should prosecute as criminals sheriffs and other ministerial officers, justices of the peace, and judges of superior courts for errors of judgment, or ignorance, causing blunders in the discharge of their duties, it would bring on a condition of chaos in a short time.

Counsel is mistaken, I think, in assuming that the court in this proceeding is so limited in its powers that it cannot consider the question of whether the defendants are guilty or not guilty of the charge of robbery upon which they were committed. It is true that this court could never adjudicate that question finally, so as to convict and punish these men for robbery if they were robbers; but in a proceeding of this kind it is absolutely necessary for the court to consider the question so far as to determine whether the officers acted wantonly and with criminal intent, or whether, in so far as their acts may be regarded as wrongful, they were mere errors of judgment. Take, for instance, the Neagle Case. 10 Sup. Ct. 658. It is not to be conceived that, if Neagle had actually committed a murder, the federal court would have shielded him from punishment. Suppose that Judge Terry had made no assault upon Judge Field, and there were no such appearances as to give reasonable ground to a person in the situation that Neagle was in to suppose that it was necessary to use a deadly weapon in defense of Judge Field, and that while acting as a protector for Judge Field, in accordance with instructions from the attorney general of the United States, he had wantonly shot and killed Judge Terry, or some other man, so that his act would have been an actual murder; certainly Judge Sawyer and the supreme court of the United States would not have justified the use of the writ of habeas corpus to shield him from punishment. If the marshal of the United States, whose duty it is to attend ses-

sions of this court, and to preserve order, should kill a man to prevent him from killing the judge on the bench, or any other officer of the court, while in session, the court would go to the last extremity in protecting the marshal against prosecution or persecution for that act. But suppose, while the court is in session, the marshal, without any justification or excuse, wantonly kills a man in the court room, this court would not be competent to deal with him according to his deserts, for it could do no more than punish him for contempt; but he should not, on that ground, be exempt from punishment for such criminal act. This court would not issue its process to shield him from prosecution before the tribunal having jurisdiction. Recently a man supposed to be guilty of a number of murders in Australia was apprehended on board of a vessel before she arrived at her port of destination in this country. If the officer in pursuit of the fugitive in that case had committed a mistake in identifying the person, and had arrested a man for whose arrest the warrant gave him no authority, and had taken him, with his goods and property, forcibly from the vessel, then, in harmony with the argument for the respondent in this case, he might be held guilty of piracy, the punishment for which is death; for if, in this case, the seizure of papers and property not authorized by Judge Kiefer's warrant makes a case of robbery, then the forcible abduction of a man, and the taking of his personal effects on board a vessel on the high seas, without a lawful warrant, would make out a case of piracy. Marshals and sheriffs very often arrest persons whom they have no right to arrest. In such cases they may subject themselves to censure, and, if substantial injury is done, even where the element of bad faith is lacking, the officer may subject himself to liability for damages to the injured party; but an officer in such case cannot be subjected to punishment as a criminal for mere errors, or mistakes, or defects in the warrant which he attempts to serve. It would be a monstrous thing if an officer who should, by mistake, take into custody a person other than the one designated by a warrant, could be subjected to punishment as for a felonious kidnapping or abduction of a person.

The undisputed and established facts in this case are that a warrant was issued by an officer authorized by the laws of the United States to issue warrants in proper cases. These petitioners were in the service of the government of the United States, and were acting in and about matters which pertained to their duties as public officers. In going with the deputy marshal, who had this warrant issued to him, they went by request, and with his sanction; and all that they did was in an official capacity, without any private or individual malice, and without any felonious intent to commit a robbery or to do any criminal act. According to the evidence, they did things which, in my judgment, they had no right to do. It is my opinion that they went beyond the line to which the warrant authorized them to go, and pried into matters which the warrant did not authorize them to pry into. All that is plain enough, but the felonious intent necessary to make robbers of them is entirely lacking. If they were guilty of robbery, Judge Kiefer is a robber, and

Deputy Marshal McLaughlin is a robber, and Mr. Cullom is a robber. Why pick out Mr. Lewis and Mr. Gardner as the robbers? They were simply acting in concert with others who were more in the position of chief actors than they were. The bare statement that these men may be sent to the state penitentiary under conviction for robbery shows that the idea is an absurdity. The charge of robbery cannot be sustained by evidence that they participated in a search of premises and seizures made under a warrant which is technically insufficient, and that they acted in excess of the authority which the warrant gave. There being no ground for a criminal charge under the laws of the state of Washington, it is the duty of this court to protect the petitioners, as federal officers, against further prosecution for acts done under color of authority in the performance of official duty. These are my views of the case, and an order will be made accordingly, discharging the petitioners.

WISE v. CHEW HING LUNG et al.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 362.

CUSTOMS DUTIES—CLASSIFICATION—TAPIOCA FLOUR.

"Tapioca flour," which is made from the root of the shrub variously known as the manihot, cassava, manioc, or mandioc, was dutiable, under the tariff act of 1890, as a preparation, "from whatever substance produced, fit for use as starch," under paragraph 323, and was not free of duty as "tapioca, cassava, or cassady," under paragraph 730; it appearing that the article is fit for, and is principally used in the United States, as a starch. 77 Fed. 734, reversed. Townsend v. U. S., 5 C. C. A. 489, 56 Fed. 222, distinguished.

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

Saml. Knight, Asst. U. S. Atty., for appellant.

Page, McCutcheon & Eells, for appellee.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The question in this case is whether certain merchandise imported into this country at the port of San Francisco is governed by the provisions of paragraph 323, or by those of section 2 of paragraph 730, of the tariff act of 1890. Paragraph 323 reads: "Starch, including all preparations, from whatever substance produced, fit for use as starch, two cents per pound." Section 2 of paragraph 730 is as follows: "Tapioca, cassava, or cassady, free." The board of appraisers admitted the merchandise free, and its decision was, on appeal to the circuit court, affirmed. 77 Fed. 734. From that decision the present appeal is brought by the collector.

It appears from the findings of the court below, which were largely based upon stipulation of the respective parties, that the importation in question consists of starch grains contained in and derived from

the root botanically known as jatropha manihot; that in the West Indies this root is known as cassava or manioc; in Brazil, as mandioc, —all of which names indicate the same thing, without any change of condition or character. The manihot, cassava, manioc, or mandioc, by whichever name called, is a shrub, of which there are at least two varieties. The root of the sweet cassava may be eaten with impunity; that of the bitter, which is most extensively cultivated, abounds in an acrid, milky juice, which renders it highly poisonous if eaten in the recent state. Both varieties contain a large proportion of starch. The starchy substance constituting the importations involved in the present controversy consists of the starch grains obtained from the manihot root by washing, scraping, and grating or disintegrating it into a pulp, which, in the bitter variety, is submitted to pressure, so as to separate therefrom the deleterious juices. The starch grains settle, and the juice is subsequently decanted, leaving as a deposit a powder, which, after repeated washings with cold water, and after being dried, is nearly pure starch, and is insoluble in cold water. This is the substance constituting the importations under consideration. If sufficient heat and motion are afterwards applied to this substance, a mechanical change takes place, the grains become fractured, and thereby agglutinated. This latter substance is partly soluble in cold water, and is granulated tapioca, known in commerce as pearl and flake tapioca. The importations in question were from China, made between November 2, 1893, and June 6, 1894, and were made chiefly for the purpose of supplying Chinese laundrymen, who use the article as starch, and to a slight extent also for food purposes. Its use for such purposes is, however, limited to the Chinese, except that in some instances, in San Francisco, this substance is used for starch purposes in their business by white laundrymen, by mixing it with wheat or corn starch. Wheat and corn and potato starches are the starches commonly used in the United States. The substance in question is not imported into San Francisco by others than Chinese. Among the white people dealing with the Chinese on the Pacific coast the substance is commonly known as "Chinese starch." In the general markets of the United States it is commercially known as "tapioca flour." In those markets the term "tapioca" includes that article in three forms, viz. flake tapioca, pearl tapioca, and tapioca flour. The same substance is imported from China, and used in the Eastern states for starch purposes,—by calico printers and carpet manufacturers to thicken colors, for bookbinding, in the manufacture of paper, filling in painting, manufacture of a substitute for gum arabic and other gums, and also as an adulterant in the manufacture of candy and other articles. The court below further found that:

"The article in question is fit for use as starch in laundry work, in the sense that by its use clothes can be starched; but it is not commonly used in such work as starch throughout the United States, and is not known to be so used except on the Pacific coast, as hereinbefore stated."

A precisely similar article was under consideration by the circuit court of appeals for the Second circuit in 1893. Townsend v. U. S., 5 C. C. A. 489, 56 Fed. 222. The evidence presented to the court in

that case failed to show that the article in question was a preparation fit for use as starch. The court concluded its opinion in these words:

"If tapioca flour was, in our opinion, a preparation fit for use as starch, the question would have arisen whether it was specially provided for under paragraph 323; but, the conclusion being that it was not such a preparation, it has a place only in the free list."

The testimony there was such that the court said:

"The article has never been sold as a starch, and is not considered in this country as adapted to the ordinary purposes of that article, and has never been manufactured into commercial starch, but it is chemically a starch. The term 'preparations fit for use as starch' means preparations which are actually, and not theoretically, fit for such use; which can be practically used as such, and not which can be made, by manufacture, fit for such use. Tapioca flour is used for purposes which are analogous to those for which starch is used. It is not used, though it probably could, by adequate preparation, be used. for the same purposes, unless its use as a sizing can be called the same purpose. The testimony of the witness upon that subject was not sufficient to justify the stress which the board of general appraisers placed upon it. The very suggestive evidence of the unsuitableness of tapioca for commercial use as starch is that, although it is much cheaper than starch made in this country, it does not come into commercial competition with starch made here." 5 C. C. A. 490, 56 Fed. 224.

In the case at bar the evidence is, and the court so found, that with the imposition of a duty of two cents a pound the cost of the article in question has been substantially as great as that of ordinary starches; a little more than that of the cheapest, and a little less than that of the best, starches. A comparison of the facts as made to appear in the Townsend Case with those established in the case at bar very clearly shows that they are almost entirely dissimilar, except in respect to the fact that the article in question is, chemically, almost a pure starch. In the present case it is shown that it is not only chemically almost a pure starch, but that it is commercially known on the Pacific coast as "Chinese starch," and is largely used by the Chinese for the starching and stiffening of clothes, and to some extent by white people in their laundry work. It is further shown in the present case that the same article is imported from China, and used in the Eastern states for starch purposes,—by calico printers and carpet manufacturers to thicken colors, in the manufacture of paper for bookbinding, filling in painting, manufacture of a substitute for gum arabic and other gums, and also as an adulterant in the manufacture of candy and other articles. The evidence and findings in the present case not only show that the article in question is a preparation fit for use as starch, but that its chief use in the United States is as a starch, and that only to a very limited extent is it used for food purposes.

The case here presented for decision is, therefore, very different from that before the circuit court of appeals for the Second circuit, entitled "Townsend v. U. S." The court here must decide, as the court there did, upon the facts before it. This is by no means saying that the tariff law means one thing in San Francisco and another in New York. Tariff laws are laws of general application, and are made, not for the government of particular ports, but for the government of

the whole country, including all of its ports. But courts do not make facts.' They find them, when called upon to do so, upon legal evidence properly introduced, and upon the facts as thus established their judgment must be based. Tapioca flour being here shown to be a preparation fit for use as starch, the question arises, which the circuit court of appeals for the Second circuit said did not arise in the Townsend Case, whether it was specially provided for under paragraph 323 of the act of 1890. It will be well to insert again the two clauses of the act in question. Paragraph 323: "Starch, including all preparations, from whatever substance produced, fit for use as starch, two cents per pound." Section 2 of paragraph 730: "Tapioca, cassava or cassady, free." That the article under consideration is prepared from the root of the mandioc plant, and is its first product, is conceded. Being a flour, it is a root flour. The application of a certain degree of heat and of motion to the flour will convert it into the flake and pearl tapioca, respectively, of commerce. These are well-known food products, and clearly entitled to free entry, under section 2 of paragraph 730 of the act of 1890. Does the fact shown by the findings and evidence, that in the general trade of the United States the term "tapioca" is understood to include the flour as well as flake and pearl tapioca, entitle the flour to free entry also? That is undoubtedly so, unless congress in the act in question has made a specific provision covering the flour, for the rule is well settled that in tariff legislation the designation of an article eo nomine must prevail over a general description that would otherwise embrace it. Homer v. Collector, 1 Wall. 486; Reiche v. Smythe, 13 Wall. 162; Movius v. Arthur, 95 U. S. 144; Arthur v. Lahey, 96 U. S. 112; Arthur v. Rheims, Id. 143. But a name under which an article is commercially known will not control a specific provision respecting it. Magone v. Heller, 150 U. S. 70, 14 Sup. Ct. 18. In that case certain provisions of the tariff act of 1883 were involved. "Schedule A—Chemical Products," of that act, imposed duties on various compounds of "potash," including "nitrate of, or saltpetre, crude, one cent per pound. Nitrate of, or refined saltpetre, one and one-half cents per pound. Sulphate of, twenty per centum ad valorem." "Bichromate of potash, three cents per pound." 22 Stat. 493. Among the articles exempt from duty by the free list of the same act were the following: "Bone dust and bone ash for manufacture of phosphate and fertilizers. Carbon, animal, fit for fertilizing only. Guano, manures and all substances expressly used for manures." Id. 515. The court said: "Congress, for the promotion of agriculture, evidently intended that, if a substance which might be described by the name of an article subject to duty under Schedule A was, within the description in the free list, of use for fertilizing the ground, it should be exempt from duty;" and, accordingly, whether the article which was there the subject of importation, and which was chemically "sulphate of potash" was entitled to free entry or not, was made to depend upon whether it was "expressly used for manure" in the sense defined by the court. As has been seen, congress, by the act here under consideration, put tapioca, cassava, or cassady on the free list; but in the same act it also provided that starch, including all preparations, from whatever

substance produced, fit for use as starch, should pay a duty of two cents per pound. Under the tariff act of July 30, 1846, starch and tapioca were made dutiable at 20 per cent. ad valorem. 9 Stat. 47. The act of March 2, 1861, continued the duty on starch at 20 per cent. ad valorem, but lowered the duty on tapioca to 10 per cent. ad valorem. 12 Stat. 188, 190. By the act of June 30, 1864, it was provided that starch made of potatoes should pay two mills a pound duty, starch made of corn or wheat three mills a pound, and starch made of rice or any other material one cent a pound; the duty on tapioca remaining 10 per cent. ad valorem. 13 Stat. 266. In the Revised Statutes root flour, tapioca, cassava, or cassady are upon the free list, and a duty imposed on "starch made of potatoes or corn one cent per pound and twenty per cent. ad valorem; made of rice or any other material, three cents per pound and twenty per cent. ad valorem." Rev. St. pp. 481, 488, 489. By the act of March 3, 1883, the duty on potato or corn starch was placed at two cents a pound, and on other starch at two and one-half cents a pound; and by the same act root flour, tapioca, cassava, or cassady, and arrowroot were placed on the free list. 22 Stat. 503, 517, 520, 521. The law so stood at the time of the passage of the act of 1890, in which act are the provisions already twice quoted, and which act omitted from the free list root flour, but inserted therein "arrowroot, raw or manufactured." While root flour, tapioca, cassava, or cassady remained upon the free list, with a duty imposed on the various starches at so much a pound, it was held in a number of cases by the treasury department that flour made from the mandioc root was not embraced by the provisions in respect to starch, but was entitled to free entry. Some of those decisions proceeded upon the ground that the flour was one form of tapioca, and therefore embraced by that term, and some of them upon the ground that the flour, being made from the mandioc root, was a root flour, and entitled to free entry as such. Decisions of Treasury Department, §§ 3161, 5802, 7971, 9031. And in Chung Yune v. Kelly, 14 Fed. 639, Judge Deady held that flour made from the manihot root, whether known as root flour, cassava, or tapioca, having been expressly exempted from duty by the then existing statute, was not included in the provisions imposing a duty on starches, although largely composed of starch granules, and fit for use as starch. The fitness of this root flour, included within the term "tapioca" as understood by the general trade of the United States, for use as starch in laundry work, as well as in the arts and manufactures, is clearly shown by the evidence and the findings of the court below. Indeed, it is shown that in this country, at least, it is chiefly so used. In view of the former legislation, to which reference has been made, and of the decisions that were based upon it, it does not admit of doubt, we think, that when congress, by the act of 1890, dropped root flour from the free list, and imposed a duty, not only on starches, as theretofore, but also on "all preparations, from whatever substance produced, fit for use as starch," it intended to add to the protection of American starches, and to make all root flour fit for use as starch, from whatever root produced, and under whatever generic name known, pay a duty at the prescribed rate. There is

nothing to the contrary in the case entitled Townsend v. U. S., 5 C. C. A. 489, 56 Fed. 222. The government's case there was, of course, ended by the failure to make it appear that the article in question was fit for use as starch. The learned counsel for the respondents in the present case, in a supplemental brief, refer to the action of the last congress in respect to the tariff act just enacted, known as the "Dingley Bill," as sustaining their construction of the act of 1890. It is said that the Dingley bill, as introduced in the house of representatives, provided for a duty of one-half of one cent per pound on "tapioca, cassava, or cassady, farina, and sago, in flake, pearl, or flour," and that, as enacted, the article tapioca was transferred to the free list, and no mention made of flour, flake, or pearl tapioca; while in the same bill as introduced and as enacted provision was made for a duty on starch and "preparations" fit for use as starch. To what extent, if at all, the latter act was influenced by the decision in the Townsend Case and by the various rulings made by the treasury department under the provisions of the act of 1890 known as the "McKinley Bill," and the subsequent tariff act known as the "Wilson Bill," may be proper subjects for consideration when an interpretation of the provisions of the Dingley bill is demanded. The question does not arise in the present case, the decision of which involves only the true meaning of the act of 1890. What congress meant by that act is not aided by its act in 1897. Judgment reversed, and cause remanded, with directions to the court below to enter judgment upon the findings in accordance with the prayer of the petition.

UNITED STATES v. JONAS et al.

(Circuit Court of Appeals, Third Circuit. November 3, 1897.)

No. 36.

1. Customs Duties—Classification—Hemstitched Initial Handkerchiefs.
   Cotton hemstitched handkerchiefs, with an initial embroidered thereon, were dutiable under the act of October 1, 1890, as "handkerchiefs composed of cotton or other vegetable fiber," under paragraph 349, Schedule I, and not as "embroidered and hemstitched handkerchiefs," under paragraph 373. U. S. v. Harden, 15 C. C. A. 358, 68 Fed. 182, approved.
2. Same—Evidence of Commercial Designation.
   In determining whether hemstitched handkerchiefs, with a single initial embroidered thereon, are "embroidered and hemstitched handkerchiefs," in the meaning of the tariff law, it is proper to admit evidence that the goods in question were commercially known as "hemstitched initial handkerchiefs," and that "embroidered and hemstitched handkerchiefs" was a commercial designation for a well-known class of goods, from which such initial handkerchiefs were excluded.

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

James M. Beck and Francis F. Kane, for appellant.

W. Wickham Smith, for appellee.

Before SHIRAS, Circuit Justice, ACHESON, Circuit Judge, and KIRKPATRICK, District Judge.

ACHESON, Circuit Judge. This is an appeal from a judgment of the circuit court in a proceeding brought by the collector of the port of Philadelphia under the fifteenth section of the customs administrative act of June 10, 1890, to review a decision of the board of United States general appraisers as to the classification and rate of duty on certain imported merchandise, consisting of cotton hemstitched handkerchiefs with an initial embroidered thereon. The collector of the port of Philadelphia assessed a duty of 60 per cent. ad valorem upon these handkerchiefs under paragraph 373, Schedule J., of the act of October 1, 1890, as "embroidered and hemstitched handkerchiefs." The protests claimed that they were properly dutiable at 50 per cent. ad valorem, as "handkerchiefs composed of cotton or other vegetable fiber," under paragraph 349 of the same act and Schedule I. The board of general appraisers, after examining witnesses, rendered a decision sustaining the protests. The board of appraisers found as facts that the merchandise in question "is commercially known and designated as hemstitched initial handkerchiefs," and that the "term 'embroidered and hemstitched handkerchiefs' is a term of commercial designation, describing a well-known and generally recognized class of handkerchiefs from which initial handkerchiefs like those in these cases are excluded." After the case was brought into the circuit court, under an order of the court additional evidence was taken both by the importers and on the part of the government. Upon the whole proofs the court affirmed the decision of the board of appraisers that the merchandise in question was properly dutiable at only 50 per cent. ad valorem under paragraph 349, Schedule I, of said act.

The question of the dutiable classification under the act of October 1, 1890, of cotton hemstitched initial handkerchiefs, was considered by the United States circuit court of appeals for the Second circuit, in the case of U. S. v. Harden, 15 C. C. A. 358, 68 Fed. 182, and that court, sustaining a decision of the board of general appraisers, held that such handkerchiefs were not dutiable at 60 per cent. ad valorem, as "embroidered and hemstitched handkerchiefs," under paragraph 373, but at 50 per cent., under paragraph 349. The court in its opinion stated two grounds for its conclusion, namely, that "the record abundantly discloses that, in the speech of commerce, these goods, though embroidered with an initial, were not classified or regarded as embroidered"; and that, apart from the question of commercial designation, "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." Certainly this decision is entitled to great respect. We do not, however, regard it as positively controlling here, especially in view of the new evidence before us. We have therefore given to the question of the dutiable classification of this merchandise an independent investigation.

In announcing the result of our consideration of this record, we do not deem it to be necessary to enter upon any extended discussion of the evidence. The above-recited findings of the board of general

appraisers, with respect to the commercial designation of the two classes of handkerchiefs mentioned by them, were fully warranted by the proofs before the board. Indeed, the great body of those proofs was against the government. The evidence upon the subject of commercial designation taken under the order of the circuit court was less one-sided. A number of witnesses testified there in favor of the government. Having regard, however, to the experience and means of knowledge of the several witnesses, the weight of the testimony taken in court seems to us to be with the importers. Basing our conclusion upon the whole evidence, we are of the opinion that the findings of fact made by the board of general appraisers upon the subject of commercial designation should not be disturbed.

We cannot agree with the counsel for the government in their contention that the evidence of trade designation was inadmissible or inapplicable here. In Robertson v. Salomon, 130 U. S. 412, 415, 9 Sup. Ct. 559, 560, the supreme court said: "The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws. * * * But, if the commercial designation fails to give an article its proper place in the classifications of the law, then resort must necessarily be had to the common designation." Again, in Twine Co. v. Worthington, 141 U. S. 468, 471, 12 Sup. Ct. 55, 56, the court declared: "It is a cardinal rule of this court that, in fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market when the law was passed will control their classification, without regard to their scientific designation, the material of which they are made, or the use to which they may be applied." In Toplitz v. Hedden, 146 U. S. 252, 256, 13 Sup. Ct. 70, 72, the court said: "If the commercial designation of the article gave it its proper place in the classification of the statute, resort to the common designation was unnecessary and improper." These principles were broadly reaffirmed in the still more recent case of Cadwalader v. Zeh, 151 U. S. 171, 14 Sup. Ct. 288. In our opinion, the evidence here produced to show that the term "embroidered and hemstitched handkerchiefs" was and is a commercial term, describing a class of merchandise which did not and does not include initial handkerchiefs like those involved in this proceeding, fully met the requirements of the adjudged cases.

Finally, aside altogether from the question of commercial designation, it seems to us that the embroidering of an initial upon a handkerchief does not make it an "embroidered handkerchief," either according to common understanding and speech or within the fair meaning of the act of October 1, 1890. The court of appeals for the Second circuit well said: "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." To the common apprehension, we think, the term "embroidery," as applied to a handkerchief, implies ornamentation, whereas an initial, whether embroidered or

otherwise affixed upon the handkerchief, is but a mark of identification. The fact that the expense of embroidering the initial forms a considerable proportion of the entire cost of the handkerchief is not material. This additional expense does not make it an embroidered handkerchief. It is still an initial handkerchief, both in commercial and in popular designation. The decision and judgment of the circuit court are affirmed.

STROM MANUF'G CO. v. WEIR FROG CO.

(Circuit Court of Appeals, Sixth Circuit. November 1, 1897.)

1. PLEADING IN PATENT CASES—DEMURRER TO BILL.
   When the case as presented is clear, and the court finds no difficulty in understanding the character and scope of the invention from the patent itself when tested by the common knowledge pertaining to it, and thereupon discerns that the patent is not sustainable, the proper course is to dispose of the case on demurrer, and thus put an end to useless litigation.
2. PATENTS—NOVELTY AND INVENTION—SUBSTITUTION OF MATERIALS.
   The substitution of one material for another, especially of kinds so intimately allied as those of cast and wrought iron or steel, involves no invention, nor are the products thereof patentable for the reason that one may possess greater advantages than the other.
3. SAME—RAIL BRACES.
   There is no patentable invention in swaging, or striking up by means of a die from a blank of malleable iron or steel, a rail brace of a form which had previously been made of cast metal.
4. SAME.
   The Alkins patent, No. 352,286, for improvements in the manufacture of rail braces used on railroad tracks, is void for want of invention.

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

This was a suit in equity by the Strom Manufacturing Company against the Weir Frog Company for alleged infringement of the Alkins patent, No. 352,286, for an improvement in rail braces. On a demurrer to the bill, the circuit court held that the patent was invalid on its face for want of patentable invention, and accordingly entered a decree dismissing the bill. 75 Fed. 279. From this decree the complainant has appealed.

Philip C. Dyrenforth and Geo. S. Baily, for appellants.

Wood & Boyd, for appellee.

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

SEVERENS, District Judge. The bill of complaint in this case charges the defendant with infringing certain letters patent issued November 9, 1886, to Charles Alkins, being No. 352,286, for new and useful improvements in the manufacture of rail braces used in the construction of railroad tracks, more especially about switches and curves in the track where the side pressure of the wheels of cars moving on the track is greatest. The rights secured by these letters

patent were subsequently assigned to the complainant. The bill is in the usual form, and prays not only for an injunction, but for an accounting. The specifications of the patent relate to a rail brace or support "struck up by dies from a blank plate of wrought or malleable iron or steel, in such a manner as to convert the blank into a suitable base provided with a hollow abutment adapted to engage the side of the rail in order to effectively brace the same." The objects of the invention, as stated in the specifications, were:

"First. To produce at a reduced cost and in a more convenient way a rail brace possessing in a high degree both strength and durability, and involving all of the advantages without the disadvantages of the old construction of rail braces.

"Second. To rapidly and economically produce a rail brace possessing all of the necessary features of strength, durability, and adaptability to its destined purpose, and at the same time involving the employment of considerably less metal than in the old construction of brace, whereby a saving in material is effected and the cost of production lessened, without weakening or otherwise detracting from the serviceability of the brace.

"Third. To effect a considerable lessening of the time and labor heretofore incident to the manufacture of rail braces, thereby reducing the cost of their manufacture, and permitting large orders to be filled rapidly."

The claims founded on the specifications are 11 in number, the first 5 of which relate to the art or process of manufacturing such braces, the sixth, seventh, and eighth to the blank piece of metal appropriately formed and trimmed on which such rail braces are constructed, and the ninth, tenth, and eleventh to the rail brace itself as formed.

The defendant demurred to so much of the bill as is founded upon claims 1, 2, 3, 6, 9, and 10 of the patent, upon the following grounds:

"(1) That said bill does not contain any matter of equity whereon this court can ground any decree or give to the plaintiff any relief against this defendant on account of said claims 1, 2, 3, 6, 9, and 10 of said patent.

"(2) That the alleged improvements specified in said claims were not new and patentable at the time of the alleged invention thereof, inasmuch as before that time it was the common and general knowledge of the public, of which the court will take judicial notice, that the art of striking up metal blanks into hollow articles was old; that the shape of the article produced depended on the form of the dies used; and that it has been held not to be invention to change the form of a die so as to make a new-shaped article under it.

"(3) That cast rail braces of the character and form of the patented one, with solid abutments, being admitted by said bill to be old before the date of the alleged invention, it is not shown by said bill that there was any invention in making the abutment hollow, that being a well and generally known result of the common practice of the art of striking up metal into any hollow form, of which the court will take judicial notice, and no special or other means than the public possessed is described in said patent for the accomplishment of this result."

To so much of the bill as relates to the other claims, the defendant answered, denying that the matter of the invention was new and useful, and further denying that the patentee was the first inventor thereof. The answer also insisted that, in view of the state of the art at the time of the alleged invention, "the subject of the last-mentioned claims did not involve invention." After the lapse of several months, the complainant set the demurrer down for hearing, and filed a replication to the answer; the defendant at the same time mov-

ing for the dismissal of so much of the bill as was covered by its answer. No proofs were offered within the time prescribed by the rules, nor at any time, in support of that portion of the bill which the defendant answered. Upon the hearing of the case in the court below, the demurrer was upheld, upon the ground that no invention was displayed in the supposed improvement set out in the patent. The bill was dismissed, and the complainant has appealed. No criticism is made upon the action of the court in the dismissal of the bill in respect of the claims to which the answer was directed, and the appeal as presented to us by counsel challenges only the decision of the court in sustaining the demurrer, which concerns the first, second, third, sixth, ninth, and tenth claims of the patent.

In support of the appeal it is first contended that the court erred in disposing of the case made by the bill on demurrer. It is claimed that this course was too summary, and that the justice of the case could have been better subserved by awaiting the proof and obtaining the aid of those conversant with the art in elucidation of the matter of the invention. But it is no longer open to question that where the case as presented is clear, and the court finds no difficulty in understanding the character and scope of the invention from the patent itself when tested by the common knowledge pertaining to it, and thereupon discerns that the patent is not sustainable, the proper and expedient course is to dispose of the case on demurrer, and thus put an end to useless litigation. Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745; Richards v. Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831; American Fibre Chamois Co. v. Buckskin Fibre Co., 37 U. S. App. 742, 18 C. C. A. 662, and 72 Fed. 508.

The proper course to be pursued when a question of the propriety of such action is presented was stated by Judge Taft in delivering the opinion of the court in the case of American Fibre Chamois Co. v. Buckskin Fibre Co., 37 U. S. App. 742, 18 C. C. A. 662, and 72 Fed. 508, thus:

"The rule is now well settled that a defendant to a patent infringement bill may raise the question, on demurrer, whether the alleged invention, as disclosed by the specification of the patent, is devoid of patentable novelty or invention. Richards v. Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831; West v. Rae, 33 Fed. 45. It is also well settled that, in considering the question of the validity of a patent on its face, the court may take judicial notice of facts of common and general knowledge tending to show that the device or process patented is old or lacking in invention, and that a court may refresh and strengthen its recollection and impression of what facts were of common and general knowledge at the time of the application for patent by reference to any printed source of general information which is known to the court to be reliable, and to have been published prior to the application for the patent. Brown v. Piper, 91 U. S. 37. The presumption from the issuance of the patent is that it involves both novelty and invention. The effect of dismissing the bill upon demurrer is to deny to the complainant the right to adduce evidence to support that presumption. Therefore the court must be able, from the statements on the face of the patent, and from the common and general knowledge already referred to, to say that the want of novelty and invention is so palpable that it is impossible that evidence of any kind could show the fact to be otherwise. Hence it must follow that, if the court has any doubt whatever with reference to the novelty or invention of that which is patented, it must overrule the demurrer, and give the complainant an opportunity by proof to support and justify the action of the patent office."

Many of the cases in which this subject has been considered were cited in that opinion, and they clearly demonstrate the correctness of the views entertained by the court as expressed by the foregoing extract.

Undoubtedly, if there appears upon the face of the patent something inhering in the substance of the invention which is recondite or abstruse, something which creates a difficulty for the court in fully comprehending its nature or its limitations, and the court, upon applying the common knowledge of the art, is embarrassed with doubt as to the proper conclusion to be reached, such difficulty, re-enforced by the presumption of the validity of the patent, would indicate the propriety of refusing to dismiss the bill upon demurrer, and awaiting the further development of the invention by the proofs. But we do not think that such a case is presented here. The specifications and claims are readily comprehensible, and no person ordinarily skillful, and having the ordinary instruction of those employed in the exercise of the art, could fail to understand all there is in this patent. There is no suggestion of anything in it which is obscure, and there is no profit in waiting for light where none is needed.

The first three claims relate to the art or process of manufacturing rail braces, and are as follows:

"(1) The improvement in the art of manufacturing rail braces consisting in striking up a metal blank into a higher abutment arising from a base, with its front or abutting end and said base shaped to the portions of the rail against which the base is to bear, substantially as described.

"(2) The improvement in the art of manufacturing rail braces consisting in striking up between the two opposite side edges and at one end portion of the metal blank a hollow abutment, with its front or abutting end shaped to the portions of the rail against which it is to bear, substantially as described.

"(3) The improvement in the art of manufacturing rail braces consisting in forming an oblong metal blank, widening towards one end, and striking up a length of the wider portion of said blank into a hollow abutment, with its front or abutting end and the material left as a base shaped to the portions of the rail against which the base is to bear, substantially as described."

There are minor variations in the expression of these claims, but these variations are unimportant in the view we take of them; and, for the purposes of decision, we shall give the invention covered by them credit for all that is contained in any of the three.

It is contended on behalf of the defendant that the improvement in the art which the patentee claims to have produced by his invention is not sufficiently described to comply with the statute (Rev. St. § 4886), which provides that the description thereof must be in such terms as to enable any person skilled in the art to make and use it. Upon first thought this objection would seem to have force, but Judge Sage, who heard the case in the court below, referring to the opinion of this court in Kilbourne v. W. Bingham Co., 6 U. S. App. 65, 1 C. C. A. 617, and 50 Fed. 697, answered, in substance, that the process of swaging was itself very old, and that any skilled person would know from the drawings and specifications how to strike up the metal into the form of a rail brace. And, indeed, we do not think it can be doubted that the form of the article to be produced being given, and the material with which it was proposed to make it stated, it would be quite an elementary operation for an experienced metal

worker to construct the rail brace of the patent. As the patentee describes no special process, the only process which can be implied is the old one, which the common experience of those employed in such pursuits would suggest.

But the implication of the exercise of the common skill of the art which must indispensably be carried into the claims in order to save them as sufficiently descriptive is fatal to their validity, for the striking up of the rail brace from a plate of metal, which the patentee claims as his improvement in the art, is thus shown to be nothing else than the old process of making such forms by means of hammers, stamps, dies, and swages, or other tools familiar to operatives skilled in working with them. It belongs to one of the earliest of the arts, and its history reaches back to the myths of antiquity. It is unnecessary for us to decide whether the process is sufficiently described in these claims; for, if it is, it is only by an implication of the pre-existing art, which would demonstrate that nothing was invented.

Claim 6 is as follows:

"(6) The blank, A, for a rail brace, widening towards one end, substantially as described."

This is for the constructed article, and not for the art of constructing it. All suggestions, therefore, about the economy of constructing the blanks by cutting them off widthwise from a strip of a plate of metal, so that the wide and narrow ends of the plate shall alternate, and thus utilize the whole of the metal, are irrelevant. Besides, it is an economy obvious to the common understanding, and in very common practice in manufactures of various kinds. As to blanks cut in this way, wider at one end than at the other, to the end that, when "struck up," they shall conform to certain requirements, there is nothing new in these. Pieces of cloth to be made up into garments, as, for example, the parts intended for sleeves, exhibit this form of construction. The pieces of leather cut to make the front portion of the uppers of boots afford a pertinent illustration. Such forms are the result of mere experiments of "cutting and trying" or of reducing to a flat surface an article having the desired conformation. This is not invention. The matter is too clear to warrant prolonged discussion.

The ninth and tenth claims are not essentially different from each other, and are for the manufactured article, the rail brace. They are these:

"(9) A struck-up metal rail brace, having a hollow abutment rising from a base, substantially as described.

"(10) The struck-up metal rail brace, formed with the hollow abutment, 3, rising from a base, 4, substantially as described."

The patentee concedes that iron rail braces cast with solid abutments, but otherwise of the same form, were already in use; but he claims certain advantages from using wrought or ductile metal. The advantages which he supposes to exist are those which economize the work of production in the saving of material and labor. It is not claimed that his rail brace possesses greater strength and durability than those in use, but he says they can be produced in a more advantageous way by his method with ductile metal, instead of by cast-

ing them in the old form. But the substitution of one kind of material for another, especially of kinds so intimately allied as those of cast and wrought or malleable iron or steel, is not of the character of invention, nor are the products thereof patentable for the reason that one may possess greater advantages than the other. Kilbourne v. W. Bingham Co., supra, and the cases there cited upon this point. And see, also, Hoff v. Manufacturing Co., 139 U. S. 326, 11 Sup. Ct. 580. No doubt, there are exceptions to the general rule, but they depend upon special facts indicating the presence of more genius or invention than is exercised by the ordinary skill and knowledge of those familiar with the qualities of materials and their various adaptations in the useful arts. The principle on which such exceptions rest was explained in Potts & Co. v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, which has become a leading case on this subject.

This patent was issued in 1886. Before that time the substitution of wrought or malleable metals for other metals had been made in a multitude of common instances. It was shown extensively in culinary utensils and in many of the industrial arts. That the products of swaging ductile metals might be lighter and require less material, that they would be less liable to break, and might be made with less labor, was known to everybody. The patent in question does not in this respect stand on better ground than did the Kilbourne patent in the case of Kilbourne v. W. Bingham Co., already referred to. In that case Kilbourne claimed to have invented a sink to be used in kitchens and similar places. Cast-iron sinks of like form had been in use before, but the patentee claimed that he had devised a better one, which he produced by striking up a blank of wrought or malleable metal into the required form, and that it possessed certain advantages over the old cast-iron sink, which he enumerated thus:

"My invention consists of a sink swaged or struck up from a single sheet of wrought iron or steel, without joint, seam, or interior angle."

He then set forth various defects in sinks made of cast metal, saying:

"Sinks of this kind are neither strong nor durable. They break easily and frequently in shipping or in storing them, and also in placing or setting them up in position for use. They are also liable to fracture or break if water should freeze in them, and, in order to give them the modicum of strength which they possess, a considerable amount of metal must be used in their construction, making them cumbersome and heavy, and increasing expense of manufacture."

He gave this description of his invention:

"I have discovered that the above-specified defects can be completely removed by making the sink of wrought iron or steel, said sink being swaged or struck up from a single sheet of such metal, as hereinbefore first specified. Such a sink is, of course, stronger than one of cast metal, and is not liable to be fractured or broken by a sudden jar or blow. It is cheaper than a cast-metal sink, for the reason that much less metal is required in its construction; and it can, by the swaging operation,—as, for instance, by being struck up in a drop press,—be made more rapidly and economically. * * * The sink, being, as seen in the drawings, without interior angle, has practically equal strength at all points, and has no corners where sediment or dirt can gather."

The objects thus sought by his improvements were very similar to those claimed by Alkins in his specifications for the patent in the case before us. They were simply the result of substituting one well-known material for another, and applying one well-known process for another, the latter being necessarily suggested by the use of ductile metal. In the court below, the bill was dismissed (47 Fed. 57), and on appeal the decree was affirmed by this court in an opinion delivered by Judge Swan, who cited many instances of like operations and like substitutions and products in the old art. Many of these, perhaps all, were in the proofs in that case, but a good number were instances in common knowledge and observation, and needed no proof.

The suggestion that the abutment of the complainant's rail brace is hollow, and therefore lighter, is only of the form it would necessarily take from the process of swaging adopted in making it. The patent does not claim that the mere openness of the abutment is of any advantage, or indicate any reason why it should be accounted as such. We quite agree with the court below in thinking that none of the claims in question are sustainable. The result is that the decree will be affirmed.

A. J. PHILLIPS CO. v. OWOSSO MANUF'G CO.

(Circuit Court, E. D. Michigan, S. D. March 9, 1896.)

PATENTS — CONSTRUCTION OF CLAIMS — MECHANICAL EQUIVALENTS — WINDOW-SCREEN FRAMES.

The Brent patent, No. 281,964, for improvements in window-screen frames, is not for a primary invention justifying the liberal application of the rules in respect to mechanical equivalents, but must be confined to the particular combinations specified in the claims; and, as one of the elements claimed is a "metallic" corner piece, there is no infringement in the use of screen frames constructed wholly of wood.

This was a suit in equity by the A. J. Phillips Company against the Owosso Manufacturing Company for alleged infringement of a patent for improvements in window-screen frames.

George H. Lothrop, for complainant.
James Whittemore, for defendant.

SWAN, District Judge. Complainant is a corporation organized under the laws of Michigan, and is the owner, by assignment, of letters patent No. 281,964, granted to Edmund J. Brent, July 24, 1883, for a window-screen frame, and brings this suit for the alleged infringement by defendant of the rights secured by said letters patent. The defendant is also a corporation organized under the laws of Michigan, and conducts its business at Owosso, Mich. The patent sued upon declares in its specification that the inventor has "invented certain new and useful improvements in window-screen frames." It further says:

"This invention relates to improvements in corner pieces or brackets for door and window screen frames; and the objects are to provide corner pieces for the purposes mentioned, which may be readily applied to the screen frame, which will hold the frame securely together, which can be applied to frames

for any sized doors or windows, and which can be packed, with the frame sticks, in a very small space for transportation. In the manufacture of frames for door and window screens it is essential that the frames be light, and that the corner pieces shall be light, and susceptible of ready attachment and detachment. The frame sticks are generally made long and high enough to fit any ordinary window or door, and are packed, with corner pieces, for shipment, the frame sticks being cut off by the users to suit the window where set in for use. My invention therefore consists in a metallic corner T-shaped piece for door and window screen frames, formed of a single piece having a vertical open sleeve piece, and a horizontal open sleeve piece adapted to receive and retain, respectively, a side bar and either a top or a bottom bar for a corner connection. My invention further consists in a metallic corner T-shaped piece formed of a single piece having a vertical open sleeve piece and a horizontal open sleeve piece, in combination with frame sticks, adapted to fit in the open sleeves of the corner pieces, as hereinafter more fully set forth. My invention further consists in metallic corner pieces of a special construction, in combination with side, top, and bottom sticks or pieces, united in such a manner that both sides of the frame shall be even or flush for the attachment of the screen cloth or netting to either side."

In his description of the accompanying drawings, forming part of his specifications, the inventor says further:

"The letter A represents the metallic corner piece formed with the vertical open sleeve, B, and the horizontal open sleeve, C, the general configuration being T-shaped, substantially as shown."

His claim is as follows:

"What I claim as my invention, and desire to secure by letters patent, is: (1) As an improved article of manufacture, a metallic corner piece made T-shaped, and formed with vertical and horizontal passages, for the purpose set forth. (2) The metallic corner piece formed with a horizontal arm or sleeve intermediately arranged between the ends of the side piece for the reception of the side and the top or bottom sticks, of even thickness therewith, to secure flush sides and ends, substantially as described. (3) The combination of metallic corner pieces, each made T-shaped, and having a vertical open sleeve and a horizontal open sleeve, in combination with frame sticks fitted in the open sleeves of the corner pieces, substantially as described."

The third of these claims is alone in issue, no infringement being charged as to claims 1 and 2 of the patent. The screen frame made by defendant consists of four sticks, each provided with a tongue along one side, and four corner pieces, each of which has two open sleeves or grooves, one groove extending along the end of the other to the width of the frame stick. The defendant also fills in one side of the T, slightly changing the appearance of the corner piece. It is not claimed that the defendant makes use of the metallic corner piece in the frames manufactured by them, but it is conceded, and the exhibits demonstrate, that their screen frames are constructed wholly of wood. The merit claimed for the complainant's device is that the frame constructed under the patent has no openings through which insects can enter; that the corners are finished or flushed on both sides, and that this is due to the fact that one of the open sleeves runs across one end of the other open sleeve. It is also claimed to be superior because of its simplicity of construction, which enables them to be easily put together by purchasers; and that, when put together, they are firm, and neat in appearance. We are not concerned, however, with the relative merits of the patented manufacture as compared with other constructions, patented or unpatented.

It may be assumed that the defendant has substantially copied the form of the corner pieces described in the patent. The mere variation of that form by the filling of one side of the T in defendant's manufacture would not suffice to repel the charge of infringement if that were the only point of difference between the frames made by the respective parties. The only inquiry, therefore, is whether the defendant, who confessedly used wood alone, has infringed the third claim of the patent, which calls for the "combination of metallic corner pieces, each made T-shaped, * * * in combination with frame sticks fitted in the open sleeves of the corner pieces, substantially as described." It is insisted on the part of the complainant that Brent's patent is entitled to a liberal construction as a pioneer or primary patent, and that, as he was the first to invent the T-shaped corner pieces, adapted for use in window-screen frames, he is entitled to invoke the doctrine of equivalents, and call upon the court to enjoin all invasions of that patent, whatever the material used in construction. It can hardly be said that the Brent screen frame is an entirely original device. The T-shaped joint or corner piece is, of course, old, and no originality is or can be claimed for it. The third claim of the patent is that Brent is the inventor of the "combination of the metallic corner piece with the frame sticks," etc., substantially as described, and, as both elements of this combination were well known prior to his patent, his invention is to be regarded rather as an improvement on preceding methods of construction, and not as a totally new departure in manufactures. In this view, therefore, it is well settled that he is not entitled to invoke the doctrine of equivalents, but his patent must be limited to what he himself has declared to be his invention. This he has defined in unmistakable language. Each of his three claims calls expressly for the "metallic" corner piece of the described form. In the quotations given above from his specification in three consecutive paragraphs he, in express terms, affirms, "My invention, therefore, consists in metallic corner T-shaped pieces" of the construction described. It is impossible to read these repeated restrictions which the inventor has imposed upon his own rights without concluding that they were intentionally made, and express his own conception of what he had originated. He evidently thought that the desired strength and solidity, the exclusion of insects by the method of construction of the corner piece, and the facility with which the frame could be put together and taken apart, could only be attained by the use of metal. He further emphasizes his purpose to restrict himself to that material in his construction in the description in the specification of the drawings illustrative of his "improvements in window-screen frames." Notwithstanding the rule that a patent should be liberally construed in favor of the inventor, it is quite clear that in this case the inventor has so restricted himself as to prevent the application of that rule. It may be that a broader patent could not have been obtained, and this was the reason of the limitation. Having, however, thus narrowed his invention to the combination of metallic corner pieces with the frame sticks, he cannot complain of articles of manufacture which do not employ his combination, and omit that feature which he has

made so prominent. Harris v. Allen, 15 Fed. 106; Manufacturing Co. v. Rosenstock, 30 Fed. 67. If his patent does not give him all that he has invented and intended to secure, the law affords him a remedy, if he can bring himself within its conditions, by a surrender and reissue of his patent, and it would be his duty to take that proceeding in justice to the public, who, in the present condition of his patent, have no notice of the extent of his claim of invention as here asserted. Merrill v. Yeomans, 94 U. S. 568. It follows from this that the defendant is not guilty of infringement. The injunction must be denied, and the bill must be dismissed, with costs.

WILCOX & GIBBS SEWING-MACH. CO. v. MERROW MACH. CO. et al.

(Circuit Court, D. Connecticut. October 30, 1897.)

PATENTS — LIMITATION BY PRIOR ART—INFRINGEMENT—OVERSEAMING SEWING MACHINES.

Patents Nos. 472,094 and 472,095, for improvements in sewing machines for making overseams (the former patent being for a single-thread and the latter for a double-thread machine), construed in view of the prior art, and *held* not infringed by a machine made in accordance with patent No. 541,722.

This is a suit in equity by the Wilcox & Gibbs Sewing-Machine Company against the Merrow Machine Company and others for alleged infringement of letters patent Nos. 472,094 and 472,095, for sewing machines making an overseam; the former being for a single-thread and the latter for a double-thread machine.

Howson & Howson, for complainant.
Church & Church, for defendants.

TOWNSEND, District Judge. At final hearing on this bill in equity, charging infringement of the second and fifth claims of patent No. 472,094, and the second claim of patent No. 472,095, defendant denies the validity of both patents, and denies infringement. The question of infringement only will be considered. The claims alleged to be infringed are as follows:

Patent No. 472,094: "(2) The combination, with the needle and its operating mechanism, of a looper having an upper jaw provided with a hook and a lower jaw (said looper being arranged to oscillate in a path around the edge of the cloth plate), and means for actuating said looper to carry a loop of the needle thread around the cloth plate, substantially as described." "(5) The combination of the double-jawed looper, moving in a single plane, and a needle moving in a line oblique to the plane of the looper's movement, and intersecting the same, whereby the looper is, when beneath the cloth, on one side of the needle, and, when above the cloth, on the other side thereof, substantially as described."

Patent No. 472,095: "(2) The looper, made with two jaws, one of which is furnished with a hook, and the other with an eye, in combination with a reciprocating needle, and operating mechanism for moving the looper in a plane oblique to the plane of movement of said needle, substantially as described."

Both patents are for a sewing machine making an overseam. No. 472,094 is for a single-thread machine. No. 472,095 is for a double-

thread machine. The application for No. 472,094 was filed July 23, 1887. The application for No. 472,095 was filed May 24, 1890. Both patents were issued April 5, 1892. No. 472,095 is similar to No. 472,094, except for the changes necessary to adapt it to the use of two threads. The stitch formed by complainant's machine is made under patent No. 472,095, is the same as that formed by defendant's machine, and is old, and several different machines for forming it were well known in the prior art. Defendant's machine is a double-thread machine. Generally speaking, the mode of forming said stitch is the same in all these machines, including those of the complainant and the defendant. A sewing-machine needle, having the eye near the point, is first thrust through the fabric, carrying the needle thread with it. Then a hook of some kind takes hold of the needle thread below the fabric, and holds it so that the needle, in being withdrawn from the fabric, leaves a loop of needle thread on the hook, and below the fabric. This loop of needle thread is then drawn out to, and lifted up around, the edge of the fabric. Then a loop of another thread is thrust through the loop of needle thread, and the needle, in making its second stroke, passes through this second loop. In single-thread machines, the loop of needle thread, after being lifted up around the edge of the fabric, is carried over the fabric; and the needle, in making its second stroke, passes through the needle-thread loop. The implement which seizes the loop of needle thread, and carries it around the edge of the fabric, is called the "looper." When two threads and two implements are used, the implement which passes the second loop through the needle-thread loop is called the "looper." In patent No. 472,094 the upper part of complainant's looper is shaped somewhat like the pointed end of a fishhook. The point passes between the needle and the thread below the fabric, when the hook, which is shaped and attached very much like the barb of a fishhook, seizes the thread and draws out the loop. After the loop is carried around and over the edge of the fabric, the forward motion of the looper causes the hook or barb to drop the loop; and it then falls upon the lower jaw or member, which carries it forward over the fabric, so that the needle, in its next descent, may pass through it. In patent No. 472,095 this lower jaw member is longer, and has an eye near the end, carrying a second thread; and, when the loop of needle thread falls upon this lower jaw, it is not carried forward, but slips back along it, while the needle passes between the lower jaw and the thread carried by its eye. Defendant's looper, which is that of patent No. 541,722, is a bar having the forward end curved around to form a hook, which is pointed, and having an eye carrying a thread in the forward part, near where the curve begins. In operation, this hook is inserted from the rear (that is, in the opposite direction from complainant's), between the needle and thread. The needle is then withdrawn, and this needle-thread loop is brought forward and around the edge of the fabric; but as the looper, with its threaded eye, moves along over the fabric, the needle-thread loop slips backward upon the bar of the looper, and the needle, again descending, passes between the looper bar and

the thread passing through its eye. Various prior modes of forming both the single and double thread stitch have been put in evidence. The Goods and Miller patent, granted in 1864, for a single-thread machine, has a slightly curved bar, ending in a point with a barb, which, if inverted, would be practically the upper jaw of complainant's patent. The point passes between the needle and thread, then the barb seizes the thread, and draws it backward and upward, when another hook seizes the thread, thus opening the loop so that the needle may readily pass through it. The second hook thus performs nearly the same office as the second member of complainant's single-thread patent. Such a device is spoken of in the briefs of both counsel as a "two-implement type of looper," because it requires two implements in addition to the needle. The Wanzer British patent, No. 1,093, granted in 1865, for a single-thread machine, has two jaws or prongs on the end. One of these is inserted from the rear, between the needle and thread. The looper is then carried by a circular motion around and above the fabric, and the loop is presented again to the needle. This belongs to the one-implement class. The Frey patent, granted in 1865, has a single looping instrument, the operating end of which somewhat resembles a half eyelet attached to a furcated shank. The hook formed by the groove thus formed at the side of the end of the furcated bar enters between the needle and thread, from the rear. As the loop is drawn around the edge of and above the fabric, the loop is gradually shifted, until it is engaged in the upper jaw of the looper, then passes upon the notched ends of both jaws, and finally, by a further turn, is presented to the needle. In the Richard patent, No. 252,799, granted in 1882 for a single-thread machine, the looper has a curve on one side, near the point, and another higher up, on the other side. It reciprocates in a curved path around the edge of the fabric, so that the loop is taken from one curve of the looper to the other, and at last is presented to the needle. The Rehfuss patent, No. 40,311, granted in 1863, is a two-thread machine. A hook takes the needle-thread loop, and draws it backward beyond the edge of the fabric, when a thread-carrying looper passes through the needle-thread loop, and over the fabric, and presents another loop for the needle. This is a two-implement machine. The Tarbox machine (patent No. 49,803, granted in 1865) has a slightly-curved looper, with a threaded eye near the point, arranged on an arm of a rock shaft, and operated diagonally to the feeding device and to the bed of the machine. This looper is inserted from the rear with a needle and thread, and, as it comes forward and upward around the edge of the fabric, the needle-thread loop slips backward upon the looper, while the threaded end of the looper passes above the fabric, and presents its loop to the needle. Several other patents for devices for making these stitches were in evidence.

Defendant claims that its machine is less nearly related to the complainant's than to several others of the older machines; and it insists that the complainant's machine, with its two jaws, is founded upon the two-implement style of machine, while the defendant's machine is founded upon the one-implement type of machine. I am inclined to

accept this view. The single-implement, double-thread loopers, prior to this patent, from which the defendant's machine is claimed to be developed, complainant characterizes as "somersault loopers." Complainant characterizes its own machine as the oblique plane, noninverting looper, and claims that its high speed is due to using a one-implement, noninverting looper, thus avoiding the necessity of complicated machinery, and of a long thrust to the needle. But I am unable to find any such statement in the claims or specifications of its patent. Even if defendant's inventor derived from complainant's patent his idea that an overseam machine might be run at a high rate of speed by using a one-implement, noninverting looper, he did not copy complainant's looper, and, I think, did not come as near to it in structure as to some of the others.

Patent No. 472,095 differs only slightly from No. 472,094, in view of the prior art, and it is very doubtful whether it can be said to contain invention. I am inclined to think that a skillful mechanic, being presented with a machine of No. 472,094, and with the prior patents in evidence, and requested to adapt the machine to a double-thread stitch, would have made the change almost as a matter of course. It is not denied that the machine of No. 472,094 had been in use for a long time before the application for No. 472,095. Both patents were issued upon the same day, and the specification of No. 472,095 states that "the general form and organization of the machine, and many of the parts or elements thereof, are similar to that described" in the other specification. The specification of No. 472,-095 contains a statement of the invention in these words:

"The novel and important feature of this part of the invention consists in the relative arrangement of the needle and the double-jawed looper, so that the line of the needle's motion is oblique to the plane in which the looper moves. In the practical embodiment of this principle, it is immaterial which of these devices is made to move obliquely with reference to the plane of the cloth plate; and any arrangement in which a double-jaw looper, having its movement all in any one plane, co-operates with a needle so moving with reference thereto that it lies on one side of the looper when both are above the cloth, and on the other when both are beneath the cloth, would be within the invention."

I do not understand it to be disputed that patents of the prior art have loopers moving in one plane, and so moving that the needle is on one side when both are above the cloth, and on the other when both are below the cloth. Attempts were made, in the patent office, to obtain a claim on this looper without the limitation of the double jaw, and in No. 472,095 an attempt was made to obtain a claim without the hook. The office refused to grant them, and the claims were limited as appear in the patent. If complainant considered that its invention lay in the noninverting character of its looper, it should have so claimed it. In the absence of any hint that the substance of the invention consisted in this feature, I do not think I have any right to so broaden the claim as to cover all one-implement, noninverting loopers moving in a plane oblique to the course of the needle. It is doubtful whether any such looper could be made which would be any more unlike that of the complainant than the looper of the defendant.

Complainant claims that it has a pioneer patent, so far as rapid overseam work is concerned; and, from the evidence, I am satisfied that, prior to complainant's machine, the practical work of such machines was not more than 1,000 stitches per minute, while by complainant's machine, more than 2,000 stitches can be made. This advantage, complainant now insists, is due to the form of its looper, which allows the stitch to be made with a much shorter thrust of the needle. How much of this increase of speed is due to this device, and how much to improvements in other parts of the machine, does not appear. Patent No. 472,095 makes no reference to speed, and the only reference to speed in patent No. 472,094 is the following:

"The machine has been contrived with reference to running it at a very high rate of speed; the reciprocating parts being as short and light as possible, and their motions derived from eccentrics, although cams or cranks may be employed for that purpose. The feed is a four-motion feed, all of whose motions are positive, although other forms of feed, as means of moving a four-motion feeding surface, may be employed."

In view of the prior art, I am unable to find in defendant's looper the elements of the claims in suit of either of complainant's patents, without unduly straining the doctrine of equivalents. Let the bill be dismissed.

KELLY et al. v. SPRINGFIELD RY. CO. et al.

(Circuit Court, S. D. Ohio, W. D. September 14, 1897.)

No. 4,610.

1. COSTS IN PATENT CASES—BRIEFS, RECORDS, MODELS, EXHIBITS, ETC.
   In the absence of a rule of court or of a written stipulation so providing, the expense of printing records, briefs, and supplemental briefs in the circuit court, or of procuring copies of the official stenographer's notes of testimony for the use and convenience of the parties, is not taxable as costs. Neither is the expense of constructing or procuring models, charts, photolithographing paper exhibits, etc., used at the hearing to illustrate and make clear the oral evidence.
2. SAME—STIPULATION SUBSTITUTING PRINTED COPY FOR ORIGINAL RECORD—ORDER OF COURT.
   An order of court, entered upon application of both parties, pursuant to a stipulation between them, that a printed copy of the proofs and record shall be considered, "for all the purposes of this suit," and shall constitute, the original record therein, is not an order requiring the printing of the proofs and record, so as to make the cost of such printing taxable against the losing party.
3. SAME—SUPPLEMENTAL BRIEFS.
   The granting of leave to file supplemental briefs does not make the expense of printing them taxable costs.

This was a suit in equity by O. S. Kelly and others against the Springfield Railway Company and others for alleged infringement of a patent. The cause was heard on defendants' motion to include in the taxation of costs certain items of expense.

Julian C. Dowell and F. F. Fish, for complainants.

D. W. Cooper and Kerr, Curtis & Page, for respondents.

SAGE, District Judge. This is a motion by defendants to include in the taxation of costs the expense of printing defendants' record, $711.33; of printing brief, $389.10; supplemental brief, $31.20; illustrative charts of applications for patents in suit, $141.65; of photolithographing paper exhibits, $339; of copies of complainants' testimony, $50.40; of constructing defendants' models and tracks and electrical appliances for operating same, $443; and of copy of opinion, $3.25; total, $2,108.93. All these were, in accordance with the general practice of the court, excluded by the clerk. It is claimed that this case, however, should be excepted from the general practice, by reason of certain stipulations and an order of court. Prior to the hearing, counsel, under a stipulation filed December 6, 1895, took or retained possession of all physical exhibits offered in evidence, for photolithographing or printing.

At the hearing the court allowed counsel for the respective parties, upon their application, time for filing supplemental briefs. Later, by written stipulation, the time was, with the consent of the court, extended still later; that is to say, on the 9th of November, 1896, it was stipulated in writing by and between the solicitors for the respective parties that the printed copy of complainants' proofs on final hearing, and of defendants' record, "filed herewith," should "be considered, for all the purposes of this suit, to be the original depositions taken and exhibits offered on behalf of the respective parties," and that they together should "constitute the original record." This stipulation was filed on the 18th of November, 1896, and on the same day the court made an order, "upon reading and filing the annexed consent" (referring to the stipulation), and upon motion of solicitors for defendants, "that the printed copy of complainants' proofs on final hearing, and of defendants' record, filed herewith, shall be considered, for all the purposes of this suit, to be the original depositions taken and exhibits offered on behalf of the respective parties, and shall together constitute the original record in this suit."

"For all the purposes of this suit" is comprehensive enough, upon any known rule of interpretation, to include taxation of costs. The clerk, so interpreting, made the taxation in all respects as if upon the original depositions, exhibits, and proofs.

The argument in favor of including in the taxation the costs of printing and lithographing is that the entry above recited, made subsequent to the taking and certification of the record, upon the written consent of the parties, while it did not cancel the typewritten testimony and the exhibits offered, did have the effect to "merely withdraw" them from the files of the court, excepting that, had a question arisen as to the correctness of the printed copy, recourse might have been had to the original papers, "then and now in the custody of counsel." But the court having, under the circumstances recited in the order, ordered a printed and lithographed copy of the record before it, counsel urge that it follows from the course of decisions that the cost of compliance with the order must be borne by the defeated party. This is very ingeniously put, but it is not sound, for the following reasons: First. The order did not have the effect to withdraw the original copies of the record from the files. As drawn, it closed with a

paragraph expressly ordering that the parties might withdraw all the exhibits and depositions; but the court drew erasing lines, striking that paragraph out, as appears on the face of the draft accepted and filed. This court never allows original depositions or paper exhibits to be withdrawn from the files of patent causes, unless there be some imperative reason, and even then only temporarily. If counsel still have original depositions or paper exhibits in this cause in their custody, the court requests that they be returned to the files, for the reason that other parties now or hereafter interested in the matters involved in this litigation may have occasion to inspect and examine them, and to them it may be important to have access to the originals. Sometimes it becomes necessary to permit the permanent withdrawal of paper exhibits, but the condition invariably imposed is that certified copies be taken and left in their stead. Second. The cost of complying with the order was nominal only, if indeed it was anything; for the printing and lithographing were done before the court was moved to make the order, and the printed copies were all filed on the day and date of making the order. Third. Not only were the printing and lithographing not done in consequence or by reason of the order, but they were altogether independent thereof, and were done by the parties upon their own motion, and for their own convenience and that of the court; and the substitution of the printed for the original was by a consent entry, which would be, indeed, a troublesome precedent, if construed in accordance with defendants' motion. The cost of printing briefs is not taxable in this district. As to the supplemental briefs, to construe the granting of leave to file them as an order that the cost of printing them should be taxed in the bill of costs would be contrary to all precedent in this district, and would tend to induce counsel to find frequent occasion for supplemental briefs, and to make them the chief presentation of their cases. The expense of copies of testimony is not taxable as part of the costs in this district, nor is the expense of constructing or procuring models, or of furnishing appliances for operating the same, nor the expense of copy of opinion.

It would seem to be unnecessary to cite authorities in support of the rulings above stated, but inasmuch as the practice is not in all respects uniform in all the circuits, and motions somewhat like the one made in this cause have been heretofore presented to and acted upon by this court, the following citations by counsel for complainants are approved and appended.

The models referred to represent structures regarding which proof was given by defendants, and they were used at the hearing to illustrate and make clear the oral evidence. They are not models of the patented invention in suit, and they were not procured under any order or rule of court. Models are not exemplifications.

Wooster v. Handy (Cir. Ct. S. D. N. Y.; 1885) 23 Fed. 49.

Exhibits of this kind are not taxable as costs.

Woodruff v. Barney (Cir. Ct. S. D. Ohio; 1862) 1 Bond, 528, 2 Fish. Pat. Cas. 244, Fed. Cas. No. 17,986.

Exhibits of this kind should not be taxed. "It is obvious that it would subject litigants in contested patent cases to onerous bur-

dens, if either party were permitted, ad libitum, to procure models, and tax his unsuccessful adversary in the case with the entire expense. I am not aware that any of the courts of the United States have given any sanction to such a principle."

In Hathaway v. Roach (Cir. Ct. D. Mass.; 1846) 2 Woodb. & M. 63, Fed. Cas. No. 6,213, it was held that models of the plaintiff's invention procured by the defendant were properly taxable as costs. Models of other patents were not recognized as taxable. "If other models are taxed, I do not think them proper items for the bill of costs, any more than other drawings of other patents procured, or the books which describe them; they all being rather arguments, than proof."

Parker v. Bigler (Cir. Ct. W. D. Pa.; 1857) 1 Fish. Pat. Cas. 285, Fed. Cas. No. 10,726. The court in this case ruled that the expense of making or procuring models could not be included among the taxable costs, nor could models properly be classed as "exemplifications," under the act of February 26, 1853 (10 Stat. 161):

"Models are not within the category, unless we treat them as 'exemplifications'; but, although printers' bills seem to be allowed, I cannot see that carpenters' or tinkers' bills have the same favor, or that a model of a mill wheel can be called an 'exemplification or copy of a paper.'"

Hussey v. Bradley (Cir. Ct. N. D. N. Y.; 1864) 5 Blatchf. 210, Fed. Cas. No. 6,946a.

Cornelly v. Markwald (Cir. Ct. S. D. N. Y.; 1885) 24 Fed. 187:

"The clerk properly refused to tax the item of $150 in plaintiff's bill of costs for the expense of obtaining a model of the defendant's infringing machine. Irrespective of any question as to the propriety or necessity of procuring such a model, the expense incurred cannot be deemed a taxable disbursement in favor of the prevailing party. The reasons why such an item should not be allowed are fully stated in the opinion of the court in Woodruff v. Barney, 1 Bond, 528, Fed. Cas. No. 17,986, and in Hussey v. Bradley, 5 Blatchf. 210, Fed. Cas. No. 6,946a. It is obvious that it would subject litigants in patent cases to onerous, and sometimes to oppressive, burdens, if parties were permitted, at their discretion, to procure models, and tax their unsuccessful adversaries with the expense. The question is not an open one. See, also, Wooster v. Barker, 23 Fed. 49."

The same reasons which exclude the cost of models as taxable costs exclude the item for photolithographing paper exhibits. However desirable these exhibits may have been to the defendant, or of convenience to the court, they are not taxable items; not being copies of any papers from the patent office, or necessarily of use in this case. These were in part introduced by witnesses explaining their testimony. In addition to the cases cited above, the two following cases directly in point cover this item:

Wooster v. Handy, 23 Fed. 62; Hussey v. Bradley, 5 Blatchf. 210, Fed. Cas. No. 6,946a.

In this latter case there was a charge as follows:

"No. 3. Paid for printing pleadings and testimony, and for lithographing drawings used on the final hearing, 362 pages, $745.00."

The court said:

"The third item also must be disallowed. It is not shown that the printing charged for was done by the consent of the parties, and under an agree-

ment that the expense thereof shall be charged as costs in the case, or that any order or rule of court, either special or general, required or authorized the printing of the papers for which these charges were made."

With reference to the charge for copies of complainants' testimony, the following cases are in point:

"We think the court was right, and that as these charges, including expenses and disbursements, were not incurred under any action of the court, but by the party in the preparation and presentation of his own side of the case, the items were properly disallowed. Another item was for money paid for a copy of the official stenographer's notes, obtained for the libelant by his counsel. This was simply for convenience, and not a copy necessarily obtained for use on the trial. The item was properly rejected." Mr. Chief Justice Fuller in The William Branfoot v. Hamilton, 8 U. S. App. 129, 3 C. C. A. 155, and 52 Fed. 390.

Atwood v. Jaques (Cir. Ct. W. D. Mo.; 1894) 63 Fed. 561:

"The next and final item objected to is the sum of $60.20 paid to Frances E. Mulett by respondent for carbon copies of testimony taken by her as stenographer. As these copies were evidently for the use of respondent or his counsel, they are not chargeable as costs in the case; and the motion, to the extent above indicated, is sustained, and the costs ordered to be retaxed accordingly."

Roundtree v. Rembert (Cir. Ct. D. S. C.; 1896) 71 Fed. 255:

"Another exception is the disallowance of the fee paid for a copy of the testimony taken de bene esse. By consent, counsel on both sides were allowed to obtain a copy of the testimony taken in New York. Properly, this is no part of the costs in the case. The copies were solely for the convenience of counsel. In the absence of any agreement that it should be included in the costs, that cannot be done. Counsel for the plaintiffs deny that there was any such agreement, and no stipulation in writing to that effect is in the record. The exception is overruled."

In no case is the printing of the record and of briefs a taxable cost, except where there is a rule of court requiring the same to be printed, or where there is a stipulation to the same effect.

Such a stipulation cannot be inferred, and, in a case where there was an agreement between counsel that the record be printed, the court would not allow the printing thereof to be charged as taxable costs; there being no written stipulation to this effect, and no rule of the court. Lee v. Simpson (Cir. Ct. D. S. C.; 1890) 42 Fed. 434.

The printing of briefs and the record is not chargeable. Spaulding v. Tucker (Cir. Ct. D. Cal.; 1871) 2 Sawy. 50, 4 Fish. Pat. Cas. 633, Fed. Cas. No. 13,221.

In the Second circuit the rule of court requires the printing of the record and briefs, and they are therefore chargeable. Dennis v. Eddy, 12 Blatchf. 195, Fed. Cas. No. 3,793; Hake v. Brown (Cir. Ct. S. D. N. Y.) 44 Fed. 734.

The right to tax, however, as stated above, depends upon the rule requiring that record and briefs be printed. Gird v. Oil Co. (Cir. Ct. S. D. Cal.) 60 Fed. 1011. See, also, Neff v. Pennoyer, 3 Sawy. 335, Fed. Cas. No. 10,084; Hussey v. Bradley, 5 Blatchf. 212, Fed. Cas. No. 6,946a; Ferguson v. Dent (Cir. Ct. W. D. Tenn.) 46 Fed. 95.

"The next item of costs objected to by complainants is the charge of $506.65 paid by respondent to printing company for printing evidence and abstract of record on behalf of respondent. In the absence

of any rule of court requiring this to be done, and in the absence of any special order of the court in this case, or any agreement between the parties that the same should be printed and charged as costs in the case, there seems to be no warrant, under equity practice, for this charge." Atwood v. Jaques (Cir. Ct. W. D. Mo.) 63 Fed. 561.

"It has never been the practice of this court, in cases brought before it under its appellate jurisdiction, to tax as costs disbursements by counsel or parties for printing briefs." Mr. Chief Justice Waite in Ex parte Hughes, 114 U. S. 548, 5 Sup. Ct. 1008.

The motion is overruled. The bill of costs made out by the clerk is correct.

UNITED STATES v. KING et al.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 361.

1. PATENTS TO MINERAL LANDS—SUIT TO CANCEL—SURVEYOR GENERAL'S CERTIFICATE.
   In a suit by the government to cancel a patent to a mining claim on the ground of false and fraudulent representations, it appeared that R. and D., certain third parties, had made a joint affidavit, alleged to be fraudulent, which was filed June 24, 1880, showing that the value of labor and improvements exceeded $500. The requisite certificate of the surveyor general, filed June 29, 1880, certified to the same fact, "as appears by the testimony of two disinterested witnesses." *Held*, that there was nothing to show that these "two witnesses" were R. and D.
2. SAME—SUFFICIENCY OF LABOR AND IMPROVEMENTS.
   The sufficiency of the character and value of labor and improvements made upon the premises by an applicant for a mineral patent, under Rev. St. § 2325, is to be determined by the surveyor general from his own observations or those of his deputy, or from the testimony of persons having knowledge of the subject.
3. SAME—PRESUMPTIONS.
   Where a surveyor general has certified in due form to the value of labor and improvements upon a mineral claim, under Rev. St. § 2325, the presumption is that he did his duty as an officer.
4. SAME—BURDEN AND CHARACTER OF PROOF.
   In a suit by the government to cancel a patent to a mining claim on the ground of fraud, the presumption that it was correctly issued can be overcome only by clear and convincing proof of the false representations whereby it was secured.

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

Preston H. Leslie, U. S. Atty. (Elbert D. Weed, of counsel), for the United States.

Toole & Wallace and Wm. Scanlon, for appellees.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge. This is a suit in equity, brought by the United States to cancel a patent to a mining claim. The amended

bill was filed in the name of the United States, by the attorney general, in the circuit court for the district of Montana, on April 30, 1892. It is stated that the original bill was filed August 28, 1886, against Silas F. King and John Ducie, and that the other defendants were made parties by the amended bill; but, as the original bill is not in the record, this fact cannot be determined. It is charged in the amended bill that a patent for a lode mining claim issued to Silas F. King and John Ducie on January 31, 1883, had been obtained by means of false and fraudulent representations, and prayed for its cancellation. The claim is situated in Summit Valley mining district, Mont., and is known as the "Hesperus Lode Claim." It is alleged in the amended bill that the other defendants have an interest in the claim, and it is charged that two of them—Murray and Hickey—participated in the fraud, and that the others are not bona fide purchasers. The defendants answered under oath, denying all the allegations of fraud. The circuit court, on final hearing, dismissed the bill, and the United States appealed to this court. The bill alleges that the claim was located by the defendants Silas F. King and John Ducie, February 10, 1880, that they applied for a patent May 8, 1880, and that a patent was issued to them January 31, 1883. The fraud charged in the bill is, in substance, that King and Ducie, without ever having discovered any vein or mine of rock in place, or otherwise, bearing gold, silver, copper, lead, or cinnabar, or other precious or valuable minerals constituting any mine of any kind, and without having performed the amount of work required by law, or without having made the amount of improvements required to develop said claim, and having failed to perform work or labor amounting to the sum of $500, conspired to defeat and defraud the government of the United States by corruptly procuring persons to swear under oath to a false statement that the improvements and labor placed upon the Hesperus lode by King and Ducie, or their grantees, equaled the sum of $500; that King and Ducie, conspiring and intending corruptly to circumvent the United States, and to procure from the officers thereof a patent for the Hesperus claim, filed this sworn evidence in the United States land office at Helena, Mont.; that the register and receiver, relying upon the sworn statements and evidence produced by King and Ducie, and believing the same to be true, as therein stated, issued their certificate of final entry; that King and Ducie, having filed in the general land office this certificate of the register and receiver, and the proper officers of the United States believing that King and Ducie had fully complied with the law in every respect for and on behalf of the United States, and believing that they had discovered a mine as claimed in their affidavits and application, and had performed the work required by law, issued to said King and Ducie a patent for the said Hesperus lode mining claim. At the trial, counsel for the United States admitted that the proof was insufficient to sustain the charge that there was no valid discovery of the vein or lode at the time the application was made for the patent. This question was, therefore, eliminated from the case, and the remaining question, as appears

from the assignment of errors, relates to the alleged false and fraudulent representations respecting the value of the work expended and improvements made upon the claim by King and Ducie, or their grantees, within the time mentioned in the statute.

It is required, by section 2325 of the Revised Statutes, that an applicant for a mineral patent must, at the time of the application, or within the 60-days period of publication, file with the register a certificate of the United States surveyor general that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors. The application for a patent for the Hesperus lode claim was filed by King and Ducie in the land office at Helena, Mont., on the 8th day of May, 1880. On June 24, 1880, there was filed in the same office the joint affidavit of John Rankin and John Dillon, in which, under oath, they depose and say that they are well acquainted with the premises described as the Hesperus lode; that the value of the labor and improvements placed thereon by the applicants or their grantors equals the sum of $500, and consists of shaft 8x4x15 feet, $75; shaft 8x6x25 feet, $125; shaft 8x4x10 feet, $50; shaft 8x4x15 feet, $75; house, $250,—total, $575. This affidavit was sworn to before a notary public, June 21, 1880. On June 29, 1880, there was filed with the register the certificate of the surveyor general of Montana that the value of the labor and improvements placed upon the Hesperus lode, claimed by Silas F. King et al., exceeded the sum of $500, and consisted of four shafts, the dimensions and cost of which are given in detail, as stated in the affidavit of John Rankin and John Dillon, and a house frame of the value of $250. Then follows this statement: "As appears by the testimony of two disinterested witnesses;" but the names of witnesses are not given, and no testimony is attached to the certificate. In the argument of counsel the affidavit of Rankin and Dillon, filed with the register of the land office on June 24, 1880, is treated as the testimony referred to by the surveyor general in his certificate filed on June 29, 1880. This may be the fact, but it does not so appear in the record, and it is nowhere established by the evidence. The certificate of the surveyor general conforms to the requirement of the statute, and is evidence of the value of the labor performed and improvements made upon the mine. It is, however, the alleged false testimony of Rankin and Dillon, filed as an affidavit with the register of the land office, that forms the basis of the charge of false and fraudulent representations made by King and Ducie with respect to the value of the labor and improvements placed upon the mine. But there is not a particle of testimony tending to show that King and Ducie, or either of them, procured the affidavit of these two witnesses, or that they knew it was false; but, as such testimony was apparently in the interest of the applicants for the patents, it might be inferred that it was through their instrumentality it was procured. There is, however, opposed to this inference the fact that such testimony, to be of any service to the applicants for a patent, should have been presented to the surveyor general, and, as just stated, this fact does not appear. The surveyor general was required by law to furnish the certificate as to the

character and value of the labor performed and improvements made upon the claim. The sufficiency of such labor and improvements was a matter to be determined by him from his own observations or those of his deputy, or from the testimony of persons having knowledge of the subject. U. S. v. Iron Silver Min. Co., 128 U. S. 673, 685, 9 Sup. Ct. 195. The bill does not charge that this testimony was furnished to the surveyor general, or that it influenced his action in any way. The presumption is that he did his duty as an officer. Moreover, the charge is that the affidavit was filed in the land office, and that the register and receiver, believing the same to be true, issued their certificate of final entry. The answer of the defendants King and Ducie is under oath. They deny all the allegations of the bill charging fraud, and allege specifically that the affidavit in question was procured and filed in the land office by the deputy United States mineral surveyor, who made a survey of the claim for a patent. It is plain that there would be some difficulty in making out a case against the defendants upon the allegations of the bill, but the trial appears to have proceeded upon the broad question whether, at any time prior to the final entry of the claim at the land office on November 23, 1882, $500 worth of labor had been expended or improvements made upon the claim. With respect to this issue, the testimony taken establishes the character of the improvements, but is conflicting as to their value. A number of witnesses testified that the shafts would cost less than $100, and a number of other witnesses testified that they would cost more than $500. The question was left in doubt. The burden of proof was upon the government. It was required to establish the fraud, and connect the defendants with it. The presumption that the patent was correctly issued could only have been overcome by clear and convincing proof of the false and fraudulent representations whereby the patent was secured. Maxwell Land-Grant Case, 121 U. S. 325, 7 Sup. Ct. 1015; Colorado Coal & Iron Co. v. U. S., 123 U. S. 307, 8 Sup. Ct. 131; U. S. v. San Jacinto Tin Co., 125 U. S. 273, 8 Sup. Ct. 850; U. S. v. Iron Silver Min. Co., 128 U. S. 673, 9 Sup. Ct. 195; U. S. v. Hancock, 133 U. S. 193, 10 Sup. Ct. 264; U. S. v. Budd, 144 U. S. 154, 12 Sup. Ct. 575. The trial court having held that the proof was insufficient to establish the fraud as charged against the defendants, we do not feel justified in reversing its judgment. The decree of the circuit court is affirmed.

JEFFREY MANUF'G CO. et al. v. INDEPENDENT ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. November 1, 1897.)

No. 476.

PATENTS—LIMITATION OF CLAIMS—INFRINGEMENT—MINING MACHINES.

The Lechner patent, No. 432,754, for an improvement in mining machines, which combine, with a traveling frame and an endless belt cutter, a cutter and holding device to resist the lateral thrust caused by the belt cutter, is limited by the prior state of the art and the proceedings in the patent office to a machine having an independent holder, which is stationary

with relation to a movable cutter which precedes and cuts a channel for it into which the holder follows, and is therefore not infringed by a machine in which the auxiliary cutter itself acts as the holder. 76 Fed. 981, reversed.

Appeal from the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

This was a suit in equity by the Independent Electric Company against the Jeffrey Manufacturing Company, Joseph A. Jeffrey, and Charles W. Miller for alleged infringement of a patent for improvements in mining machinery. In the circuit court the patent was sustained, and a final decree for an injunction and accounting ordered. 76 Fed. 981. The defendants have appealed.

H. H. Bliss and John R. Bennett, for appellants.

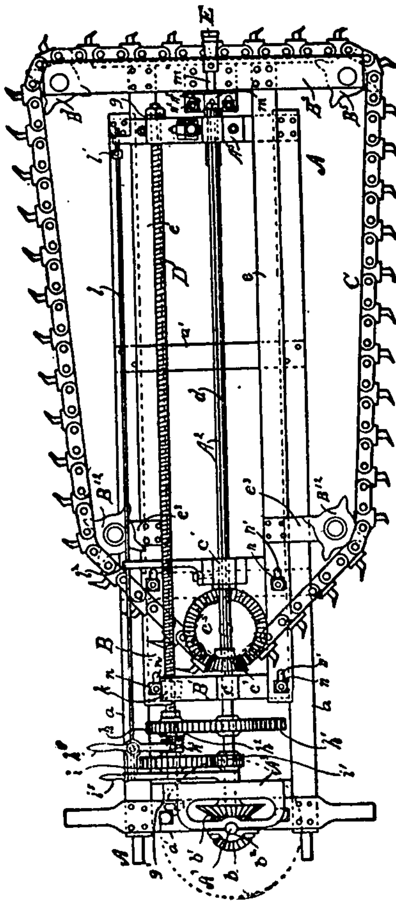
Francis W. Parker, Thomas B. Kerr, and James H. Hoyt, for appellee.

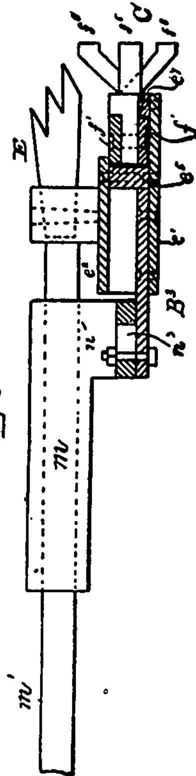
Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge. This is a bill in equity to restrain infringement of patent No. 432,754, granted July 22, 1890, for improvements in mining machinery, to Francis M. Lechner, assignor to the Lechner Electric Mining-Machine Company. Upon a final hearing the circuit court sustained the complainant's patent, found the defendants guilty of infringement, granted an injunction, and ordered an accounting. From this decree an appeal has been perfected by the Jeffrey Manufacturing Company and the other defendants. The invention involved is for an improved means of overcoming the lateral thrust of the chain cutter carrying frame of single chain breast coal-mining machines. A mining machine of this class has a fixed frame and a forwardly moving chain cutter carrying frame which is intended to be forced in at the floor of the mine under the coal, a kerf being thus cut by the cutters rigidly attached to an endless chain on the forward end of the moving frame. As this movable frame moves forward under the coal there is more or less of a sidewise tendency in the direction opposite to the motion of the chain, which tends to throw the frame out of line, and unless controlled by some guiding device will prevent the successful operation of the machine. To some extent this lateral tendency is overcome in machines of this class by firmly anchoring the stationary frame by means of jacks or braces, and such appliances are usually found in all such machines. But, as the movable frame is pushed further and further beyond this anchored frame, the lateral pressure increases, and the steadying effect of the stationary frame becomes very much lessened. Both lateral motion and vibration operate against the proper alignment of the projected cutter frame, and impair the durability and operativeness of the machine.

The device in controversy is one whose object is to overcome this lateral tendency, and guide the cutter frame in a straight line. As described in the specifications and shown in the drawings of the Lechner patent, it consists in a reciprocating auxiliary chisel or cut-

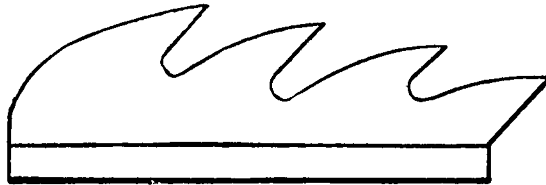
ter, a rod or stem extending from this cutter back to the power devices, whereby the cutter is reciprocated, and a holder adapted to follow the cutter into the kerf or channel cut by it. This holder is stationary in relation to the cutter to which it corresponds in size. Its function is to steady and guide the forward movement of the chain cutter frame and operate against the lateral tendency of the machine. We here set out Figs. 1 and 3 from the drawings of the patent. Fig. 1 is a plan of the machine embodying Lechner's invention, and Fig. 3 is an enlarged view, partly in section, of a portion of the cutting and holding mechanism and its supporting frame. In Fig. 3, E is the cutter, and m the holder adapted to follow the cutter chisel at the end of the rod, m'.





The device which the defendants below admit to have used for accomplishing the same purpose consists of a small steel plate stationarily fastened to the movable frame of the machine, and moved only by the forward push of the carriage, and having behind the cutter no supplemental projection adapted to operate as a holder. The device used by them is substantially exhibited by the figure following:

Appellants' "Standard Holder."



Claims 1 and 2 of the Lechner patent are as follows:

Claim 1.

"It is obvious that the constructions shown and described admit of modifications in the details of construction and arrangements without departing from the spirit of my invention. I do not, therefore, limit myself to the exact construction set forth, but claim as my invention—

"(1) The combination, with a traveling frame and an endless-belt cutter, of an auxiliary cutter operating in a different plane from said endless-belt cutter, and a holding projection adapted to follow said auxiliary cutter into the kerf or incision made thereby to form a holder to operate against the thrust or force of the endless-belt cutter, substantially as specified."

Claim 2.

"(2) The combination, with a traveling frame and an endless-belt cutter thereon, of a *reciprocating* auxiliary cutter arranged above and slightly in the rear of the line-cut of said endless-belt cutter, a holding projection having substantially the same size as said auxiliary cutter and arranged in the rear and in line with said cutter, and means, substantially as described, for imparting motion to said cutters, substantially as specified."

Claim 2 differs from claim 1 only in that a reciprocating cutter is distinctly an element, while in claim 1 it is not expressly described as an element. There are many other claims, but all which have any bearing upon this controversy are identical with the second claim in describing the cutter as reciprocating. Claim 1 is the only one here involved, inasmuch as it is not contended that defendants use either a reciprocating or other form of movable cutter.

The defenses presented below were that complainant had no such title to the patent in suit as would support a suit for infringement, that the Lechner patent and especially the first claim was void as being anticipated in the earlier patents, and, finally, that defendants' device did not infringe. We shall find it only necessary to consider the last defense. Coal-mining machines intended to cut a kerf or incision under a breast of coal, and to do away with the primitive method of undercutting by pick and other hand tools, are old, and more than a half hundred patents, American and foreign, have been put in evidence for the purpose of establishing the history of the art. These patents may be divided into several general classes. One class comprises those in which the coal is undercut by means of reciprocat-

ing bars with picks. The Stutz patent, No. 302,958, of 1884, is an illustration of this class. Another class consists of machines having revolving cutter bars, revolved generally by large heavy chains extending from seven to nine feet to the driving mechanism at the back of the frame. A patent issued to F. M. Lechner, the patentee whose invention is here involved, in 1876, and numbered 172,637, is an example of this class. A third class consists of those with reciprocating cutter saws, of which patents No. 321,103 of 1885, to Harrison, and No. 342,614, to B. A. Legg, dated 1886, are examples. Another class is that of machines in which the undercutting is done by wheel cutters on carrier arms, which thrust them directly forward, such as shown by the patent to Wilverth, No. 26,726, of 1860, and Haupt and Smith, No. 47,168, of 1865, and Morris, No. 92,871, of 1869, and Blyth, No. 208,361, of 1878. Still another class consists of those in which the cutter carrier is an endless chain, which class may be subdivided into two subclasses,—those operated by two chains running in opposite directions, and those with a single chain. Examples of the double chain carrying cutter class are to be seen in patents No. 287,032, of 1883, to S. C. Lechner, and No. 295,183, issued in 1884, to Van Amburg Lechner; and of the single chain machines in patent No. 135,874, to Alexander, and No. 179,464, in 1876, to Prosser, and in the German patent of A. Weber, No. 6,848, issued in 1879. In the operation of all these machines there is found present, in greater or less degree, a reactionary thrust tending to throw the cutting head in a lateral direction opposite to that of the motion of the cutters, whether picks, saws, wheels, or chains. This conclusion seems thoroughly established by the voluminous evidence in the record, and accords with the conclusion of Judge Sage, who heard the case below, and who said as to this lateral tendency that:

"Incidental to the operation of every mining machine is a reaction or thrust exerted by the carriage upon the cutters and in a direction opposite to their operating motion. Every 'heading' or 'breast' machine—whether 'bar,' 'saw,' 'chain,' or what not—has a bed frame, a sliding carriage, and a cutting apparatus at the front of the carriage. It has always been necessary to provide for each machine two 'jacks,' one at the front, and one at the rear, of the bed frame. The rear jack engages with the mine roof, and the front one, inclined upward, and at a sharp angle to the right, bites into the vertical wall just above the kerf. They bear down with great force upon the bed, each having a powerful screw and a hand wheel for clamping the bed to the floor of the mine and holding it in position when the machine is set ready for operation with its cutter head close and parallel to the coal. As the kerf or incision made by the cutter deepens—extending seven feet or more into the coal—it is obvious that the leverage against the holding power of the jacks increases with a corresponding increase of the lateral strain upon the moving or sliding carriage and upon the frame." 76 Fed. 981-985.

As supplemental to the support afforded by the jacks, which anchor the stationary frame of such machines, it has, in both tunneling and mining machines, been found expedient to provide some means of guiding and centering the sliding frame, which carries the principal cutters, whether arranged in circular form as in tunneling machines, or in a straight horizontal line as in mining machines. A few examples taken from these allied arts will serve to show how narrow a field remained for further invention in respect to such holding de-

vices. British patent No. 1,424, of 1876, to Brunton, is for an improvement in tunneling machinery. That patent shows a steering pipe which the specification describes as "intended to facilitate the guiding or directing of the head in its motion," which pipe passed through the center of the cutting head and protruded slightly beyond its exterior. A passage for this pipe is made in advance of the "head" by means of a screw auger on its interior. In the British patent to Gay, No. 1,857, of 1863, for an improvement in boring apparatus, is shown "a guiding bar for maintaining the cutter (drum) in a straight or fixed direction." In the German patent to Weber, of 1879, is shown an auger for cutting a kerf above and at right angles with the horizontal kerf. Touching this auger drill and its shaft the inventor says: "To allow of the following of the projecting parts of the shaft, the drill placed upon it works out the necessary space, and the diameter is determined thereby." Then come a class of cutter-wheel holders illustrated by the British Stanley patent of 1886, No. 1,449, which was guided or steadied by cutter wheels both on the top and bottom of the tunnel which cut into the top and bottom of the material, and holds or steadies it against any reactionary thrust. Patent No. 340,791, issued April 27, 1886, to Van Amburg Lechner and Samuel C. Lechner, is for a coal-mining machine in which are found two chain carrying cutters moving in opposite directions, the advantage of which is stated in the specifications as being "that the cutters moving in opposite directions * * * balance each other, so that the strain on the machine is equalized and the amount of bracing necessary to hold it up to its work is reduced to a minimum." But the inventor further steadies his machine by a vertical revolving cutter wheel, of which the patent says:

"In order to keep the machine from being moved laterally by reason of one of the chains working against harder material than the other, or from any other cause, we have provided the vertical cutter, 90, which is of a diameter somewhat in excess of the height of the kerf cut by the horizontal chain cutters, so as to make a guiding groove or crease in the bottom or top, or both in the bottom and top, of the kerf. The cutter, being in this vertical crease or groove, will prevent the machine from moving laterally."

Other means for holding were also resorted to, such as the "keel pieces," shown in the Brunton patent, already referred to, where their function is described as follows: "To plough up a groove in the interior surface of the tunnel, for their own passage, and in which they may be imbedded to resist the tendency to turn the chambers when the head is being rotated." In patent No. 172,637, issued in 1876, to F. M. Lechner, "each carrier has a guiding plate, D, secured by one end to block, D; the free end of each plate being adjusted vertically by means of a set screw." "These plates press against the upper side of the kerf or drift which is cut by the cutting teeth, and the shoes rest on the bottom of this drift. Thus they (the teeth) are always maintained in proper working relation to the coal." A holding device is found in patent No. 232,280, for improvements in mining machines, issued to F. M. Lechner, September, 1880, which in Figs. 6 and 7 show a supporting shoe, the upper member of which may be provided with what the inventor calls "a dove-tailed rib" projecting

inwardly from the vertical face, "whereby this rib assists in supporting the upper member, E, against the upward thrust which is produced by the cutting action of the bits of coal," etc.

The clear and manifest purpose of the auger in the center of the sliding frame of the German patent to Weber, as well as the augers at the end of the bar carrying cutter in the Legg patent, is to guide or steady the movable frame and counteract any sidewise tendency. This function, where the shaft of the auger is much smaller than the auger bit, would be performed by the auger bit alone. But, if the auger stem be but slightly less in diameter than the cutting points of the auger drill, the stem itself would assist as a holder, inasmuch as the hole drilled would not be smooth or regular, and these irregularities might be such as that an auger shaft of less size than the auger bit would also act as a holder, and this seems to be the opinion of Messrs. Davis and Sperry, two of complainant's experts. In the German patent the idea that the projecting parts of the auger shaft might serve as a holder, as well as the auger bit, seems to be foreshadowed by the statement that the diameter of the drill is determined by the diameter of the projecting parts of the drill shaft, though the drawings show the auger shaft and its projection to be much less in diameter than the bit of the auger. This foreshadowed idea found later distinct expression in a patent issued to this same patentee, F. M. Lechner, May 27, 1890, being No. 428,920. The application for that patent was filed December 10, 1889, and is for an improvement. The inventor thus states his improvement:

"The difficulty which my improvement is designed to remedy is the tendency of a machine having chain cutters to vibrate laterally, and thus often to move the machine so far as to jam the cutters and to oppose such resistance to the cutters as to stop the machine. To obviate this I employ in connection with a machine a drill or boring shaft which advances with the cutters, and which has a bearing on the moving frame of the machine, which bearing is of substantially the same diameter as the end of the drill or boring shaft, so that it shall enter the hole made thereby, and shall afford means for holding the machine frame stationary and for preventing the lateral motion mentioned above."

His second claim, as allowed, was as follows:

"In a coal-mining machine, the combination, with the cutters and a forwardly movable cutter frame, of a rotary drill which advances with the cutters, and is so situate relatively thereto that the hole drilled thereby shall not be coincident in width with or included by the cutter kerf, said drill having bearings of substantially the same diameter as the drill, whereby the bearings will enter the drill hole and will steady the machine, substantially as and for the purposes described."

The application for the patent in suit was filed January 4, 1890, and granted May 27, 1890. There was therefore a co-pendency of the two applications from January 4, 1890, until May 27, 1890, on which day both were issued. Neither of these applications makes any reference to the other. The effect of this earlier application upon the patent in suit we shall not now determine. Thus it clearly appears, from the history of the art prior to Lechner's auxiliary auger-cutting and holding application, that the devices used as supplementary to the well-known support by jacks for guiding and steadying

the movable frame as it progressed deeper and deeper under the coal, included the auger and steering pipe of the Brunton patent, the guiding bar of the Gay patent, the auger auxiliary drill of the Weber patent, the auxiliary cutter wheel of the A. and S. C. Lechner patent, the auxiliary auger drills at the extremities of the saw cutter bar of the Legg patent, and the "keel pieces" of the Brunton patent, to say nothing of other patents using one or more of these means.

Counsel for appellee have contended that Lechner is entitled to a liberal construction of the claim here involved, and in their printed brief they say:

"Here we have a pioneer invention of great merit. It solved the problem of economic and successful application of mechanical power to the mining of coal by chain-breast machines. It made practical the use of the chain-breast machine; the very best form that had ever been devised. The contribution which this invention made to the art was the holder; that was the last step, the happy thought, the lucky stroke, the novel element. Lechner embodied it in two forms. Each form was separately patented, but the applications were contemporaneously pending. It enters equally into the claim of each patent. These two patents are not inconsistent any more than two separate claims in one patent. They must be read together and share in common the merit of pioneer patents."

Referring again to Lechner's two patents covering two means of holding, they say:

"In one he made use of an auger for boring the groove or seat for the holding device, and in the other he made use of a cutter for cutting the groove or seat. These two forms exhausted the art so far as Lechner could see, and instead of attempting to obtain a generic claim which would cover them both and which might be expressed in the following terms, viz.: 'The combination in a chain cutter machine, of means for forming a groove or seat, and a holding device which bears against the side of such groove or seat, for steadying the machine and preventing lateral motion,' he applied for and obtained, upon applications which were contemporaneously pending in the patent office, two separate patents,—one for the holder in combination with the auger, and the other for the holder in combination with the cutter."

In the light of the history of this and kindred arts it cannot be admitted that Lechner's contribution to this art was the holder. The steering pipe and keel pieces of the Brunton patent, the auger auxiliary cutters found in both the Weber and Legg patents, the auxiliary cutter disc of the A. and S. C. Lechner patent, were all holders. Some were more efficient than others, and none were possibly as efficient as a holder independent of the auxiliary cutter and adapted to follow such a cutter into the channel cut by it. The cutter disc of the A. and S. C. Lechner patent was both a cutter and holder in one piece, having no other function than to prevent lateral motion. It may be that the holding function of the disc cutter was impaired to a degree by the fact that the channel cut by it was somewhat wider and deeper than the disc by reason of the projecting character of the cutter blade extending beyond its sides, as shown by the drawing. But the degree of effect upon its holding function caused by this slight projection of these cutters must, under the evidence, be very slight, if any. Both Sperry and Davis, experts for appellee, in speaking of the variance between the diameter of the auger bit and the projecting parts of the auger shaft, having the function of a holder

in early auger machines used by appellee, say that the irregularities of the hole bored by the bit and the presence of chips operate to give a tight bearing against the sides of the following holder, although slightly smaller than the bit.

The same thing is evidently true of the disc holder and cutter, and the evidence strongly tends to show that when used as an adjunct to the jacks it does operate quite effectually as both a holder and cutter. So, in the auxiliary auger drill of the German patent to Weber, the bit itself is the holder,—a holder which in degree is doubtless less satisfactory when used in connection with steam or electric power than when employed in a mere hand machine, as contemplated by Weber. Nevertheless, there is present in that patent the principle of an auxiliary holder in a single chain breast-cutting machine. The bit of the auger is both a cutter and a holder, the latter function resulting from the persistent push of the point and blades of the bit against the material into which it bores. Lechner improved on this by journaling his auger shaft in a box "of substantially the same diameter as the end of the drill," so that it would enter the hole made thereby, and "afford means for holding the machine frame stationary and for preventing lateral motion." In the patent in suit he substitutes for the auger a reciprocating chisel, and journals the shaft of this chisel in a projecting box adapted to engage the channel cut by the chisel cutter, and thus prevent any lateral motion of the traveling frame. It may be admitted that this idea of furnishing a holder corresponding in size to the kerf cut by the auxiliary cutter which is stationary in relation to the cutter, and adapted to follow it into its channel, is a more satisfactory solution of the problem of steadying and centering such machines than that afforded by the disc cutter and holder or that found in the auger cutter and holder. But the spirit of his invention is an independent holder for which a position is furnished by an auxiliary cutter in advance of it. If Lechner's first claim is to be sustained, it must be limited by his specifications and drawings so as to include only that which is different from the earlier means used for the same purpose. The specifications and drawings may properly be looked to for the purpose of limiting this claim, and they show most clearly that the principle of his invention consisted in an independent holder stationary with relation to a movable cutter which preceded the holder and cut a channel into which the holder follows. The claim itself includes as an element "a holding projection adapted to follow" an independent auxiliary cutter into the kerf made thereby, and to thus form a holder against the thrust or force of the endless cutter. Whenever we eliminate the principle of an independent holder adapted to follow an independent cutter from this claim, and broaden it so as to include a cutter which has the double function of a cutter and holder, we find that such combined holder and cutter was old, and his claim would be invalid, unless it could be sustained for a reciprocating or movable chisel, as distinguished from an auger drill or a disc wheel cutter, a distinction which would still further narrow the claim and clearly exclude the device of appellants, who do not use a movable chisel or auger. The construction we have placed upon this claim is

supported by the occurrences in the patent office, as shown by the file wrapper and contents.

When the application for this patent was pending, his claims 1, 2, 3, 4, 6, 8, and 9, were rejected. The first claim thus rejected was identical with claim 1 in the patent as finally issued. The rejection was based upon references to the German patent to Weber, No. 6,848, and the patent to Legg, of 1886, No. 347,813. In an amendatory paper filed thereafter the applicant among other things said:

"Claims 1 and 2 have not been inclosed in this amendment, as a copy of the German reference is not available to this office, and it is respectfully requested that the office submit to the undersigned an estimate of the cost of a tracing of so much of said German patent as will convey an intelligent idea of the same in its bearing on this application. * * * The claims, with the exception of claims 1 and 2, which, as before noted, have not received action, have been amended so as in the opinion of the applicant to free them from the references cited. Attention is called to the fact that claim 6 includes as an element the 'holding projection,' which does not seem to be found in the reference devices. Claim 1 also seems free from the references for this reason, unless the German reference discloses some such device, of which we are not at present advised. We respectfully request that the claims herein submitted receive an early and favorable action, and that the estimate concerning the German reference be forwarded to applicant at an early date. Very respectfully, Francis M. Lechner,
"By Paul A. Staley, Atty."

In a later communication the applicant undertook to remove the objection based upon the reference to the Weber patent by saying in a communication to the office:

"It is thought that claim 1 is clearly distinguished from the reference devices, as explained to the examiner in charge in a recent personal interview, inasmuch as none of the reference devices show a stationary holding device adapted to follow a cutting device. A cutting device when relied upon as a holding device is not a success, because the thrust of the machine against the cutter will make it run in the direction of the thrust."

Thereupon claim 1 was allowed, together with certain other claims which had been so amended as to conform to the requirements of the office, but which do not materiallv affect the question as to the proper construction of the first claim. This correspondence, followed by this action of the patent commissioner, clearly indicates that this first claim did not include a cutter relied upon as a holder, and that in respect of this matter there was a substantial difference between an auxiliary drill, whether an auger or a chisel, when relied upon as a holder, and a device in which the holder was an independent element adapted to follow the cutter, and thus form a holder. This was the construction which Lechner placed upon his own claim, and the presumption is, in view of the subsequent allowance of the claim, that the judgment of the office was that this was the distinguishing feature, and not found in the reference device. The object of Lechner was to make an improvement upon existing means for holding such machines against lateral movement. The only advance he made was in providing an independent holder adapted to follow an auxiliary cutter as a substitute for various forms of auxiliary cutters theretofore used as combined cutters and holders. This he did by enlarging the journal of his cutter bar so that it would conform

to the size of the channel cut by his chisel, and thus form a holder independently of any action of his chisel in that respect. He is not a pioneer in any sense of the word.

Having described an independent holder adapted to follow an independent auxiliary cutter into the channel cut by it, he is not entitled to claim that an auxiliary cutter which operates as a holder and cutter is within the claim of his patent. He is not entitled to invoke the doctrine of equivalents. A broad construction such as is now insisted upon, which would include all cutting devices relied upon as holders, would make his claim void for anticipation. In view of the history of devices intended to perform the same function performed by his holder, his patent can only be saved by confining him to the specific form he has described and claimed. Knapp v. Moore, 150 U. S. 221, 228, 229, 14 Sup. Ct. 81; Miller v. Manufacturing Co., 151 U. S. 186, 207, 14 Sup. Ct. 310; Wells v. Curtis, 31 U. S. App. 123, 158, 13 C. C. A. 494, and 66 Fed. 318; Ney v. Manufacturing Co., 37 U. S. App. 371, 16 C. C. A. 293, and 69 Fed. 405.

The device used by defendants departs from this principle of an independent holder stationary in relation to the auxiliary cutter and following behind the cutter, and returns to the old means of using the auxiliary cutter itself as a holder. That it is effective as a holder is due not only to the fact that the spur-like points of the cutter are persistently held in constant contact with the material being cut, but also from the fact that the inner and flat side of the cutter is in contact with the wall of the channel cut by the points of the chisel-like teeth, and which must therefore, to some extent, co-operate with the imbedded chisel points in the function of holding. There is no movable chisel in appellants' device, and no supplemental holder adapted to follow the cutter. It does not for these reasons infringe. We have not considered the patent issued to Dierdoff for the device used by appellants, and only decide that appellants do not infringe the first claim of the Lechner patent. For this reason the decree must be reversed, and the bill dismissed.

CONSOLIDATED STORE-SERVICE CO. v. WILSON et al.

(Circuit Court, D. Massachusetts. October 20, 1897.)

No. 788.

1. PATENTS—INVENTION—CASH CARRIERS.

The Osgood patent, No. 357,851, for a cash carrier, in which the car is propelled upon a horizontal wire from one station to another by the momentum imparted by a single impulse or push, thereby eliminating the double track necessary in the gravity system, and the intermediate mechanical contrivances inherent in the endless-cord system, discloses patentable invention.

2. SAME.

The Osgood patent, No. 293,192, covering, in a cash-car system, an arresting stop or spring buffer, consisting of a pair of spring arms supported parallel with the track, and opening outward at their free ends, to catch the car and bring it gradually to a stop by friction, covers a new and useful invention, and is infringed by a car having a spring at each end

which clasps between itself and the wheel a tapering enlargement of the track, whereby its motion is arrested.

This was a suit in equity by the Consolidated Store-Service Company against John W. Wilson and others for alleged infringement of two patents relating to cash-carrier or store-service apparatus. The cause was heard on a motion for preliminary injunction.

Fish, Richardson & Storrow and Guy Cunningham, for complainant.
Charles E. Mitchell and Elihu G. Loomis, for defendants.

COLT, Circuit Judge. This motion for a preliminary injunction is based upon the alleged infringement of the first claim of letters patent No. 357,851, issued February 15, 1887, to Edwin P. Osgood, and the second claim of letters patent No. 293,192, issued February 5, 1884, to Byron A. Osgood and Edwin P. Osgood. These patents relate to cash-carrier or store-service apparatus. The first claim of patent No. 357,851 is as follows:

"(1) In a cash-car apparatus, a wire stretched horizontally between fixed supports at each end, and in the described relation to the cashier's desk, in combination with a freely-moving car held below the wire on wheel hangers, to which it is rigidly connected, the wheels thereof being fitted to run one behind the other on the wire, whereby the car is held rigidly against oscillation longitudinally of the way, the whole moving structure being thus adapted to be impelled as a solid body from one end of the way to the other, in either direction, by the momentum imparted by a single impulse or push, substantially as described."

This patent, for the first time, describes a car, in a cash-carrier system, propelled upon a horizontal wire from one station to another by the momentum imparted by a single impulse or push. The prior art discloses no such apparatus. In the old systems the car was propelled either by gravity, as illustrated in the White patent of November 11, 1879, or by intermediate mechanical means, such as an endless cord attached to the car, and operated by pulleys, as illustrated in the Brown patent of July 13, 1875. My impression at the hearing was rather against the validity of this patent, but, upon careful consideration, I am satisfied that it describes a new, useful, and patentable improvement in the cash-carrier art. To have devised a simple apparatus, by which are eliminated the double track, which is a necessity in the gravity system, and the intermediate mechanical contrivances, which are inherent in the endless-cord system, involved, in my opinion, invention. It is unnecessary to discuss the other prior patents contained in the record, because the nearest approach to the Osgood device are the devices described in the White and Brown patents. As to infringement, it is not disputed that the defendants' apparatus contains the horizontal wire, the rigidly attached car, and the impulse feature of the Osgood patent.

Claim 2 of patent 293,192 is as follows:

"(2) In combination with the wires and supporting bar or ring of a cash-car system, an arresting stop or a spring buffer adapted to receive and hold the car."

The construction of a suitable stop mechanism for the car in a cash-carrier system has proved to be a problem not free from difficulty.

This is shown by various patents which have been taken out for different forms of stop mechanism. The present device is composed of a pair of spring arms supported parallel with the track, and opening outward at their free ends. The forward end of the approaching car runs between the spring arms, which then bear against the sides of the car, and, through friction, gradually bring it to a stop. This form of stop is not found in the prior art. The White patent, already referred to, describes an inclined spring blade which comes into collision with a projection on the car. This may work well with a gravity track, but not with a horizontal track, where it is necessary to bring the car gradually to rest. The Higgs patent, dated November 26, 1878, is a spring latch or catch, rather than a spring stop. No prior device disclosed in the record has the construction or mode of operation of the Osgood stop. The invention covered by this claim may be a narrow one, but the device seems to be new and useful, and adapted especially to a cash-carrier system operated upon the impulse plan. The defendants' car is provided near each end with a spring. These springs are in line with the track and wheels, and press elastically towards the wheels. At the end of the track where the car is to be stopped, the track has a tapering enlargement, so that the forward wheel of the approaching carrier is gradually clasped and finally held by means of the spring and the enlargement of the track. We regard this device as an equivalent of the Osgood spring stop.

The two patents now in suit were sustained at final hearing in this court by Judge Carpenter in the case of This Complainant v. Whipple, 75 Fed. 27. As, however, the defendants in the present suit contend that that suit was not contested bona fide, or at least not strenuously, I have preferred to consider the motion in this case on its merits, and independently of the former suit, or of the effect the decree in that case should have as a prior adjudication upon the determination of the present motion. Motion granted.

THOMSON-HOUSTON ELECTRIC CO. v. ATHOL & ORANGE ST. RY. CO.

(Circuit Court, D. Massachusetts. September 27, 1897.)

No. 644.

1. PATENTS—INFRINGEMENT.
   The Blackwell patent, No. 470,817, for a railway motor of such an organization and construction that the armature and other parts which need frequent attention can be readily inspected or removed, and, when in operation, the less delicate parts of the motor protect those more delicate, is void for want of patentable invention.

2. SAME—MOTOR SUSPENSION FOR RAILWAY WORK.
   The Rice patent, No. 488,260, for a motor suspension for railway work, the essential characteristics of which consist in the introduction of a double hinge, and in utilizing the motor frame for one leaf of the hinge, and the motor itself for the other leaf, the first leaf being journaled upon the driven axle, so that the car axle constitutes the pivot for the first leaf of the hinge, while the armature axis serves as the pivot for the other leaf, analyzed and construed, and *held* not infringed.

This was a suit in equity by the Thomson-Houston Electric Company against the Athol & Orange Street Railway Company for alleged infringement of two patents relating to electric railway motors.

Fish, Richardson & Storrow, for complainant.
Mitchell, Bartlett & Brownell, N. Sumner Myrick, and J. Albert Brackett, for defendant.

PUTNAM, Circuit Judge. This bill is brought on two patents, which it is claimed by the complainant are capable of joint use, and which were in fact so used by the respondent. One patent is that issued to Francis O. Blackwell, March 15, 1892,—No. 470,817. As to this, the complainant says that the claims in issue relate wholly to such an organization and construction of a railway motor that the armature, and other parts which need frequent attention, can be readily inspected or removed, and that when in operation the less delicate parts of the motor protect those more delicate. The court was impressed at the hearing with the view that there is nothing covered by this of a patentable nature, and its subsequent examination of the record and briefs has not changed this impression. This patent seems to fall within the principles of Priest v. Manuf'g Co., 81 Fed. 615.

The other patent issued to Edwin Wilbur Rice, Jr., March 17, 1891, —No. 448,260. Its preamble claims the invention of a certain new and useful motor suspension for railway work. As to this patent, the court must confess that the results which it feels compelled to reach are not without doubt. The court especially finds itself not free from embarrassment arising from the multiplicity of claims on which the complainant relies, and the difficulty of analyzing them with relation to each other. A fundamental question in the case is whether the claims in issue are to be construed as covering a broad invention, or whether they are limited to mere mechanical details. Though some of them are doubtful of construction, yet many are clearly of a broad character, and the court finds itself bound to hold that the invention, as submitted to it, is of that nature. The complainant's device, so far as concerns the case in issue, is described in the specification practically as follows:

"The frame, being supported at one end by the car axle, is elastically supported at its other end by some portion of the truck frame. The opposite end of the field magnet may be supported in any desired manner. I prefer to support it elastically from the car body or from the truck frame,—as, for instance, by means of an elastic support, or by a flexible ball and socket joint. It will be observed that by means of this support for the motor, independent of the frame carrying the bearings therefor, said frame is relieved of the weight of the motor, and the weight is transferred to a support independent of such frame, while the rigid motor frame around the motor preserves an accurate alignment of the armature shaft and the driven axle of the vehicle. The particular manner of supporting the yoke end of the field magnet elastically or flexibly does not form any part of my present invention, and other means besides those shown may be employed in connection with the particular means hereinafter described for supporting the opposite end of the motor. Other special devices may be employed, instead of those shown, for supporting the end of the motor independently of the motor frame."

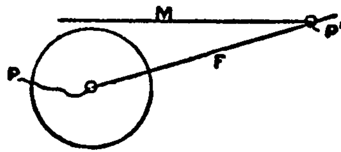
The function claimed by the specification, arising from this method of construction, is stated therein as follows:

"By my construction of supporting frame and mounting of the parts, hereinbefore described, I not only secure stiffness and rigidity when the apparatus is subjected to strain, but also an adaptation of the mechanism to vibrations, jars, or movements of the car and supporting parts, which will maintain the mechanism in unchanged relation during all conditions of working."

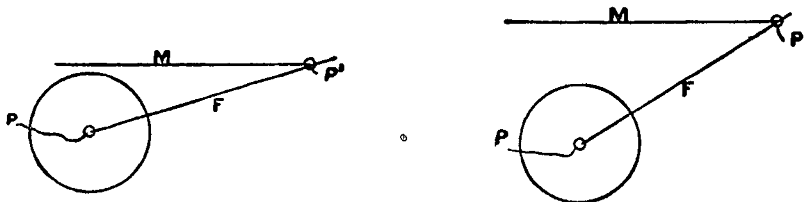
The different directions of the lines of force tending to produce vibrations and jars, and the serious evils resulting therefrom, were clearly pointed out at the hearing. No function additional to that stated in the extract we have made from the specification has been brought to our attention by the complainant, although devices contained in the patent, and referred to in claims not submitted to the court, cover others.

The complainant at the hearing described the alleged invention in issue as follows:

"The fact is, the exigencies of the street-railway art demanded two inconsistent things. One was the fixed relation which must be preserved between the motor gear wheel and the axle gear wheel, and the other was the capacity of the motor to be perfectly unconfined and free to 'float' with relation to this same car axle. The construction of the Rice patent in suit we think will be made clear by the following figure:



"In this figure, F represents the frame, and M the motor. The frame, F, is journaled to the driven car axle, P, so that this car axle serves as a pivot for the frame. The motor, M, is, in turn, hinged to the frame at the point, P'. It will be seen that, by this construction, Rice has introduced and made use of a double hinge, and, as a result of the compound motion thus obtained, the upper leaf of this hinge can do more than simply rotate. It is enabled to move bodily upward in space, without the necessity of any rotation, as illustrated by the two positions for the upper leaf shown in the following figures:



"The mere conception of a double hinge would not have accomplished the long-desired end in the street-railway art of maintaining a fixed relation between the motor gears and the gears of the driven axle, if Rice had not, in making his double hinge, utilized as the leaves for his hinge the motor frame and the motor, and for the pivots of his hinge the driven axle and the motor armature. For his first pivot, Rice utilized the driven axle of the car, and for the second pivot he utilized the armature shaft, cutting the motor free from its frame, and thus permitting the motor to turn upon a part of itself, namely, the armature shaft. It will now be seen that the motor, M, of the Rice patent, can, for the first time in the art, float bodily up or down, with relation to the driven axle of the car; and, in spite of this freedom of the motor to move

bodily up and down with relation to the car axle, the fixed relation or mesh between the motor gear wheel and the axle gear wheel is absolutely maintained, as illustrated in the preceding sketches."

The complainant emphasizes the advantages of its construction as follows:

"In the Rice motor neither the motor as a whole, nor any part of it, is compelled to 'jump' with the car axle."

And it points out the essential elements of its device as follows:

"The essential characteristics of this construction consist, not merely in the introduction of the double hinge, but in utilizing the motor frame for one leaf of the double hinge, and the motor itself for the other leaf of the hinge. Furthermore, it is essential to the Rice construction that the first leaf should be journaled upon the driven axle, so that the car axle constitutes the pivot for the first leaf of the hinge, while the armature axis serves as the pivot for the other leaf of the hinge. Finally, there must be combined with the above mechanism, arranged and pivoted as we have described, a pair of spring supports, one of which, at least, must be independent of the frame."

The element of sleeving the frame on the car axle makes it practicable that the gear wheel mounted on the armature axis, or receiving its motion from that axis, shall always mesh with the gear wheel mounted on the car axle, whatever position the motor may take by reason of the elastic support described. The principle underlying this seems very simple, when once stated. It is involved in the fact that, if the frame is thus sleeved, the circumference of the gear wheel receiving its motion from the motor must always be in the circumference of the gear wheel mounted on the car axle. The element of the so-called "double hinge," which co-operates with the devices for elasticity, we find clearly new, in this particular connection, and no doubt useful. The other element is the spring, or other elastic support. Thus, there are three elements, namely, the contrivance for keeping the gears in mesh, and the double hinge, combined with the springs in such way that the complainant maintains that there results a capacity on the part of the motor to float bodily up and down, with relation to the car axle. This means only that the motor is entirely held up or supported by springs, so that no part of it rests on a fixed basis incapable of elasticity. The first-named element is shown in almost every prior device discussed before us; and that it is common in the arts, so far as this case is concerned, is settled by the opinion of Judge Sanborn, speaking for the court of appeals for the Eighth circuit, in Adams Electric Ry. Co. v. Lindell Ry. Co., 23 C. C. A. 223, 77 Fed. 432, 443, 447. Therefore, in making use of this element, the respondent borrowed nothing from the complainant. What it did beyond this was as follows: The motor used by the complainant, and shown in its patent, is styled by the respondent to be of the "double-reduction form." This admits of such a location of the armature axis, shown in the complainant's illustrations which we have already reproduced, as permits the motor, with the parts putting it in relation with the armature axis, to assume normally the form and functions of one leaf of a hinge, as also represented by the complainant. On the other hand, the respondent's motor, as used in its manufactures, is what it styles the "symmetrical form of single-reduction mo-

tor." This normally shows the armature axis as the axis of a motor of a cylindrical form, with the weight distributed in every direction from it. Therefore the respondent's motor and armature, with the parts putting them in mutual relation, do not normally take the form of the leaf of a hinge, nor normally perform its functions, although in the case at bar we are satisfied it does perform them, and we would be holden to determine the suit for the complainant if this were the only issue. This last observation is also true as to respondent's claim that its motor supports the armature axis, instead of being supported by it, and as to its claim that its motor is lifted on springs, instead of depending from them, and also that its peculiar arrangement relieves the car axle by a larger proportion than the complainant's. Details of this character cannot be pressed successfully on the attention of the court in connection with an alleged invention so broad as that claimed by the complainant. It is plain that everything urged by the respondent with reference to the brushes is equally irrelevant.

The simplest way of solving this case is to return to a consideration of what the respondent has in fact done, and, bearing in mind that the device by which, in combinations of this class, the gears are kept in mesh, is a matter of common right, to inquire at once whether whatever in addition thereto the respondent has availed itself of is not also within the like right. In many patent causes this is a much simpler and safer method of solving the questions at issue than to inquire first as to patentability, and second as to infringement. In answering this question, it is to be borne in mind that the matter of elastic suspension by springs, and of otherwise giving either entire or partial independent support, is so common in the arts, and has taken on such innumerable forms, that it cannot easily be perceived that any method not heretofore used remains. The presumption is therefore against patentability in any mere form of elastic suspension, unless under exceptional circumstances. We do not understand that the complainant holds otherwise, as we think nothing patentable is claimed for the mere method of adjusting or attaching or locating the springs, or for anything relating to them independently of the peculiar double hinge which the patent describes. Also, it cannot be denied that the respondent was within its right in using its peculiar motor, which normally locates its armature at its axis, and, as a necessary element to the operation of its motor, in using its armature shaft as a pivot. All this is in the common field of mechanical construction. What would remain would be the question of holding the motor in position. This would, in ordinary course, be by support either at its center or at its radial poles, and, in either case, rigidly or elastically. In the normal work of construction the mechanical engineer must select, and, in an art of so common a character as that of so suspending heavy working parts elastically as to minimize the shock, he might rightfully select either. This is all which has been done by the respondent. Therefore, if complainant's patent is so broad as to cover respondent's device, it is too broad to be sustained. The case undoubtedly shows difficulties in the way of adjusting and disposing of the weight of an electric motor so as to relieve the superstructure and the car from the

effects of shock, and to minimize the consequently increased cost of maintenance; but it does not show that electrical engineers had been endeavoring to overcome them, except incidentally, or that they considered that there was involved anything more than the usual problem of easing the shock common to all road vehicles. The state of the art, as proven by the complainant's expert, covers the history of this matter. The prior efforts shown by him, and explained by the complainant, were looking especially towards finding a method of attaching the motor to the car axle instead of to the car body, and also to increasing the tractive power of the wheels. Moreover, we have not been referred to proofs that the complainant's device actually overcame in practice the difficulty described, or minimized it to any considerable degree. The evidence in these respects falls far short of that class of proof sometimes accepted as overcoming a presumption that what was accomplished was within the scope of ordinary mechanical work. On the whole, we must conclude that the complainant fails to maintain its suit. Let a decree be entered, as provided in rule 21 of this court, dismissing the bill, with costs.

CAMPBELL MACH. CO. v. EPPLER WELT MACH. CO.

(Circuit Court, D. Massachusetts. October 8, 1897.)

No. 645.

1. PATENTS—VALIDITY AND INFRINGEMENT—WAX THREAD SEWING MACHINES.
   The Campbell patent, No. 253,156, for improvements in wax thread sewing machines, whereby the conjoint and opposed movements of the thread arm and eye are dispensed with, and the abrasion incident thereto obviated, construed, and *held* valid and infringed as to the nineteenth claim.

2. SAME.
   The Campbell patent, No. 374,936, for an improvement in wax thread sewing machines, consisting of a device for reducing the momentum of the take-up mechanism, and thereby securing greater uniformity in the locating of the lock, is void for want of patentable invention.

This was a suit in equity by the Campbell Machine Company against the Eppler Welt Machine Company for alleged infringement of two patents, for improvements in wax thread sewing machines.

James E. Maynadier, for complainant.
Fish, Richardson & Storrow, for defendant.

BROWN, District Judge. This is a suit for an injunction and account based upon the nineteenth claim of patent No. 253,156, dated January 31, 1882, and upon the first claim of patent No. 374,936, issued December 20, 1887. Both patents were issued to the complainant as assignee of D. H. Campbell, and relate to wax thread sewing machines. The questions are of validity and of infringement.

The nineteenth claim of patent 253,156 is as follows:

"19. The combination, substantially as hereinbefore described, of a hook needle, a thread arm, a thread eye, and operating mechanism for the arm and eye, which causes said eye to first carry and deliver the thread to the arm and thence deliver thread to the needle, and also causes the arm to merely re-

tain and release the thread delivered to it by the eye whereby said arm is prevented from abrading the thread, as set forth."

The defendant contends that this claim is limited to a machine wherein the thread arm has no positive thread-drawing motion of its own, and that consequently there is no infringement by the defendant's machine, wherein the thread arm has a pronounced thread-drawing motion, with resulting abrasion of the thread by the thread arm. I am of the opinion, however, that this claim should not be thus limited.

The defendant's argument proceeds as follows: The claim was first presented to the patent office in the following form:

"23. The combination, substantially as hereinbefore described, of a hook needle, a thread arm, and a thread eye vibrated by mechanism which causes said eye to first deliver thread to said arm, and then to the needle."

This language was broad enough to include the prior inventions covered by the patent to Turner and Craig, No. 116,893, and the earlier patent to Campbell, No. 231,954. The claim was therefore invalid, and was rejected. Thereupon the applicant amended his claim to a form which, defendant contends, apart from an immaterial word or two to improve the English, is the same as original claim 23, except that he added the words given in italics, to wit, "*and also causes the arm to merely retain and release the thread delivered to it by the eye whereby said arm is prevented from abrading the thread, as set forth*"; that consequently the sole point of distinction is that described by the words added in amendment, namely, a thread arm that merely retains and releases the thread, etc. The defects in the argument are an assumption that the language of the original and unamended claim sufficiently describes the prior art, and the further assumption that this language is not affected in meaning by the new context added in amendment. Because the inventor first made a claim so broad in terms as to include the earlier machines, as well as his own, it by no means follows that his machine did not in fact involve a patentable invention. Although the original claim failed to indicate them by its terms, as a matter of fact differences did exist between the complainant's machine and the former machines. The importance of these differences should be determined by referring directly to the prior art, rather than to the language of a rejected and abandoned claim that fails to describe with requisite particularity either the mode of operation of the complainant's machine, or the mode of operation of the machine of Turner and Craig or of the earlier Campbell patent. The devices in question pertain to sewing machines in which the hook needle must be threaded at each stitch. For the practical operation of machines of this character, it was found necessary so to thread the needle that there should be between the last stitch hole and the needle throat a length of thread considerably greater than the distance between the needle throat and the last stitch hole, in order to produce slack thread behind the needle, so that, when the needle drew down through the material, it would supply itself without the undue resistance that followed from drawing the thread directly from the spool. It was

therefore found necessary to add to the eye which carries thread to the needle and to the needle which receives the thread, a thread arm to co-operate with the eye in the production of a loop of slack thread.

Upon the evidence, there can be no doubt that the complainant placed the old elements in new relations, produced the loop of slack thread by a new mode of operation, and achieved as a result a machine highly successful in practical operation. In the machines of the prior art the slack thread was produced by the simultaneous, conjoint and opposed movements of the arm and eye. The defendant's expert, Calver, says of the operation of the Turner and Craig machine:

"Simultaneously with the movement of the thread arm in one direction, the thread eye moves in the opposite direction. The resulting effect obviously is the formation of a bight caused by the conjoint movements of the thread arm and the thread eye."

This description is applicable equally to the prior Campbell patent, and accords with the statement in the amended specification of the patent in suit:

"It is not new to employ a swinging thread arm with a swinging eye; but, as heretofore organized and operated, the arm helped itself to thread during the movement of the eye, and, by continuing onward, said arm carried the thread in a direction away from the eye and over the presser foot, so that the thread slipped over the arm, and it is the abrasion incident to this slipping action at the arm which I have obviated by having the eye carry the thread to the arm which merely holds it while the eye next proceeds to and around the needle."

The specification further states:

"This combination of a thread eye which delivers thread to an arm which only moves for the purpose of securely holding the thread thus delivered to it by the eye, said eye then proceeding to deliver thread to the needle, is a novel feature, and valuable because of the non-abrasion of the thread by the arm, and it is also novel to combine these elements as described so that the arm is always not only at one side of the needle, but also at one side of the presser foot and never above it", etc.

By the invention of the patent in suit, the conjoint and opposed movements of the arm and eye were dispensed with, the abrasion incident thereto avoided, and such advantages were secured of compactness in arrangement of the parts as arose from locating the arm always on one side of the needle. A novel and useful result was thus attained, which was an advance in the art entitled to the protection of letters patent. Moreover, it is obvious that this result was effected not merely by a change of the function of the thread arm. The thread eye's function was also necessarily modified. Instead of the direct and continuous stroke of the eye to the needle, in the course of which the thread was intercepted by the opposing stroke of the arm, the complainant adopted two movements of the eye, one of which was independent of the movement that carried the thread to the needle. These two movements are separated by the action of the arm in engaging and retaining the thread carried to the arm by the first motion of the eye.

Finding a departure from the prior art and a new mode of motion of the parts, and not merely a new operation of the thread arm, it is

necessary next to inquire: Does the nineteenth claim sufficiently point out any differences other than the new motion of the thread arm? In my opinion, the amended claim, unlike the unamended claim, excludes by its terms the conjoint and opposed movements of Turner and Craig and of the earlier Campbell machine, and provides for the location of the arm upon one side of the needle. The journey of the eye described in the original claim might be either to an advancing arm or to a stationary arm. The claim was thus broader than the prior art. When, however, the amendment specified the function of the arm as merely to retain and release the thread, and provided that the eye should carry and deliver the thread to the arm, the necessary implication of this language was a journey of the eye differing from that in the former machines. Movements of the eye in two distinct paths for the elongation of the thread and supplying it to the needle were necessarily involved in the provision that the arm should merely retain and release the thread. Interpreting this nineteenth claim, in view of the imperfections of former devices, and of the specifications of the patent in suit, and of the purpose of the inventor to obviate the imperfections of the existing art, I think that the nineteenth claim sufficiently describes the actual invention intended to be covered by the patent in suit.

The question of infringement must, then, be determined by a comparison embracing other features than the functions of the respective thread arms. The machines of the complainant and defendant resemble each other, and differ from former inventions, in that they dispense with the simultaneous and opposed movements of thread arm and thread eye, and avoid the abrasion resulting from these opposed movements, and also in having the thread arm always upon one side of the needle. The defendant's thread eye, by a movement independent of the needle-threading stroke, carries the thread to the arm. The arm engages and retains it. The eye then makes the needle-threading stroke. I find these movements to be the same, and in the same order, as those described in the nineteenth claim. The contention that the defendant's machine has a different cycle of operations or a different order of movements rests upon the assumption that the word "first", in the nineteenth claim, means first after the completion of a stitch. The time of operation of the take-up for setting the stitch is immaterial, however. It is the order of movements for the production of the loop of slack thread that is essential, and the movements to effect this end are in both machines the same, and in the same order. In my opinion, therefore, the defendant's machine embodies the new mode of operation of the complainant claimed in the nineteenth claim, and infringes unless the pronounced thread-drawing movement of the defendant's arm and the resulting abrasion is a material difference. Inasmuch as the abrasion incident to the old opposed movements is obviated, the fact that the defendant has given to the thread arm a new abrading movement is of no consequence. If the defendant appropriate substantial advantages of the complainant's device, he does not escape infringement by failure to appropriate all its advantages, nor by introducing abrasion different from that obviated by complainant's device.

The defendant insists that its thread arm does not merely retain and release the thread, and therefore is not within the terms of the nineteenth claim. The word "merely", however, must be given a reasonable interpretation, according to the subject-matter relative to which it was employed. The primary purpose of the inventor was not to produce a thread arm that merely retained and released the thread; it was to avoid old defects by a new combination. So far as this new combination is concerned, a stationary arm and an arm with a retreating movement, or a movement not opposed to the eye, are substantially the same. The word "merely" was used to indicate the exclusion of the old opposing movement of the arm, and the location of the arm upon one side of the needle. This clearly appears from the specification. To put upon the word "merely" a signification that would make movements of the thread arm, in no way affecting the value of the new mode of operation, essential features in a case of infringement, would defeat the manifest intention of the inventor, and nullify a valuable invention by a misinterpretation of the language employed to describe it. The thread-drawing movement of the defendant's thread arm is, in my opinion, merely an additional movement given to one of the parts of complainant's machine, and is not a movement of the kind intended to be excluded by the inventor by the use of the word "merely", in the nineteenth claim. The differences between the machines of complainant and defendant I find to be in immaterial features.

There remains the Cornely patent, No. 219,225, cited as an anticipation of the nineteenth claim. The invention set forth in this patent is for a combination of elements different from those of the patent in suit. It is apparent that the thread carrier in this device requires additional mechanism for the threading of the needle; and the device appears to me too different in its purpose, and too inapplicable to machines like those under consideration, to constitute an anticipation of the nineteenth claim.

The second patent in suit is patent No. 374,936, of which only the first claim is involved. The first claim is as follows:

"1. In a wax thread sewing machine, the combination with a thread-clamping brake of a take-up embodying two or more positively reciprocated stitch tightening thread fingers, substantially as described, whereby slack thread is taken up in two or more bights, and thereby easily and promptly placed under a stitch-tightening tension."

The issue is as to the patentability of the invention claimed. The term "thread-clamping brake", interpreted in the light of the specification, I find to mean a device through which the thread must not slip or render when the take-up operates. Such a device was old in combination with a single take-up, and a multiple take-up was old in combination with a yielding tension device. It is, nevertheless, claimed that the combination of a multiple take-up with a device through which the thread cannot render is an invention. The object of this combination is to reduce the momentum of the take-up mechanism, thereby securing greater uniformity in the locating of the lock. The means for reducing this momentum were found in the multiple take-up, an old device for that purpose, and in a thread-

clamping device which prevented the take-up from drawing thread, also an old device. Each of these devices tends to lessen the stroke of the take-up, and in the new combination each performs only its old function of lessening the length of the stroke. I think that nothing more was done than to substitute for the single take-up in the prior patent to Campbell, 231,954, the well-known device of a multiple take-up, and that momentum was lessened by this substitution, in the same way that it was lessened in the prior art. It is contended, however, that this reduction of momentum remedies an evil not existing in the prior machines, i. e. the irregular location of the lock, and was adopted for that purpose. Admitting that this beneficial result followed, it was simply from a reduction of momentum by an old and familiar device to lessen the excessive length of the stroke of the take-up. The beneficial effect was due to mechanical skill, and not to invention.

I find, therefore, that the nineteenth claim of patent No. 253,156 is valid, and is infringed by the defendant. I find that the first claim of patent No. 374,936 is invalid. Decree for complainant as to patent No. 253,156. Bill dismissed as to patent No. 374,936. Question of costs reserved.

GAGE-DOWNS CO. v. FEATHERBONE CORSET CO.

(Circuit Court, W. D. Michigan, S. D. October 27, 1897.)

TRADE-MARK—GEOGRAPHICAL NAME—UNFAIR COMPETITION.

One making corset waists at Chicago, and selling them as "Chicago Waists," so that this designation has come to denote among purchasers the goods made by him, is entitled to an injunction against another who makes similar waists in a different state and city, and sells them as "Chicago Waists," with the manifest intent of availing himself of the reputation acquired by the other's goods.

This was a suit in equity by the Gage-Downs Company against the Featherbone Corset Company to enjoin the use of certain marks and labels upon its goods. The cause was heard on a motion for preliminary injunction.

Aldrich, Reed, Foster & Allen and Crane, Norris & Stevens, for complainant.

Howard, Roos & Howard, for defendant.

SEVERENS, District Judge. In this case a motion was made some time ago for an injunction to restrain the defendant from using certain marks and labels upon its goods, which it is alleged in the bill are calculated to deceive the public, and lead them to suppose that they are buying the goods of the complainant; and the complainant claims that the defendant is thus appropriating the benefits of the reputation acquired by the complainant's goods. Upon the facts as they now appear, the complainant has long been in the business of making and selling corset waists at Chicago, and marking them "Chicago Waists," and, being the only person marking its

manufactures thus, the complainant has come to be known as the origin by manufacture of the goods thus branded. The complainant has also employed upon its package as a label the initials of the company, "G. D." In the course of its business it employed Buyer & Reich as its agents on the Pacific coast, and the latter sold these goods thus marked; that is to say, marked "Chicago Waists." After the termination of their agency for the complainant, they continued to sell "Chicago Waists," and they would seem to have made some arrangement with the defendant by which the defendant makes corsets, and does them up in boxes marked in large letters "Chicago Waists," with the initials "B. & R.," and the defendant sells such goods of its manufacture to Buyer & Reich, and also to the trade in Michigan, and generally throughout the country.

Upon the arguments and in the briefs a great number of cases bearing upon the subject of the right of a party to appropriate the name of a place as a trade-mark or a trade-name, and wherein the circumstances in which it would be permitted and in which it would not, are extensively discussed. I have examined all the cases which were cited which were accessible, but I have not had the time to make any extended analysis of them upon paper. The circumstances vary greatly, but the underlying principle which is effective in the solution of such cases is that a party may not adopt a mark or symbol which has been employed by another manufacturer, and by long use and employment on the part of that other has come to be recognized by the public as denoting the origin of the manufacture, and thus impose upon the public by inducing them to believe that the goods which this new party thus offers are the goods of the original party. In other words, it is a fundamental principle that a man cannot make use of a reputation which another manufacturer has acquired in a trade mark or name, and, by inducing the public to act upon a misapprehension as to the source of the origin, deprive the other party of the good will and reputation which he has acquired, and to which he is entitled. Now, there are many cases in which it has been held that the name of the place where goods are manufactured is not the subject of appropriation, and this may be said to be the general rule, and to be applicable where that is the sole feature of the trade-mark or trade-name, and where the name of the place is used in its primary signification. But the use of the name of a place may, under circumstances, be such as to denote to the eye and mind of the public the name of the person who has, perhaps, by long-continued business in that place, or long appropriation of that name, and being the only person there who has thus appropriated and used that name, produced goods which have gained their favor. In such circumstances the name of the place may acquire a secondary signification, and become, instead of denoting the place where the goods are manufactured, a mark denoting the manufacturer, and in such case, and in the circumstance where the name has thus acquired a secondary signification, a party may use it, and may be entitled, possibly, to its exclusive use. In such a case it depends entirely upon the proof, and, if it appears that the name is used for the purpose of denoting the place where the goods are made,—if this is the primary object,—

then it is not subject to be appropriated by any one person resident there. All other residents have the like privilege of use. But, if the circumstances of the case show clearly that the use of that name is a means of appropriating the business advantages, good will, and trade-name of the complainant, that is not lawful. This feature of the case would be much affected by the circumstance of the residence of the parties. If they both resided in the same place, there would be a stronger reason for the general rule just stated. But where the name is appropriated by a manufacturer who resides at a different place, it very naturally starts an inquiry as to what is the motive—what is the object—which the party sought to attain. Now, in the present instance, the persons who are charged and who confess to using this label "Chicago Waists" on their goods are people who reside and do business in California (Buyer & Reich), and by others manufacturing at Kalamazoo (the Featherbone Corset Company). It is manifest that a very serious question arises upon this fact as to what purpose and object these California and Kalamazoo parties have in appropriating this name. It seems to me that there can be but one object, and that that object is to make use of the reputation which the goods thus branded have acquired. I gather that these goods have been manufactured and sold in this way by the complainant at Chicago solely, and that the inference should be that this mode of doing business by the defendant is adopted to mislead, and for the purpose of deriving such advantage in the manufacture and sale of the goods as arises from the good will and reputation of the complainant. Circumstances may develop upon the proofs which may change the impressions which the court has now formed. But I think the case is made out, and the usual preliminary injunction should issue, and the motion is allowed.

NELSON et al. v. WHITE et al.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 364.

ADMIRALTY APPEALS—HEARING IN CIRCUIT COURT OF APPEALS.

The act of February 16, 1875, requiring the circuit courts, in admiralty cases, to make separate findings of fact and conclusions of law, and limiting the supreme court, on appeal, to a review of the questions of law arising on the record, etc., is not applicable to the trial of admiralty cases in the district courts, and the review thereof on appeal by the circuit courts of appeal; but in the latter courts an admiralty appeal is, to all intents and purposes, a trial de novo, so that the appeal cannot be heard upon the merits, where the transcript of the record does not contain the testimony taken below, as required by general admiralty rule 52 and by the rules of the circuit court of appeals.

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

James Kiefer and H. K. Struve, for appellants.

G. M. Emory (Bausman, Kelleher & Emory, of counsel), for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The first question to be considered upon this appeal is the motion of the appellees to dismiss the appeal. This motion is predicated upon the fact that the transcript of the record does not contain the testimony taken in the court below. This is an admiralty suit, instituted in the district court of the United States for the district of Washington, Northern division, by Charles H. White, one of the appellees, against the schooner M. M. Morrill, to recover the sum of $259, being a balance alleged to be due for services rendered the vessel, upon a sealing voyage in the North Pacific Ocean, in the capacity of a hunter, at the special instance of Edward Cantillion, her master, and one of the appellants on this appeal. Subsequently S. N. Johnson, the other appellee, filed a libel in intervention against the schooner, also to recover a balance claimed to be due for services rendered at the special instance of Edward Cantillion, the master, in the capacity of a hunter, upon the sealing voyage in the North Pacific Ocean. The vessel was claimed by A. S. Nelson, the managing owner, one of the appellants. Edward Cantillion, the master, intervened in his own behalf to recover certain sums claimed to be due him as wages, and for money advanced to fit out the vessel for the voyage in question, and also for the payment of certain notes secured by mortgages on the vessel of the interests of the owners. During the pendency of the suit the vessel was sold, bringing the sum of $1,800, and it is against the balance of proceeds of the sale that the claims of the libelant and the interveners for preference are directed. The court below preferred the claims for wages of the libelant, C. H. White, and of the intervener, S. N. Johnson, as against that of Edward Cantillion, the master and mortgagee of the vessel. From this decision the claimant and managing owner, A. S. Nelson, and Edward Cantillion have appealed.

Rule 14, subd. 3, of the rules of the United States circuit court of appeals for this circuit (Ninth), provides:

"No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in this court, shall be filed." 21 C. C. A. ciii., 78 Fed. ciii.

Subdivision 6 of the same rule provides:

"The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court." Id. civ.

Rule 52 of the general admiralty rules promulgated by the supreme court provides that:

"The clerks of the district courts shall make up the records to be transmitted to the circuit courts, on appeals, so that the same shall contain the following: * * * (6) The testimony on the part of the libelant and any exhibits not annexed to the libel. (7) The testimony on the part of the defendant and any exhibits not annexed to his pleadings."

There is a proviso at the end of this rule, as follows:

"Hereafter, in making up the record to be transmitted to the circuit court on appeal, the clerk of the district court shall omit therefrom any of the

pleadings, testimony, or exhibits which the parties, by their proctors, shall, by written stipulation, agree may be omitted, and such stipulation shall be certified up with the record."

There is no stipulation in the record of this case dispensing with the testimony taken in the court below. On the contrary, as appears by the record, counsel for appellees filed a protest, entitled "Notice as to Printing of Record," wherein they objected to the hearing of the appeal in this action on the transcript of the record in the lower court filed in the clerk's office of this court, upon the ground that the transcript should include the testimony taken in court and also the facts agreed upon in writing by counsel for both parties in the court below. It is a well-settled rule that an appeal in admiralty is, to all intents and purposes, a trial de novo. Yeaton v. U. S., 5 Cranch, 281; The Lucille v. Respass, 19 Wall. 73; The Charles Morgan, 115 U. S. 69, 75, 5 Sup. Ct. 1172; Irvine v. The Hesper, 122 U. S. 256, 267, 7 Sup. Ct. 1177; Anon., 1 Gall. 22, Fed. Cas. No. 444; The Roarer, 1 Blatchf. 1, Fed. Cas. No. 11,876; The Saratoga v. 438 Bales of Cotton, 1 Woods, 75, Fed. Cas. No. 12,356; The Havilah, 1 C. C. A. 77, 48 Fed. 684; Singlehurst v. La Compagnie Générale Transatlantique, 1 C. C. A. 487, 50 Fed. 104; The Philadelphian, 9 C. C. A. 54, 60 Fed. 423. As was said by Mr. Chief Justice Marshall in Yeaton v. U. S., supra:

"The majority of the court is equally of the opinion that in admiralty cases an appeal suspends the sentence altogether, and that it is not res adjudicata until the final sentence of the appellate court be pronounced. The cause in the appellate court is to be heard de novo, as if no sentence had been passed. This has been the uniform practice, not only in cases of appeal from the district to the circuit courts of the United States, but in this court, also."

If the cause is to be heard in the appellate court de novo, and the merits of the case are involved in the questions presented to the court for its consideration, it is essential and necessary that the court should have the testimony upon which the lower court based its decision. It is claimed that the act of February 16, 1875, entitled "An act to facilitate the disposition of cases in the supreme court of the United States, and for other purposes," has altered the practice, as defined in the above-entitled case, so far as admiralty appeals to the circuit court of appeals are concerned. That act (18 Stat. 315) provided:

"That the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. * * * The review of the judgments and decrees entered upon such findings by the supreme court, upon appeal, shall be limited to a determination of the questions of law arising upon the record and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions of law."

In this case the transcript of record contains certain findings of facts found by the district judge, and it is contended that, for the purposes of the question of law which the appellants seek to have this court determine, these findings of fact are sufficient and binding. It is to be observed that the district judge, in admiralty cases, is not re-

quired by law, nor does it appear to be the practice, to make findings of fact. The general practice seems to be for the judge to render an opinion, written or oral, whenever the exigencies of the case require it, in which such facts are stated as the court deems the evidence supports and justifies the decree. But, however this may be, we are of the opinion that the act referred to is inapplicable to appeals in admiralty from the existing district courts to the present circuit courts of appeal. The same question was raised in The Havilah, 1 C. C. A. 77, 48 Fed. 684, where the circuit court of appeals for the Second circuit used the following language:

"Obviously, that act does not apply to an appeal to the circuit court of appeals. The eleventh section of the act of March 3, 1891, establishing the circuit court of appeals, provides that 'all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writ of error provided for in this act in respect of the circuit court of appeals.' By the act appeals in admiralty henceforth lie direct from the district court to the court of appeals, and no method or system of review by findings or bill of exceptions was in force for the review by appeals in admiralty from the district court when the act was passed. It would be unreasonable to hold that congress intended a different practice to apply to the limited number of cases where appeal lies from the circuit court to the circuit court of appeals (solely because they were pending and undecided when the act was passed) from that which would apply to appeals in admiralty from the district court. As the act of 1875 provided a method and system of review, through appeals, only for such cases in the circuit court as went to the supreme court, there seems no good reason for extending the general language of the eleventh section of the new act to cover cases in the circuit court which are not to go to that tribunal."

Therefore, both under the rules of the supreme court and of this court, and of the doctrine laid down by the supreme court, that an appeal in admiralty is a trial de novo, the testimony taken in the court below should have been certified up in the transcript of record on appeal, in the absence of a stipulation that it might be omitted. In the case of The Alejandro, 6 C. C. A. 54, 56 Fed. 621, this court said, with reference to the fact that the testimony had not been included in the transcript of record:

"We are of opinion that the case is not presented in such a manner as to require at our hands a review of the testimony. The record on appeal only contains the 'judge's notes of testimony,' and deposition of one witness. Rule 52 (admiralty rules) describes what shall constitute the record on appeal to the circuit courts, and, among other things, provides that it shall contain 'the testimony on the part of the libelant, and any exhibits not annexed to the libel; the testimony on the part of the defendant, and any exhibit not annexed to his pleading.' In making up the record the clerk may omit therefrom 'any of the pleadings, testimony, or exhibits which the parties, by their proctors, shall by written stipulation agree may be omitted, and such stipulation shall be certified up with the record.' No such stipulation appears in the record. There is no certificate that the notes of the testimony contain all the material evidence."

It does not appear, from the report of the case, that a motion to dismiss the appeal on that ground was made, but the court used the above significant language when asked to review the testimony on its merits. However, inasmuch as no special objection was made to its consideration, the court deemed it proper to say that they had read

the "judge's notes of testimony," and they were of the opinion that, when the same was considered in connection with his opinion in the case, the testimony in the record was sufficient to justify his conclusions, and to sustain the findings of the circuit judge. In the case of The Glide, 18 C. C. A. 504, 72 Fed. 200, it appeared, upon appeal to the circuit court of appeals for the Fourth circuit, that in making up the record on appeal the testimony taken at the trial could not be included in the record, for the reason that no part of it was reduced to writing, nor were any official notes of it taken. A motion was made to dismiss the appeal. It was sought to rectify this omission, on the part of the appellant, by taking de novo, before a notary public, the evidence of the witnesses who had testified in his behalf; giving notice to the proctors of the libelant of his intention so to do, and of the time and place selected. But the proctors for libelant declined to appear. When the testimony was taken, it was submitted to the district judge who had tried the case, to obtain his certificate to the fact that this was the purport of the testimony, or at least a part of the testimony, taken before him at the hearing. The district judge refused to give this certificate:

"First, because he knew of no law or practice which would justify him in doing so; and, second, because he could not, from his recollection or notes, certify that the testimony of the witnesses, so taken, was in substance the same as given before him."

The court of appeals (Judge Simonton delivering the opinion) said:

"The next ground for the motion [to dismiss the appeal] is that the record does not contain any of the evidence taken at the trial in the district court. This is strictly correct. The affidavits taken by the respondent after the trial of what the witnesses say they testified at the trial are in no sense evidence taken at the trial. We fully concur with the district judge that there is no law or practice which would justify him in granting the certificate asked by proctors for the claimant. The rule 14 of this court, clause 6 (11 C. C. A. cv., 47 Fed. vii.), requires that the record, in cases of admiralty and maritime jurisdiction, shall be made up as provided in general admiralty rule No. 52 of the supreme court. This rule No. 52 requires that the record shall contain the testimony upon the part of the libelant and the testimony on the part of the defendant, unless the parties agree, by their proctors, by written stipulation, that it may be omitted. There is no such stipulation here. Clearly, the record is incomplete. This court cannot pass on the merits of the case. Nor, in the absence of a stipulation by counsel, is it possible to supply the omission. We must have the evidence taken at the trial."

It was held, however, that as there was no rule or practice in the district court requiring the reduction to writing of evidence used at the trial, the case should be remanded to the court below, with instructions to grant a new trial. The court added this warning, after stating that there was no precedent, for or against the course, which suggested itself: Parties to cases were notified that that case could not be relied on as a precedent, and that in the future the party through whose omission or neglect the testimony, or any part of it, taken at the trial, is not before the court when the cause comes up on appeal, must suffer the consequences. The case just cited is to be distinguished from the case at bar, in that in this case it is not pretended that all the testimony was not taken down and reported. Under the circumstances, therefore, this court would not be justified in pursuing the same course followed by

the appellate court in the case cited; assuming, of course, that such a course would be proper and desirable under the circumstances of this case. We see no alternative to granting the motion to dismiss, unless it be true, as contended by counsel for appellants, that the assignments of error present simply a question of law; that the testimony is wholly unnecessary to the determination of this question, and, if certified up, would involve an expense practically prohibitory of an appeal; and that in any event the findings of facts made by the district judge in connection with his opinion supply all the material facts necessary to the consideration and determination of the question of law which it is claimed the assignments of error present. It is sought, further, to fortify the findings of fact by showing that no exceptions to them were taken by the appellees in the court below. On the other hand, it is strenuously contended by counsel for appellees that the court cannot review the case upon the findings, and without the testimony and exhibits; that such evidence would tend to show—which the findings do not—such inequitable and unconscionable conduct on the part of the appellant Cantillion in his dealings with the appellees, White and Johnson, as would justify the decision of the court below in allowing their claims for wages as hunters on the schooner M. M. Morrill, in preference to the amount claimed by the intervening libelant, Edward Cantillion, for his wages as master, and advances and amounts due him upon the several notes and mortgages set out in the findings of fact of the court below. A perusal of the opinion of the district judge satisfies us that he decided the case largely upon the peculiar state of facts presented to him, particularly with reference to the conduct of Cantillion in his dealings with White and Johnson. The facts, as they are stated in the opinion, are as follows:

"In this case the libelant, Charles H. White, and the intervener, S. N. Johnson, are suing to recover money earned by and due to them for their services as hunters on a sealing voyage in the North Pacific Ocean. The case is defended by A. S. Nelson, one of the owners of the vessel, and by Edward Cantillion, who was master of the vessel on the voyage. Cantillion was owner of one-third of the vessel, and he sold his interest to said libelant and intervener, conveying one-sixth to each, for which he received from Johnson $350, and a promissory note for $350, and from White a promissory note for $700; and, to secure payment of said notes, he received mortgages upon the interests of each in the vessel. He also held mortgages from the other owners upon all of their interests. He then entered into a contract with the owners, by which he undertook to furnish supplies for the voyage, and to go as master, for which he was to be paid a stipulated sum for wages, and also to have a certain amount for each seal skin secured, and one-fourth of the proceeds from all seals which he should kill; and he was to be repaid for his advances for supplying the vessel, with interest. He then hired the libelant and said intervener to go on said voyage as hunters, agreeing to pay them for their services one-fourth of the proceeds of all seal skins which they should secure. He also made a special contract with them, by which one-half of their earnings on the voyage should be applied to pay their indebtedness to him upon said promissory notes. The voyage proved to be unprofitable. Cantillion sold the seal skins secured, and from the proceeds thereof has paid himself his wages in full, and his compensation at the agreed rate for all seals which he individually killed; and after deducting such disbursements, and applying the remainder on account of advances which he made for supplies, there remains due to him a balance of nine hundred and forty-three and eight one-hundredths ($943.08)

dollars, and the individual indebtedness of the several owners, secured by mortgages on the vessel, remains wholly unpaid. The libelant acknowledges to have received on account of his wages the sum of one hundred and thirteen and two one-hundredths ($113.02) dollars, and there remains unpaid two hundred and fifty-nine ($259) dollars. Johnson received, on account of his earnings one hundred and eighteen ($118) dollars, and there remains unpaid two hundred and nine ($209) dollars. These balances Cantillion has taken out of the proceeds from the sale of the seal skins which came into his hands, and claims the right to retain the whole thereof, on account of the indebtedness to him for supplies furnished, and the promissory notes above mentioned."

After discussing the legal aspects of the case, the district judge continues:

"With the acquiescence of all parties interested, the vessel has been sold by the marshal, and Cantillion became the purchaser, for the sum of $1,800, and he is now claiming the proceeds of the sale, after payment of costs, to apply on the indebtedness of the several owners to him; so that, if he should prevail in defeating the libelant and the intervener from recovering their wages, the result of the adventure may be summed up as follows: Cantillion will have the $350 paid by Johnson, and for the balance of less than $1,000 on account of supplies, and the marshal's costs upon the sale of the vessel, will have absorbed the entire earnings of the vessel and her crew, and acquired the vessel itself, and still hold the libelant and the intervener indebted to him for a considerable part of the promissory notes given for the purchase price of their interests in the vessel. All this by his cleverness in persuading these men to purchase his interest in the vessel before hiring them. I consider that the justice of the case requires that these men should receive their wages from the money in the registry, and it will be so decreed." 78 Fed. 509.

We cannot say that the district judge erred, unless we have all the evidence before us for our consideration. If, as contended for by counsel for appellants, there is only a question of law presented for our determination,—the question being whether or not the appellees, being part owners of the vessel, can have their claims preferred to those of Cantillion,—then, in accordance with the rules and the regularity of appellate procedure, a stipulation dispensing with the testimony should appear in the record. While it may be true that the ultimate question to be determined by the court resolves itself into one of law, still it is plain that the determination of the question depends largely upon the nature of the evidence presented in the lower court. It is undoubtedly the general rule, in admiralty, that a part owner has no lien on the vessel, to the prejudice of others extending credit to the vessel. Patton v. The Randolph, Gilp. 457, Fed. Cas. No. 10,837; Petrie v. The Coal Bluff No. 2, 3 Fed. 531; The Short Cut, 6 Fed. 630; The Queen of St. Johns, 31 Fed. 24; The Lena Mowbray, 71 Fed. 720. But in his opinion the district judge states that there were "no innocent creditors or purchasers to be prejudiced by the discovery of a secret lien," and he held that under the peculiar facts of the case the rule was inapplicable, as against the claims of White and Johnson. While it is true that they were part owners, they had rendered maritime services as hunters on the sealing voyage, in which Cantillion acted as master, he being at the same time mortgagee of the interests of the appellees in the vessel acquired from him as above stated. If it would have been inequitable to give the claims of Cantillion preference over those for hunters'

wages, under the peculiar circumstances of the case as presented to the court below, we cannot say, in view of the fact that we have not the evidence itself before us, that the court erred in holding that the rule was inapplicable. A court of admiralty, while not a court of general equity, yet acts upon equitable principles. Dean v. Bates, 2 Woodb. & M. 87, Fed. Cas. No. 3,704; Petrie v. The Coal Bluff No. 2, 3 Fed. 533; The Eclipse, 135 U. S. 599-608, 10 Sup. Ct. 873. See, also, The Juliana, 2 Dod. 521. Under the circumstances of this case, we think that the decision of the district court should be affirmed. Our decision must, of course, be understood as being limited to the peculiar state of the case as presented by the record. The judgment of the district court is affirmed.

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THE EUGENE.

JACOBI et al. v. THE EUGENE.

(District Court, D. Washington, N. D. October 23, 1897.)

ADMIRALTY—JURISDICTION IN REM—BREACH OF CONTRACT OF CARRIAGE.

A suit in rem is not maintainable for breach of an executory contract to carry a passenger on a particular vessel, where the vessel has never entered on the performance thereof. The lien upon which the right to proceed in rem depends does not attach until the passenger has placed himself within the care and under the control of the master.

In Admiralty. Libel in rem by Gaston Jacobi and Charles Ruff against the steamer Eugene, to recover passage money, and damages for breach of contract to carry the libelants, with their baggage, from Seattle, via St. Michaels, in Alaska, to Dawson City, in the Northwest Territory. Heard on exceptions to the libel.

John C. Hogan, for libelants.

J. C. Flanders, for claimant.

HANFORD, District Judge. Each of the libelants alleges that the Portland & Alaska Trading & Transportation Company, a corporation, being at the time owner of the steamship Eugene, entered into a contract to carry him, with his baggage, on board the steamer Bristol, from the city of Seattle, in the state of Washington, to St. Michaels, in Alaska, and thence on board the steamer Eugene to Dawson City, and thereupon issued two tickets, one being for passage from the city of Seattle to St. Michaels, for which he paid $100, and the other for passage from St. Michaels to Dawson City, for which he paid $200. A breach of the contract is alleged, in this: that the steamer Eugene wholly failed to go to St. Michaels to receive the libelants, as agreed. The libelants allege that they have been injured and damaged by loss of the amount paid for their passage, and the cost of a miner's outfit, and loss of time, for which they each claim damages in the sum of $1,000.

The authorities are conflicting on the point as to whether a suit in rem can be maintained for breach of an executory contract to carry

a passenger on board a particular vessel, where the vessel has not entered on performance. In the case of The Pacific, Fed. Cas. No. 10,643, it was held by Mr. Justice Nelson that, in the case of a contract maritime in its nature and subject, it is not essential, to give jurisdiction to an admiralty court in a suit in rem, that the vessel should have entered on the performance, or that the breach should have occurred in the course of the voyage, and that, when the contract has been entered into for the conveyance of goods or persons in a particular ship, the liabilities of the owner and of the ship attach at the same time. In the case of The General Sheridan, Fed. Cas. No. 5,319, Judge Blatchford held that the decision by Mr. Justice Nelson in The Pacific Case had been overruled by the supreme court in the cases of The Freeman v. Buckingham, 18 How. 182, and Vandewater v. Mills, 19 How. 82. These two cases may be regarded as the leading cases on opposite sides of the question. In a dictum by Judge Lowell in Oakes v. Richardson, Fed. Cas. No. 10,390, which was a suit in personam, the decisions of the supreme court supposed to overrule The Pacific Case are treated as dicta, not having the force of decisions. In the case of The Williams, Fed. Cas. No. 17,710, in an elaborate opinion showing a careful examination of the numerous authorities, Judge Emmons sustained and followed the ruling of Mr. Justice Nelson. In the case of Scott v. The Ira Chaffee, 2 Fed. 401, Mr. Justice Brown, then sitting as district judge for the Eastern district of Michigan, and who appears, by the report of The Williams Case, to have successfully argued for the jurisdiction before Judge Emmons, denied the authority of that decision. Referring to the decisions of the supreme court in 18 and 19 How., he says:

"Those cases cannot be said to have definitely fixed the measure of liability. They seem, rather, to have announced in general terms a doctrine from which the supreme court has not as yet shown any disposition to recede."

Then, after reviewing at length the American and foreign authorities, he reaches the conclusion that the owner of a cargo has no lien on the vessel for the breach of a contract of affreightment until the cargo, or some portion, has been laden on board, or delivered to the master. In the case of The Monte A., 12 Fed. 331, Judge Brown, of the Southern district of New York, carefully reviews the decisions, and in his conclusion sustains the ruling of his predecessor in the case of The General Sheridan. In subsequent decisions the supreme court seems to have regarded the declarations contained in the decisions in 18 and 19 How. as expressing the doctrine of that court, and not as mere dicta. Mr. Justice Davis, in the opinion of the court in the case of The Lady Franklin, 8 Wall. 325–329, says:

"The doctrine that the obligation between the ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed, and so long settled, that it would be useless labor to reiterate it, or the principles which lie at its foundation. The case of The Freeman v. Buckingham (decided by this court) 18 How. 182, is decisive of this case. It is true, the bill of lading there was obtained fraudulently, while here it was given by mistake, but the principle is the same; and the court held in that case that there could be no lien, notwithstand-

ing the bill of lading. The courts say, 'There was no cargo to which the ship could be bound, and there was no contract for the performance of which the ship could stand as security.'"

And again, in an opinion by Mr. Justice Davis in the case of The Keokuk, 9 Wall. 517–521, he reiterates:

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on the vessel, as a security for the performance of a contract to transport a cargo, until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master, or some one authorized to receive it. The Freeman v. Buckingham, 18 How. 188."

In an opinion by Mr. Justice Clifford in the case of The Delaware, 14 Wall. 579–606, the case of The Freeman v. Buckingham, 18 How. 182, is cited as an authority supporting the proposition that bills of lading, duly executed in the usual course of business, bind the owners of the vessel, if the goods were laden on board, or were actually delivered into the custody of the master; "but it is well-settled law that the owners are not liable if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board, or delivered into the custody of the carrier or his agent."

These authorities are conclusive upon the point that the right to proceed in rem for breach of a contract of affreightment does not exist unless the cargo, or a portion of it, has been delivered to the master of the vessel, or to his authorized agent. The authorities also hold that ships engaged in carrying passengers on the high seas stand on the same footing of responsibility, according to the maritime laws, as those engaged in carrying merchandise. 1 Am. & Eng. Enc. Law (2d Ed.) pp. 661, 662. The weight of authority bears so strongly against the position of the libelants that I am unwilling to set up my judgment in opposition. According to the authorities, it is not the making of a contract, nor the payment of the consideration therefor, which renders the vessel liable. The lien upon which the right to proceed in rem depends does not attach until the goods or passenger have been placed within the care and under the control of the ship's master. In the argument of the exceptions it was insisted that, the contract being entire, both vessels became liable from the time libelants started on their journey from Seattle to St. Michaels; but the libel fails to allege that they ever rendered themselves, or placed their baggage, on board the steamer Bristol, or that performance of the contract on the part of the owner of the vessels was ever commenced. Exceptions sustained.

NATIONAL MASONIC ACC. ASS'N OF DES MOINES v. SPARKS.

(Circuit Court of Appeals, Eighth Circuit. October 6, 1897.)

No. 859.

1. FEDERAL JURISDICTION—ALLEGATIONS OF CITIZENSHIP—BURDEN OF PROOF.
Where a plaintiff's pleading, in the federal courts, sets out the necessary diverse citizenship of the parties, the burden of both allegation and proof to the contrary rests upon the party who seeks to defeat the jurisdiction.

2. SAME—EFFECT OF GENERAL DENIAL.
A general denial, in a federal court, is a plea to the merits, and does not put in issue averments of citizenship, upon which the jurisdiction depends. The matter of jurisdiction is waived unless it is challenged by a special plea.

3. APPEAL AND ERROR—REVIEW—BILL OF EXCEPTIONS.
To enable the circuit court of appeals to review the action of the circuit court upon the admission or exclusion of evidence, the evidence to which the exception is directed must be incorporated in the bill of exceptions.

4. SAME—HARMLESS ERROR.
It is not error to exclude, upon a trial, cumulative evidence of a state of facts which is not controverted.

5. SAME—TRIAL TO COURT—SPECIAL FINDINGS.
In order that the opinion of the court, in a case tried without a jury, may be treated as a special finding of facts, so that assignments of error may be based thereon, its statement of the facts found should not be mingled with the evidence, or with discussions of law or the reasons for the court's conclusions.

6. SAME—ASSIGNMENTS OF ERROR.
Upon a writ of error the objection that the circuit court made neither general nor special findings of fact cannot be considered, unless raised by the assignment of errors.

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

Clark Varnum, for plaintiff in error.
Carroll Wright, for defendant in error.

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

RINER, District Judge. This was an action at law brought by Nannie R. Sparks, the defendant in error, against the National Masonic Accident Association of Des Moines, Iowa, the plaintiff in error, in the circuit court of the United States for the Southern district of Iowa, to recover the sum of $5,250, with interest and costs, upon a judgment obtained by her against the association in the circuit court sitting within and for the county of Johnson, in the state of Missouri. The petition filed in the circuit court for the Southern district of Iowa averred, in substance, that the plaintiff was a citizen of the state of Missouri; that the defendant was a citizen of the state of Iowa; that the amount involved in controversy exceeded the sum of $2,000, exclusive of interest and costs; that on the 25th of November, 1893, she recovered a judgment against the defendant in the circuit court within and for the Seventeenth judicial district of the state of Missouri, held in the county of Johnson, in said state, in the sum of $5,225, with costs and interest from that date; that the court rendering such judgment was a court of general jurisdiction, and a

court of record, and that she was the owner and holder of the judgment at the time this action was brought. To this petition the defendant answered:

(1) Admitting that it was a corporation organized under the laws of the state of Iowa; (2) denying each and every other allegation of the petition; (3) as a separate defense, that the defendant never appeared in any suit or proceeding brought against it by the plaintiff in the circuit court of Johnson county, Mo., and denied that it was ever summoned to appear, or was served with process to appear, in such action; (4) for a further and separate defense, "that it is a corporation organized under the laws of the state of Iowa, with its office and place of business at the city of Des Moines, in said state of Iowa, and that it never has had an office in the state of Missouri, nor kept or maintained any agents or officers in said state; that neither the superintendent of the insurance department of the state of Missouri, nor any other person within said state, has ever been appointed by the defendant as a person upon whom service of process might be served upon the defendant within said state of Missouri; that the defendant has never made application to the insurance department of the state of Missouri to be admitted to said state to do business; that said defendant has never been served with process by any of its officers or agents, or any person upon whom service of process could be lawfully made, or who was appointed thereunto, within the said state of Missouri, and that any judgment, if any was obtained by the alleged plaintiff in the said alleged suit or proceeding alleged to have been had in the circuit court of Johnson county, Missouri, was rendered without service of process upon the defendant, or upon any person or persons authorized or empowered to accept such service of process, or have such service of process made upon him or them, for the defendant;" (5) for another defense, "that it never entered any voluntary appearance in the alleged suit or proceeding claimed to have been had in the circuit court of Johnson county, Missouri; that no person that was authorized or empowered to accept service of process for it (the defendant), or to have service of process made upon him or them for the defendant, was ever personally cited to appear in said cause, or personally served with any summons or process in said cause, nor did any such person ever appear for the defendant in said cause or proceeding;" (6) for another defense, "that any alleged judgment pretended to be rendered by the circuit court of Johnson county, in the state of Missouri, against this defendant, in favor of the plaintiff, was obtained through the fraud of the plaintiff, in this: that the said plaintiff, well knowing that each and every of the matters hereinbefore pleaded in this answer were true, and the same being true, and being hereby reaffirmed and reaverred as though pleaded at length herein, said plaintiff did, with the express purpose of preventing the defendant from presenting a defense to such alleged suit, fail, neglect, and refuse to serve or cause to be served upon it (the defendant) any process or summons or citation whatever in the said alleged suit, and fraudulently, and with the intent to defraud this defendant, caused service of a writ of process to be made upon the superintendent of insurance of the state of Missouri, and after having caused and procured such service to be made, and thus preventing the defendant and its agents and officers from having due and legal notice of the commencement of such suit, the plaintiff then and there caused and procured the court pretending to render such judgment to fraudulently and untruthfully recite in the said judgment the false and untrue statement that the defendant was doing an accident life insurance business in the state of Missouri, and the further false and untrue statement that personal service was had upon the defendant in the state of Missouri, and the further false and untrue statement that the superintendent of the insurance department of the state of Missouri was authorized to receive such service of process, all of which acts and things were done by the plaintiff for the express purpose of causing and procuring an apparently valid judgment entry to be made by the said circuit court of Johnson county, Missouri, when in truth and in fact the said court so making such judgment entry was wholly without jurisdiction over said cause, and wholly without jurisdic-

tion over the defendant, and wholly without jurisdiction to render said judgment or make such alleged entry of judgment, and which want of jurisdiction was known to the plaintiff at the time of the causing and procuring such court to make such entry."

By stipulation in writing, signed by the parties and filed in the circuit court, a jury was waived, and the case was tried by the court. The trial resulted in a judgment in favor of the plaintiff for the sum of $6,081.90. The defendant thereupon sued out this writ of error.

In the brief filed on behalf of the plaintiff in error, it was insisted that, as this was an ordinary civil action, the jurisdiction of the circuit court depended entirely upon the fact that the plaintiff was a citizen of Missouri and the defendant a citizen of Iowa, and that the burden was on the plaintiff to establish that fact by proof. It is the well-settled rule in the federal courts that where the plaintiff's petition, as in this case, sets out the necessary diverse citizenship of the parties, the burden of both allegation and proof rests upon the party who seeks to defeat it. In the case of Hartog v. Memory, 116 U. S. 588, 590, 6 Sup. Ct. 521, the supreme court said:

"It was well settled before the act of 1875 that, when the citizenship necessary for the jurisdiction of the courts of the United States appeared on the face of the record, evidence to contradict the record was not admissible, except under a plea in abatement, in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such a plea to the jurisdiction."

And again, in the same case, it is said:

"The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction, or some other appropriate form of proceeding." See, also, Foster v. Railway Co., 56 Fed. 434.

The answer here admits that the defendant is a citizen of Iowa, but "denies each and every other allegation contained in the plaintiff's petition." A general denial, in this form, is a plea to the merits, and does not raise the question of jurisdiction, if proper averments appear of record to confer it. The matter of jurisdiction is waived unless it be challenged by a special plea in that behalf. In Refining Co. v. Wyman, 38 Fed. 574, Judge Hammond said:

"And there is a good reason for it, found in the fact that in a certain, but very particular and somewhat peculiar, sense, the federal courts are tribunals of limited jurisdiction; and the rule that the jurisdiction of all courts of limited powers, in that general sense which is not at all applicable to the federal courts, must exhibit itself, has been applied to them, nevertheless, and their jurisdiction must appear upon the technical record. So that, if we permit a mere general denial to put in issue these special averments of jurisdiction, along with all other averments, we should have the jurisdictional facts tried and settled without any minute made of that issue upon the technical record, and there would be no showing whether the suit failed for want of jurisdiction in this limited tribunal, or upon other grounds, of a more formidable effect when passed into the general judgment."

The jurisdiction was not challenged by special plea in that behalf in the circuit court, and the case comes within the rule announced in Hartog v. Memory and Foster v. Railway Co., supra.

An examination of the record disposes of the assignment of error based on the exclusion of the record book of the association. It does not appear from the bill of exceptions that the record book of the association was excluded by the court. At the trial, counsel for the

plaintiff in error stated to the court that he wished to offer the book for certain purposes, and upon objection being made an opportunity was given to examine the book. The offer was not again renewed, and the court did not rule upon the question of its admissibility.

It is also insisted that the circuit court erred in admitting in evidence what purported to be a transcript of the judgment rendered by the circuit court of Missouri, upon which this suit was brought, for the reasons that the transcript of the record of that judgment was not properly certified; that it disclosed the fact that the judgment was rendered without service of summons upon the association; that the only prócess which was attempted to be issued or served in that case was issued against, and served upon, the superintendent of the insurance department of the state of Missouri; that the association had never appointed the superintendent of the insurance department of Missouri its agent upon whom service of process might be made, and that therefore the judgment entered in the circuit court of Missouri was invalid. We have examined the record carefully, but have been unable to find any transcript of this judgment in the bill of exceptions. To enable this court to review the action of the circuit court upon the admission or exclusion of evidence, the evidence to which the exception is directed must be incorporated in the bill of exceptions; otherwise the court has no means of forming a judgment in regard to the propriety of the alleged erroneous ruling. Where a similar question was before the court, Judge Sanborn, speaking for the court, said:

"This is a court for the correction of the errors of the court below, but those who assail its rulings must present the evidence upon which it acted. In the absence of that evidence, the presumption is that the court below was right. This assignment cannot be sustained." Sipes v. Seymour, 40 U. S. App. 185, 187, 22 C. C. A. 90, and 76 Fed. 116.

Complaint is also made that the court erred in overruling the objections of the defendant to the testimony of the witnesses J. A. Doverman and R. S. Clark, agents of the association, to the effect that they solicited applications for membership in the association in the state of Missouri in the year 1892, and in refusing, after admitting the evidence above mentioned, to permit these witnesses to testify whether the officers of the association knew that they were in Missouri, or soliciting business there. The defendant had already offered in evidence the deposition of Alfred Wingate, the vice president of the association, who testified, without objection, on cross-examination, that the association received applications for membership solicited by its agents in Missouri, issued certificates upon these applications, appointed collectors, who collected their assessments, and that the agents were not authorized to do business in the state of Missouri. The testimony of Doverman and Clark, therefore, was merely cumulative; and it was not error to receive it, as it could not have prejudiced the defendant's case to allow additional evidence tending to prove a state of facts, the existence of which was not controverted at the trial. Wingate had also testified—and his testimony was not contradicted—that these agents were not authorized to do business in the state of Missouri; hence the refusal to let Doverman and Clark testify to the same fact could not have been prejudicial to the defendant.

Several assignments of error are based on certain statements of fact found in the opinion of the trial court. That this opinion cannot be treated as a special finding of facts, or as an agreed statement of facts, seems to be well settled. Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481; Adkins v. W. & J. Sloane, 19 U. S. App. 573, 8 C. C. A. 656, and 60 Fed. 344; Hinkley v. City of Arkansas City, 32 U. S. App. 640, 16 C. C. A. 395, and 69 Fed. 768; Minchen v. Hart, 36 U. S. App. 534, 18 C. C. A. 570, and 72 Fed. 294. In the case last cited, this court, in speaking of cases tried by the court without the intervention of a jury, said:

"The finding in such cases may be general, like the general verdict of a jury, or it may be special, like the special verdict of a jury. When the finding is special, the facts found should be stated as they would be in a special verdict of a jury. In stating the facts found, no reference whatever should be made to the evidence upon which those facts are found. Neither the evidence nor any discussion of it should be injected into the ultimate finding of facts upon which the court rests its judgment. The special finding of facts should be a clean-cut statement of the ultimate facts, without importing into it the evidence or the reasoning by which the court arrived at its finding."

It is doubtless true, as said by Mr. Justice Brewer in Lehnen v. Dickson, supra:

"That cases may arise in which, without a formal special finding of facts, there is presented a ruling of the court which is distinctly a ruling upon a matter of law, and in no manner a determination of facts, or of inferences from facts, in which this court ought to, and will, review the ruling. Thus, in Insurance Co. v. Tweed, 7 Wall. 44, where, on the argument in this court, counsel agreed that certain recitals of fact made by the trial court in its opinion, or 'reasons for judgment,' as it was called, were the facts in the case, and might be accepted as facts found by the court, it was held that, as they could have made such agreement in the court below, it would be accepted and acted upon here, and the facts thus assented to would be regarded as the facts found or agreed to, upon which the judgment was based."

In the opinion of the court set out in the record here, however, the facts found are so mingled with a statement of the evidence, and a discussion of the law and facts, and the reasons for the court's conclusions thereon, that we cannot accept it as a special finding of facts.

The suggestion of counsel for the plaintiff in error at the argument, and again urged in his brief, that the circuit court made neither general nor special findings of fact, and therefore the judgment must be held to be invalid, is fully answered by the fact that this question is not raised by the assignment of errors. Some other questions are discussed by counsel in their briefs, which, in our judgment, in view of the state of the record before us, do not require special mention. The judgment of the circuit court is affirmed.

AMERICAN LOAN & TRUST CO. v. CLARK et al.

(Circuit Court of Appeals, Eighth Circuit. September 7, 1897.)

No. 857.

PARTIES ON APPEAL—DEFAULTING DEFENDANTS.

All parties to a suit or proceeding who appear from the record to have an interest in the order, judgment, or decree challenged in the appellate court must be given an opportunity to be heard there before that court will proceed to a decision upon the merits of the case, even though they were made parties in the court below, and defaulted in appearance.

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

Edward W. Sheldon, for appellant.
W. R. Kelly, for appellees.

Before THAYER, Circuit Judge, and RINER, District Judge.

RINER, District Judge. Upon a bill filed for that purpose by Oliver Ames, Second, and others, in the circuit court of the United States for the district of Nebraska, and in the circuit courts of other districts through which the railway lines of the Union Pacific Railway system as then constituted extended, Silas H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, the appellees, were in October and November, 1893, appointed receivers of the Union Pacific System, which included, in addition to the lines of railway and property of the Union Pacific Railway Company, the lines of railway and property of the Denver, Leadville & Gunnison Railway Company and several other corporations. The receivers above named continued to operate the Denver, Leadville & Gunnison Railway as a part of the Union Pacific System until the 7th day of August, 1894, when they surrendered possession of the property to Frank Trumbull, who had been appointed receiver of the property by the circuit court for the district of Colorado in a foreclosure suit brought by the American Loan & Trust Company, as trustee, against the Denver, Leadville & Gunnison Railway Company. On June 26, 1894, the receivers of the Union Pacific System filed a petition in the circuit court praying for instructions as to the continuance by them of the operation of the lines of railway owned by certain of the defendants named in the original bill in the Ames Case, and included in the Union Pacific System, whose earnings were represented to be insufficient to pay their operating expenses and taxes, the Denver, Leadville & Gunnison Railway Company being one of the lines mentioned. The court directed service of the petition to be made upon the parties interested, including the appellant and the Denver, Leadville & Gunnison Railway Company, and set the cause down for hearing. At the hearing an order of reference to the special master was made directing him, among other things, to "take and state the accounts of the said receivers with the Denver, Leadville & Gunnison Railway and ascertain the amount of the deficiency arising out of the operation of the said railway as of the 7th day of August, 1894. On such hearing, the officers of the Denver, Leadville & Gunnison Railway Company, the American

Loan & Trust Company, the trustee of the mortgage of August 1, 1889, made by the said railway company, may appear and contest any item contained in said account, and the said master shall report the amount of the deficiency ascertained after said accounting, and shall report the railroad or railroads or parts or divisions of railroads against which the deficiency so incurred should be charged, and the proper proportions for the distribution of such charge, and also what, if any, portion of such deficiency, should be charged as a lien against the property of the Denver, Leadville & Gunnison Railway Company, and whether the charge, if any, so to be made, should be prior in point of time to the lien of the said mortgage of the American Loan & Trust Company, dated August 1, 1889, and the surrender and delivery of the property of the said railway company hereinafter ordered is made subject to the lien and charge of any deficiency resulting from the operation of the said railway by the receivers which shall be adjudged to exist upon the final hearing upon the said report of the master." Hearings were had before the master, who found that the deficiency arising from the operation of the Denver, Leadville & Gunnison Railway from October 13, 1893, to August 7, 1894, was $207,201.83, and that the receivers of the Union Pacific System had turned over to the receiver of the Denver, Leadville & Gunnison Railway Company $48,870.15 worth of supplies, and recommended that the amounts for the deficiency and supplies be charged as a first lien on the property, in priority to the lien of the mortgage to the appellant. The American Loan & Trust Company filed exceptions to this report. May 9, 1896, the exceptions of the American Loan & Trust Company and the evidence taken before the master, together with his report, were submitted to the court. The court modified the findings of the master as to two items contained in his report, and decreed the amount of the deficiency resulting from the operation of the property to be $192,630.17, which, with interest at the rate of 8 per cent. per annum from August 7, 1894, "constitutes a lien in favor of said receivers upon the property of the Denver, Leadville & Gunnison Railway Company, prior in right and superior in equity to the mortgage thereon dated August 1, 1889, and to all other liens and incumbrances upon said property, and should be enforced in the decree of foreclosure of said mortgage to be entered in the district of Colorado." It further decreed "that Frank Trumbull, the present receiver of said property, is indebted to the five receivers, appellees herein, in the sum of $48,870.15, with interest from August 7, 1894, at the rate of eight per cent. per annum, for materials and supplies furnished by them to him for use in the operation of the railroads of that company when they surrendered the same to him, on August 7, 1894; and that said amount and interest constitutes and is a lien upon the income derived from the operation of the said railroads of said company, and upon all the property of said company, prior in right and superior in equity to that of the said mortgage, and should be enforced in the decree of foreclosure thereof to be entered in the district of Colorado." The opinion of the court below is reported in 74 Fed. 335. From this decree the American Loan & Trust Company appealed to this court. The citation was directed to and served upon "Silas H. H.

Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, as receivers of the property of the Union Pacific Railway Company, and said the Union Pacific Railway Company," and the bond on appeal was to the parties named in the citation.

The appellees, Clark and others, receivers, and the Union Pacific Railway Company, have filed motions to dismiss the appeal, on the ground that the Denver, Leadville & Gunnison Railway Company and Frank Trumbull, as receiver, are not made parties to the appeal, and that therefore this court does not have before it the parties whose interests are directly involved, and whose presence is necessary to the proper disposition of the questions upon which the judgment of this court is asked. The appellant contends that the Denver, Leadville & Gunnison Railway Company is not a necessary party to this appeal, for the reasons (1) that, although it was made a party to the original petition of the receivers for instructions, and was duly served with notice, it did not answer that petition, nor appear on its return, nor before the master on any of the hearings before him, nor except to his findings, nor appear in the circuit court on the final hearing; (2) that the decree from which the present appeal was taken was not a joint decree against the Denver, Leadville & Gunnison Railway Company and the American Loan & Trust Company; and (3) that even if the decree had been joint, the proceedings in the court below operated as a summons and severance.

In support of the first proposition our attention has been called to the case of Bank v. Perry, decided by this court February 18, 1895, and reported in 32 U. S. App. 15, 14 C. C. A. 273, and 66 Fed. 887. That was a case where an error existed in the record, and the circuit court, upon application of one of the parties, made an order amending and correcting its record to conform to the facts. As stated by Judge Thayer in the opinion of the court in that case:

"The record was false in point of fact, and the circuit court so found, in that it recited that Lane, Kent, and Kelley had appeared and defended the suit, and that the court had actually rendered a judgment in their favor, whereas Lane and Kent had not even been served with process, and the court had not tried any issue as between the plaintiff bank and either of said three defendants, and had not rendered a judgment in favor of either of them. The judgment actually spread of record was the act of the clerk, and in no sense the act of the court. Such mistakes, we think, are clearly subject to correction within any reasonable period of time."

In that case the parties named had not been served with process, were not before the court, no issue, so far as they were concerned, had been considered by the court, and no judgment rendered for or against them. The case was altogether a different case in its facts from the case at bar, and does not support the contention of counsel.

It is, however, insisted that the decree appealed from was not a joint decree against the Denver, Leadville & Gunnison Railway Company and the American Loan & Trust Company, and hence the Denver, Leadville & Gunnison Railway Company was not a necessary party to the appeal. The liability sought to be enforced was primarily the liability of the Denver, Leadville & Gunnison Railway Company for a deficiency arising from the operation of its road, and by the decree this charge was made a lien against its property, prior in

right and superior in equity to the appellant's mortgage. The circuit court had the right to adjudicate the questions presented by the petition between the parties interested in this property, for the reason that they had been made parties to the proceeding, and had been duly served with notice. The appellant now seeks to set aside the decree of the circuit court, and to have this court adjudicate anew the questions decided by the circuit court, without bringing before the court all of the parties whose rights are to be passed upon. This, by repeated adjudication, it cannot do. As stated in the case of Dodson v. Fletcher, 49 U. S. App. 61, 24 C. C. A. 69, and 78 Fed. 214, "all the parties to a suit or proceeding who appear from the record to have an interest in the order, judgment, or decree challenged in the appellate court must be given an opportunity to be heard there before that court will proceed to a decision upon the merits of the case." See, also, Masterson v. Herndon, 10 Wall. 416; Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. 39; Davis v. Trust Co., 152 U. S. 590, 14 Sup. Ct. 693; Gray v. Havemeyer, 3 C. C. A. 497, 53 Fed. 174. That the Denver. Leadville & Gunnison Railway Company has an interest in the decree appealed from, there can be no doubt. The decree makes this deficiency arising from the operation of its lines a direct charge against its property, and declares it to be a lien in priority to the mortgage held by the appellant upon the same property, and thereby necessarily increases by the amount so paid the deficiency for which the mortgagor will remain personally liable after the sale of the property if it is insufficient to satisfy the mortgage debt.

The contention was made at the argument that, even though the court considered the decree a joint decree. the proceedings in the court below operated as a summons and severance, and our attention is called to the case of Trust Co. v. McClure (recently decided by this court) 49 U. S. App. 46, 24 C. C. A. 66–69, and 78 Fed. 211. We think that case is clearly distinguishable from the case at bar. True, there was no formal notice to the railway company to appear in that case, and take part in the appeal; but the railway company did appear, and moved to set aside the appeal which had been allowed in its behalf, and the court said:

"There was no formal notice to the Stuttgart and Arkansas River Railroad Company to appear in this case and take part in this appeal, but that railroad did appear and moved to set aside the appeal which had been allowed on its behalf. The order which it thus obtained, showing, as it does, the appearance of the railroad company in the court below to set aside the allowance of its appeal, shows as conclusively its knowledge of the appeal, and its refusal to join in or proceed with it, as a formal notice and flat refusal to proceed could have done."

We think the Denver, Leadville & Gunnison Railway Company was a necessary party to this appeal, and, as it had no notice of its hearing, the appeal must be dismissed. This disposes of the motion to dismiss, and renders it unnecessary for us to consider or decide whether Frank Trumbull, the present receiver, was a necessary party. The appeal is dismissed.

VOORHEES, MILLER & CO. v. BLANTON et al.

(Circuit Court, W. D. North Carolina. November 2, 1897.)

1. FRAUDULENT CONVEYANCES—DEED TO WIFE—CONSIDERATION.
   In a creditors' action in North Carolina to set aside conveyances, it appeared that the debtor had held in his own name a farm for which about half the purchase price had been furnished by his wife's father, for the purpose of buying land for her. He conveyed it all in settlement of a debt, and in consideration of the wife's half interest in it conveyed to her a house and lot about equal to that interest. Some of the payments for the wife had been made prior, and some subsequent, to the adoption of the provision (Const. N. C. art. 10, § 6) relating to the property rights of married women. *Held*, that as to both classes of payments there was a resulting trust for the wife, and that her interest was such as to support the conveyance to her.
2. SAME—INADEQUATE CONSIDERATION.
   Mere inadequacy of consideration in honest family settlements is not a badge of fraud.
3. SAME—INSOLVENCY—PREFERENCES.
   In the absence of a statute forbidding preferences, a debtor in failing circumstances may prefer one creditor to another.
4. SAME.
   Any conveyance whose object or manifest tendency is to hinder, delay, or defeat a creditor falls within the meaning of the statute (Code N. C. § 1545) relating to fraudulent conveyances.
5. SAME.
   If a conveyance by a debtor in failing circumstances is void as to one creditor it is void as to all.
6. SAME—PAYMENTS BY GRANTEE—REIMBURSEMENT.
   Where a debtor in failing circumstances makes a conveyance in fraud of creditors, and the grantee in consideration thereof pays a particular valid debt of the grantor, the circumstances may be such as warrant his reimbursement from the proceeds, in case of sale of the property in a creditors' suit.
7. SAME—CREDITORS' SUIT.
   Where, after a conveyance of a house and lot by a debtor in failing circumstances, voidable for fraud, the house is burned down, and is restored with the money of an innocent third party, she should, in a creditors' suit to set aside the conveyance, be allowed a lien therefor on the premises.

This was a suit in equity by Voorhees, Miller & Co. against William M. Blanton and others to set aside certain conveyances alleged to have been made in fraud of creditors.

Merrimon & Merrimon, for plaintiffs.
P. J. Sinclair and Ed. Justice, for defendants.

BRAWLEY, District Judge. This is a bill to set aside certain conveyances as fraudulent. The plaintiffs are merchants in Cincinnati, Ohio, who sold a bill of goods to C. D. Blanton & Co., merchants doing business at Asheville. N. C., and the defendant William M. Blanton, with others, guarantied the payment of the same. William M. Blanton was a farmer residing in McDowell county on what is hereinafter called "South Muddy Creek Farm," in McDowell county, N. C., until about the year 1878, when he moved to the town of Marion, in the same state, where he engaged in merchandizing, and is now about 65 years of age. He became a partner with his son

Charles, who was doing business at Asheville under the name of C. D. Blanton & Co. Some time before the transactions hereinafter related he gave his interest in that business to a younger son, Josephus, but there was no publication of his withdrawal from that firm until after the accrual of the indebtedness which is the subject of this controversy. Charles D. Blanton became greatly involved in debt outside of his mercantile obligations, and his father was surety for a considerable amount. In December, 1892, Charles D. Blanton sold the stock of goods of C. D. Blanton & Co. in Asheville to J. D. Brevard for $16,000 under a bill of sale which provided that the proceeds should be applied to the payment of certain debts of C. D. Blanton & Co. While a controversy subsequently arose, and it was disputed whether the debt to the plaintiffs was among those provided for in this bill of sale, I am satisfied from the testimony that William M. Blanton at the time believed that it was so provided for, and that he believed that the amount of $16,000, the purchase price of the stock of goods, was ample to pay all of the debts of C. D. Blanton & Co. for which he was liable as indorser or guarantor. Subsequent events have demonstrated that he was mistaken in this conclusion. The debt of the plaintiffs remains unpaid, the property of William M. Blanton has been disposed of, and this suit is for the purpose of inquiry into such disposition of it, and to set aside all of the conveyances as fraudulent. While it might be that a court would feel itself compelled to set aside conveyances as in fraud of creditors, although there was no intention at the time to defraud a particular creditor, it cannot in fairness determine the character of a series of transactions without inquiry into the motive which impelled them, and entering as far as may be into the state of mind of the chief actor therein.

I find sufficient testimony to support the conclusion that at the time when William M. Blanton commenced to dispose of his property in the manner to be hereinafter specifically considered he was of the opinion, founded upon what to him was sufficient ground for the belief, that the plaintiffs' debt was already provided for; and it may be as well to say, further, that no statute of the state of North Carolina has been cited forbidding preferences among creditors, and these conveyances are not contested on that ground. Here, then, we have an old man who finds himself in his declining years involved as surety for his son's indebtedness, which had already absorbed part of his fortune, and which was sufficient to sweep away all of his property. On the part of the plaintiffs it is contended that, confronted by these conditions, he straightway devised and executed such disposition of it as would secure for himself such ease and comfort as could be provided, and it must be admitted that the temptation so to do was sore, and such as human experience teaches us is often sufficient to swerve good men from the straight and narrow way. On the part of the defendant, it is contended that having led a life of industry and integrity, which had secured for him the respect and confidence of his fellows, his first and controlling thought was so to dispose of the remnant of his property as to pay all of his debts upon the best terms that he could secure, and thus become a free man again, maintaining his own self-respect and that of his

fellowmen. The great searcher of hearts alone can know with absolute certainty which theory is right,—that of the plaintiffs or that of the defendant. Without that guidance, and with such lights as circumstances afford, we will consider these conveyances each in its order.

1. Among the debts due by Charles D. Blanton was a note for $4,500, dated December 14, 1892, to the National Bank of Asheville, on which William M. Blanton was indorser. After negotiations, complicated with details fully set forth in the testimony, with which it is unnecessary to cumber this opinion, this note was liquidated by the conveyance of the South Muddy Creek farm. This farm, upon which William M. Blanton lived prior to his removal to Marion, was made up of several tracts of land, the first of which was bought in 1859 or 1860. Inasmuch as the decision on this branch of the case turns upon it, the testimony relating to the purchase will be given as it appears in the record:

"Q. Where did you get the money that paid for the farm? A. I furnished some myself, and my wife furnished some of it. Q. How much did your wife furnish? A. I think a little over $400 at the time, in 1860. In 1869 she furnished $600. In 1884 or 1885 she furnished $200. Q. Where did she get that money? A. From her father, David Setzer. Q. What did he give her that money for? A. To help me buy that land. Q. Who were you to buy it for with the money you got from him? A. It was his and her understanding and mine that I was to buy it for her."

There was testimony that some of the later purchases were of more value than the earlier, and also testimony going to show that David Setzer had furnished some money as he had done for another daughter, and also testimony that the wife had always claimed an interest in the land, and the defendant Blanton claimed that that interest amounted to one-half interest, and in consideration of the surrender of that half interest in liquidation of the debt to the bank he conveyed to her the lot and house in which he lived in the town of Marion. There is testimony tending to show that the house and lot in the town of Marion was of greater value than that set upon it by the defendants, but the preponderance of testimony is that the house and lot in Marion was not worth more than the one-half interest in the South Muddy Creek farm. The conveyance of the house and lot in Marion is one of those sought to be set aside, and the question for decision is whether the claim of the wife to one-half interest in the farm lands is a valuable consideration, sufficient to support the deed. Assuming, as the testimony fairly warrants, that the one-half interest in the farm was about equal in value to the house and lot, the case will be considered as if it were a proceeding to set up an interest in the farm lands in behalf of the wife, and must be determined in accordance with the laws of North Carolina. A part of the money claimed to have been invested in lands for her benefit was invested prior to the adoption of the constitution of that state, in 1868, which provides, in article 10, § 6, that "real and personal property of any female in this state acquired before marriage and all property real and personal to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and

property of such female." Chief Justice Merrimon in Walker v. Long, 109 N. C. 513, 14 S. E. 300, citing this provision and the pertinent legislation in harmony with it, says:

"As to her separate property, however acquired, she and her husband are, as to property rights and estates, not to be recognized and treated in legal contemplation as one person. She is an unmarried woman; it is so expressly provided."

As to so much of the money as was laid out in land subsequent to the adoption of this constitution, the case presents no difficulty, and the testimony shows that the Higgins tract, bought in September, 1869, for $1,200, of which amount the wife furnished $600, was worth as much as the remainder of the farm. By the law of North Carolina, prior to the adoption of the constitution of 1868, the husband—jus mariti—became entitled to all of the personal property of the wife which came into his possession; not so as to real estate or the proceeds of real estate. The testimony of Blanton is that the money which David Setzer gave to his daughter in 1860 was to be invested in land for her benefit, and that it was so invested. If so, the marital rights never attached, the husband having no marital rights in David Setzer's money. Taking as true the testimony of Blanton, that, at the time David Setzer gave this money to his daughter, in 1860 (and there is nothing in the record contradicting it), "it was his and her understanding and mine that I was to buy it (the land) for her," then the money went into his hands clothed with a trust, and there is a resulting trust in the lands for the benefit of the wife, and this view seems in consonance with the opinions of the supreme court of North Carolina. The learned counsel for the plaintiffs has cited some cases which might lead to another conclusion, but the facts may be differentiated. In Hackett v. Shuford, 86 N. C. 151, and in Kirkpatrick v. Holmes, 108 N. C. 206, 12 S. E. 1037, there was no agreement at the time the money was received that it was to be invested for the wife. In the case last cited Shepherd, J., held that the proceeds of sale of wife's lands before 1868 became the property of the husband, "if he received it without any special agreement to invest it for her benefit." The converse would seem to be true if there was a special agreement. If he received it after 1868, the proceeds would be her separate estate, and if it went into the hands of her husband, and he invested it in land, taking title in his own name, as was the case here, in the absence of an agreement to the contrary, a trust would have resulted to her. And the same learned Judge in Beam v. Bridgers, 108 N. C. 277, 13 S. E. 113, says: "It is a well-settled principle that where, in the purchase of property, the conveyance of the legal title is taken in the name of one person, but the purchase money is paid by another at the same time or previously, and as a part of the one transaction, a trust results in favor of him who supplies the purchase money,"—citing Adams' Eq. 33; Malcolm, Real Prop. 509,—and the principle has been frequently applied where land is purchased with funds arising from the separate estate of the wife. In Giles v. Hunter, 103 N. C. 201, 9 S. E. 549, moneys arising from the sale of wife's land was, with her consent, paid over to the husband, who invested it in other lands, with no request on her part that the land purchased should be con-

veyed to her or for her benefit, and the husband took title in himself. It was held that the land vested absolutely in him discharged of any equity in her. In all of the North Carolina cases examined, wherever it appears that the wife's money was invested in lands under an agreement that it was to be for her benefit, the courts have held that there was a resulting trust. In Dula v. Young, 70 N. C. 451, John Witherspoon (in 1842) in right of his wife was seised of a certain tract of land, which he sold under agreement with his wife that he would buy another tract. This he took in his own name, and upon his death it was sold by his administrator to pay debts. The agreement between the husband and wife was not in writing. It was held that the children of his wife, Elizabeth, were entitled to the land. The demand of Elizabeth Witherspoon, says the court, did not rest upon the moral duty or voluntary bounty of her husband, but, having parted with her own lands, she was entitled to say, "I have paid valuable consideration." In Lyon v. Akin, 78 N. C. 258, a husband, in 1848, purchased land, paying for it in money belonging to his wife, part of it being proceeds of real estate descended from her father, and took title in his own name, which he mortgaged in 1861. It was held (in 1878) that there was a resulting trust in favor of the wife, whose money paid for it. In Brisco v. Norris, 112 N. C. 676, 16 S. E. 850, a husband purchased land with the separate estate of the wife, and title was taken in his name, with agreement that he would convey same to her when requested. Merchandise was sold to a firm of which he was a member upon his credit, and testimony was offered to show that nobody knew of any claim upon the lands, which had been in his possession for 20 or 21 years. When the claim of the creditors was put in the hands of lawyers, in 1869, and was being pressed, he conveyed the land to his wife. Burwell, J., delivering the opinion of the court, held that the husband held the land as trustee for the wife. In Garner v. Bank, 151 U. S. 420, 14 Sup. Ct. 390, the supreme court of the United States, reviewing the decisions in Rhode Island, where the property was situate, in a case where a husband invested a part of the separate estate of his wife in real estate without her knowledge or consent, taking title in his own name, and on this coming to her knowledge, after a lapse of time, she required it to be conveyed to her, the husband at the time of the conveyance being insolvent, held (reversing the decree of the lower court) that the wife's equities in the estate were superior to those of the husband's creditors, if it does not appear that the creditors were induced to regard him as the owner of it by reason of representations to that effect either by him or by her. On page 434, 151 U. S., and on page 395, 14 Sup. Ct., the court, after reviewing the facts, says:

"The conveyance to Garner, followed by his conveyance to her, was executed for the purpose of discharging the husband's obligations to the wife, and were made before any creditor acquired a lien on the property by attachment. As between the husband and wife, a court of equity would have compelled him to secure this property to her. If, before any rights of attaching creditors intervened, he did voluntarily what the law made it his duty to do, the transaction is not subject to impeachment by his creditors unless the wife has been guilty of such fraudulent conduct as ought in conscience to estop her from claiming the property as against such creditors. If the wife has been guilty of deception, or if she had contributed to its success by countenancing it, she

might with justice be charged with the consequences of her conduct. But the evidence furnishes no ground for the imputation of fraud against her."

The case of Humes v. Scruggs, 94 U. S. 22, was considered, and, as it is relied on here, it may be as well to say that the court found that the proof showed a state of the case the reverse of that claimed by the wife, and here, as there, we may repeat that "the observations of the court in Humes v. Scruggs have no application to the facts that we consider to be established by the proofs in the present case." Nor is it conceived that the observations of the court in Olcott v. Bynum, 17 Wall. 59, that no trust arises unless the money "is paid for some aliquot part of the property, as a fourth, a third, or a moiety," should avail, under the circumstances of this case, to defeat the just claims of the wife. There is no such uncertainty as to the proportion of the property to which the trust extends. It extends to the value of the lands purchased with the money of the wife, and under the proofs it cannot be said that one-half of the value of the farm would be so disproportioned to the extent of the trust that the whole should be defeated. Where a conveyance is attacked on the ground of fraud, proof of carelessness and confusion in dealings make rather against than in favor of the claim of fraud, if upon the main issue the court is satisfied that the transaction is grounded upon good faith, and as rights allowed in accordance with the principles of equity do not depend upon, they should not be defeated by, nice calculations. I am of opinion that the conveyance of the house and lot in the town of Marion to the wife, Josephine Blanton, was made bona fide, and for good consideration, and that it cannot be impeached for fraud. Even if it were true that the wife's interest in the Muddy Creek farm was worth slightly less than the consideration expressed, mere inadequacy of consideration in honest family settlements is not a badge of fraud. Bump, Fraud. Convey. (4th Ed.) p. 45; Holden v. Burnham, 63 N. Y. 74.

2. The conveyance of the Ed Justice house and lot and of two other small houses and lots in the town of Marion, for the consideration of $3,500, must likewise be sustained. The only ground of impeaching the transaction seems to rest upon the suspicion that there must be something wrong because one of the brothers of the defendant Blanton was a partner of the firm of H. D. Lee & Co. There is no doubt that the debts were due, and that the lots were sold for their full value. S. J. Green, a member of the firm of H. D. Lee & Co., testifies that on the day the property was bought they would have "sold it for cash for $500 less than the amount it was valued to them at." In the absence of a statute forbidding preferences, a debtor in failing circumstances may prefer one creditor to another. Payment of debt to one creditor is no fraud upon the other creditors,—no legal injury to them. If there is a true debt, and a real transfer for adequate consideration, and no secret understanding in derogation of the ostensible alienation, it must be sustained; for fraud consists, not in preferring one creditor to another, but in the intention to prefer one's self to all creditors. The law cannot take cognizance of the feelings which prompt the preference, and if the act is right the motive which induces it cannot change the character.

3. The conveyance of the defendant's (Blanton's) interest in the Huthsleiner place to W. McD. Burgin must likewise be sustained. It seems to have been made bona fide and for valuable consideration, and there appears no ground for impeaching it. The note received by Blanton as the consideration should be turned over to the clerk of this court for collection under the direction of the solicitors in the cause, and the proceeds held for further order.

4. The conveyance of the tanyard property to J. L. Morgan stands upon a different footing. At the time that it was made one Lowman was pressing for the payment of a debt of about $1,000, and the defendant Blanton was endeavoring to secure a reduction of the claim. Conveyances of property under such circumstances cannot be sustained. They fall under the condemnation of the law as laid down in Peeler v. Peeler, 109 N. C. 633, 14 S. E. 59. Any conveyance whose object or manifest tendency is to hinder, delay, or defeat a creditor falls within the meaning of the statute. If the object is to compel the creditor to accept a compromise by putting hindrances in his way, or to embarass him by delay, or to subject him to expense or trouble in the recovery of what is justly due, it is equally to be condemned. If void as to one creditor, it is void as to all, and this conveyance must be set aside; but inasmuch as it appears that J. L. Morgan, as part of the purchase money, paid the debt of Lowman in full as well as some other debts of the defendant Blanton, and as it does not appear that he was so far a participator in the unlawful conduct of the defendant Blanton as to disentitle him to all consideration, it is adjudged that he be reimbursed from the proceeds of sale so much money as he has actually paid out on the debt of Lowman and other bona fide indebtedness of William M. Blanton.

5. The conveyance of the storehouse and lot and stock of goods to J. D. Blanton must fall within like condemnation to that last mentioned, but, inasmuch as it sufficiently appears that J. D. Blanton has paid out, on the bona fide indebtedness of William M. Blanton, an amount equal to the value of the stock of goods, no good purpose could be served by further accounting on that score. The conveyance of the house and lot is set aside, but as the testimony shows that the buildings on the lot have been destroyed by fire, and a new building erected on the premises in part with moneys advanced by the widow of W. P. Blanton, with whom J. D. Blanton became associated in business subsequent to the transaction herein condemned,— and as the said widow was in no wise implicated in the same, it is adjudged that she have a lien on the premises to the amount of the moneys expended out of her estate in the erection of the building now standing thereon. The costs will abide the further order of the court.

BARNARDIN v. NORTHALL et al.

(Circuit Court, D. Indiana. November 10, 1897.)

No. 9,358.

COSTS—ATTORNEY'S FEE—DEPOSITIONS.

Under Rev. St. § 824, an attorney's fee of $2.50 for each deposition is not taxable until the deposition has both been taken and admitted in evidence.

This was a suit in equity by Alfred L. Barnardin against William H. Northall and others. The cause was heard on defendants' motion to strike the amended bill from the files.

Church & Church, for complainant.

Robert H. Parkinson, for defendants.

BAKER, District Judge. On September 28, 1897, leave was granted complainant to file an amended bill on payment of "all the costs of the suit to date." The costs taxed by the clerk were paid, and the amended bill was filed. The defendant now moves to strike the amended bill from the files because an attorney's fee of $2.50 was not taxed and paid upon each deposition that was taken in the cause. The only depositions in the cause were taken by the complainant. They have never been admitted in evidence upon a hearing before the court or a master in chancery. There has not been any hearing of the cause. They have never been offered in evidence. They have not even been published. It is impossible for the court to say whether they would have been published or offered in evidence if the cause had proceeded under the original bill. The statute is as follows: "* * * For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents." Rev. St. § 824. It was held by this court in Indianapolis Water Co. v. American Straw-Board Co., 65 Fed. 534, that under this statute attorney's fees on depositions are allowable only when there is "a concurrence of three things, viz.: (1) There must be a deposition; (2) it must have been taken in a cause; and (3) it must have been admitted in evidence therein." The contention of the defendant is that, when a deposition is "taken," it is "admitted in evidence." If such were the case, the words "admitted in evidence" would be mere surplusage. It is a rule in the construction of statutes that effect shall, if possible, be given to every part of them. It is evident that congress meant by the words "admitted in evidence" something more than the mere taking of a deposition. An attorney's fee on depositions is not taxable until they are both taken and admitted in evidence. The admission of depositions in evidence involves an exercise of judicial functions which are not vested in an examiner or other ministerial officer. These depositions may or may not be legally entitled to be admitted in evidence. If a fee were taxable for the taking of a deposition, it might be contended that another fee would be taxable when the deposition is thereafter admitted in evidence. But it is plain that a single fee is taxable for a single deposition, under the conditions

which are prescribed by the statute. The fee is annexed to the deposition under those conditions. When the costs were taxed in this case, the statutory conditions had not been complied with. The depositions had been taken, but they had not been admitted in evidence. Attorney's fees upon them were, therefore, not taxable, and the taxation by the clerk was correct. The motion of the defendant to strike the amended bill from the files is accordingly overruled.

CAREY v. ROOSEVELT et al.

(Circuit Court, S. D. New York. November 12, 1897.)

1. EXECUTORS AND ADMINISTRATORS—LEGATEES—JUDGMENT—PRIVITY.
While, in general, a judgment against executors or administrators c. t. a. is not binding on legatees when the suit is commenced or revived after the administrators' accounts have been settled, and all the property in their hands paid over to the legatees and trustees under the will, pursuant to a decree of the proper court, yet it is so binding if the legatees voluntarily assumed the expense of defending the action, and made themselves privies to it, and had the same benefits in connection therewith as if they had been named as defendants.

2. LIMITATION OF ACTIONS—ACTION ON JUDGMENT.
If an action on a judgment is not itself barred by the statute of limitations, the fact that the original claim which is merged in the judgment was so barred is immaterial.

3. LACHES—ACTION ON JUDGMENT—DEMURRER.
In a suit on a judgment the alleged laches of the complainant in prosecuting the original action, if available at all, cannot be considered on demurrer, if the bill excuses the delay and imputes it to thos^ who defended that action.

This was a suit in equity by George G. Carey, as trustee, etc., against John E. Roosevelt and others, as trustees and legatees under the will of Amos Cotting, deceased, to enforce payment of a judgment previously rendered against the administrator c. t. a. of said Cotting's estate. The cause was heard on demurrer to the amended bill.

The demurrer to the original bill was sustained and the complainant had leave to amend. (81 Fed. 608, where the principal facts are stated.) Thereafter the complainants filed an amended bill. Among other new averments are the following: "And your orator further says that, as he is informed and believes to be true, the defense of the said action at law was conducted, and all proceedings therein were taken, by the said defendants Roosevelt and Schermerhorn, with the knowledge and consent, and at the instance and request, of the other defendants, beneficiaries under said will, to wit, the defendants, J. Egmont Schermerhorn, as executor of Elizabeth Cotting, deceased, and Jameson Cotting and Katie T. Schermerhorn individually, and of the defendants, John E. Roosevelt and W. Emlen Roosevelt, as trustees of the trusts created by the said will of Amos Cotting for the benefit of Elizabeth Cotting, deceased, and of the said defendants, Katie T. Schermerhorn and Jameson Cotting, and that such defense was conducted by them for the sole benefit of the said trust estate and of the said trustees and beneficiaries. That a large proportion of the expenses of such defense, including the fees of their attorneys and counsel, and including also the expenses and counsel fees incident to the proceeding in the surrogate's court hereinafter referred to, was borne by the said trustees and paid by them out of the trust funds, and the amount thereof was charged by them ratably against the shares of the said beneficiaries therein, who consented thereto and severally paid, or consented to such payment of, the charges so made against their respective ratable shares in the trust funds; and that said trustees and bene-

ficiaries respectively were, at all times, after its revival, fully informed as to the nature of and issues in said action at law and as to all the proceedings had in the said action at law, and took an active part in the defense thereof, with the intent and purpose of protecting the said trust funds and their respective shares and interests therein." The defendants again demur.

Burton N. Harrison, Arthur H. Masten, and Henry M. Ward, for complainant.

George H. Yeaman, George C. Kobbé, and James A. Speer, for defendants.

COXE, District Judge. The demurrer to the original bill was sustained principally upon the theory that the defendants had no opportunity to contest the claim against the testator which was revived against his administrators. As the allegations then stood the administrators had no interest in defending the revived suit, and, for aught that appeared, an unfounded claim might have been established to which a perfect defense could have been interposed had the defendants been informed of the pendency of the action and been given an opportunity to defend it. The amendments change all this. It now appears that the defendants had the same opportunities to defend as though actually parties to the record. The suit was defended with the utmost vigor, and judgment was obtained only after two trials had been had. The defendants were informed of every important step in the litigation and the suit was defended at their instance and request, they paying the expenses thereof. In short, they voluntarily made themselves privies to that action and had precisely the same benefits therefrom as if they were named as defendants. Had they been so named they could have done nothing more. They have had their day in court, and should not now be heard to dispute a claim which they have already disputed without success. The doctrine that a party directly interested in the result of an action, who assumes and pays for its defense, is not permitted thereafter to dispute the judgment there rendered, has been frequently recognized and enforced in the federal courts.

As pointed out in the former opinion this action is based solely upon the judgment which was recovered in 1895, less than two years before the original bill was filed. This action, then, is not barred by the statute of limitations, and the question whether the claim in the suit against Cotting was so barred is, upon the theory of the bill, wholly immaterial.

Assuming that laches in the prosecution of the suit against Cotting and his representatives is available here, it certainly cannot be considered on demurrer for the reason, inter alia, that the amended bill excuses the delay and imputes it to those who were defending that action.

The bill may be maintained in this court for the reason that the parties are citizens of different states. The demurrer is overruled; the defendants may answer in 20 days.

DUGGAN et al. v. SLOCUM.

(Circuit Court, D. Connecticut. October 5, 1897.)

No. 887.

1. CHARITIES—VALIDITY OF BEQUEST.
A bequest for a public library and for a protectory for boys is a charitable bequest, and entitled to the benefit of Gen. St. Conn. § 2951, which provides that "all estates that have been or shall be granted for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for the preservation, care and maintenance of any cemetery, cemetery lot, or of the monuments thereon, or for any other public and charitable use, shall forever remain to the uses to which they have been or shall be granted, according to the true intent and meaning of the grantor, and to no other use whatever."

2. SAME—UNCERTAINTY.
Such a bequest is not void for uncertainty as to the object, or for the want of a provision for the selection of the beneficiaries, the particular mode of carrying the intent of the donor into effect being left to the discretion of the trustees.

3. SAME—FAILURE TO PROVIDE FOR SUPPLYING VACANCY IN TRUSTEESHIP.
The failure of the testator to provide for the appointment of other trustees in case of the death of the trustees named or their refusal to act does not invalidate the gift, the rule of law that in such an event other trustees are to be appointed by the court being substantially a part of the will.

4. SAME—PERPETUITIES.
A direction to trustees to invest the trust fund for a term of 10 years or more at their discretion does not contravene the rule against perpetuities, as the trustees can be compelled to apply the fund to the use of the beneficiaries within a reasonable time after the expiration of 10 years.

5. SAME—FAVORABLE CONSTRUCTION.
Charitable trusts are entitled to a favorable construction in courts of equity.

6. SAME—LAW OF TESTATOR'S DOMICILE.
The validity of a charitable bequest is determined by the law of the testator's domicile.

John C. Donnelly and C. Walters, for complainants.
John O'Neill, for defendant.

TOWNSEND, District Judge. Demurrer to bill in equity. The three orators herein, describing themselves as British subjects, residing, respectively, in the state of Michigan, city of Dublin, Ireland, and the city of Montreal, Canada, bring this bill in behalf of themselves and all other heirs at law and next of kin of one John H. Duggan, deceased, who may unite in the prosecution thereof, and aver that they are respectively the brothers and sister and next of kin of said Duggan, late of the town of Waterbury, in the state of Connecticut, who had never married, and who died in said town on the 10th day of November, 1895, leaving the orators and other heirs at law and next of kin, not known to them, surviving; that said John H. Duggan was a priest of the Roman Catholic Church; that on August 5, 1895, the decedent executed a will, which was admitted to probate on December 2, 1895; that, the executors and trustees therein named having refused to qualify, one William J. Slocum, of said Waterbury, was duly appointed and duly qualified as administrator with the will annexed, "and is now acting, and has possession and

custody and control of the property and assets of the said Reverend John H. Duggan, hereinafter referred to, and claims to be entitled to the control, management, and disposition thereof." The orators further aver that they are advised that the provisions of the fourth paragraph of the will "are indefinite and uncertain in the subject and objects, invalid, and unauthorized by law, and unlawfully suspend the absolute power of alienation of said estate." They also aver that the estate attempted to be disposed of under said provisions amounts to $20,000, and that, in the event of such provisions being declared invalid, they would be entitled to one-half thereof, and that the amount in controversy exceeds the sum of $10,000; and they pray that said devises and bequests in the fourth paragraph of the will may be decreed to be illegal and void, and that the property remaining, after carrying out the other provisions of the will, may be accounted for and paid over to the orators and other heirs and next of kin.

The provisions of said fourth paragraph are as follows:

"Fourth. All the rest and residue of my estate, both real and personal, and wheresoever situated, I give, devise, and bequeath to my executors hereinafter named, in trust, however, for the following purposes, viz.: One-half to be used for the purpose of establishing and maintaining a library and reading room in connection with St. Patrick's parish in said Waterbury, or in whatever part of said Waterbury may be deemed by my said executors most suitable and convenient for the general public, and one-half for the purpose of establishing or maintaining a Roman Catholic protectory for boys in said diocese of Hartford; it being my will that the personal estate and rents accruing from any real estate of which I may die possessed be invested in safe securities for a term of ten years or more, at the discretion of my said executors. I also will that the management and disposal of my real estate be at the discretion of my said executors."

The defendant, said administrator with the will annexed, demurs to the complaint on several grounds. Inasmuch as the demurrer must be sustained if the provisions of said fourth paragraph of the will are valid, this point only will be considered. Complainant insists that said provisions are void upon three grounds: First, for uncertainty as to the object; second, for the want of a provision for the selection of the objects of the bounty; third, as contravening the rule against perpetuities.

It is clear that bequests for a public library and for a protectory for boys are charitable bequests, and entitled to the benefit of section 2951 of the General Statutes of Connecticut, usually referred to as the statute of 1702. It was enacted in 1684, and has been statute law of Connecticut ever since. Said section is as follows:

"All estates that have been or shall be granted for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for the preservation, care and maintenance of any cemetery, cemetery lot, or of the monuments thereon, or for any other public and charitable use, shall forever remain to the uses to which they have been or shall be granted, according to the true intent and meaning of the grantor, and to no other use whatever."

This statute pledges the good faith and honor of the state that all public and charitable bequests shall, if possible, be appropriated to the use intended by the donor. It is unnecessary to consider the

earlier decisions of the supreme court of this state as to such bequests. It is now certainly the well-settled policy of said court to uphold charitable gifts wherever it is possible.

I do not think there is any such uncertainty as to the intent of the donor as should invalidate the gift. A protectory for boys is an institution for the education and care of destitute or homeless boys, especially those in danger of becoming vicious. The nature of such institutions under the care of the Roman Catholic Church is well known. The property is left to certain persons named, in trust, to be used for the purpose of establishing and maintaining a library and reading room, and for the purpose of establishing or maintaining a Roman Catholic protectory for boys. The particular mode of carrying the intent of the donor into effect—the site of the library and reading room, the character of the books and papers, the selection of boys for the protectory, and the regulations for the conduct of both institutions—is wisely left to the discretion of the trustees. It is manifestly the intent of the testator that the trustees shall make such provision for carrying out these purposes and selecting beneficiaries as they may think best. He is presumed to have known that, in case of their death or inability or declination of the trust, the proper authority would fill their places. The rule of law to that effect is substantially a part of the will. It is as though the testator had said: "In case of the death of said trustees or their refusal to act, other trustees shall be appointed by the proper court." Conklin v. Davis, 63 Conn. 377, 383, 28 Atl. 537; Dailey v. City of New Haven, 60 Conn. 314, 324, 22 Atl. 499 et seq. The general assembly of Connecticut would doubtless give suitable persons corporate powers for effectuating the provisions of this will, if necessary.

In Bronson v. Strouse, 57 Conn. 147, 17 Atl. 699, the will directed the executors to invest $1,000, and to apply the interest, so far as necessary, in keeping a burial lot in order, and added: "And, if any surplus shall remain, I will that said surplus shall be given to some poor deserving Jewish family residing in the city of New Haven." Here there seems to be no more certainty as to the object, and certainly no more designation of the persons to make the selection of beneficiaries, than in the case at bar. The court held that the executors had power to select the family, and to determine the amount to be expended for its relief. Bronson v. Strouse is cited with approval in New Haven Young Men's Inst. v. City of New Haven, 60 Conn. 32, 40, 22 Atl. 447, 449, where the court says concerning it: "Here, too, nothing was said about discretion, nor was it expressly stated who was to select the poor deserving Jewish family, but both were implied from the mere application of the money in the hands of the executors as trustees." The objections raised in the present case were considered in Storrs Agricultural School v. Whitney, 54 Conn. 342, 8 Atl. 141, in which a fund was left to the selectmen and their successors, in trust, "the interest of which shall be applied by said selectmen to aid indigent young men of said town of Mansfield in fitting themselves for the Evangelical ministry." The will was sustained. In approving this case, in New Haven Young Men's Inst. v. City of New Haven, supra, the court says: "No discretion here

was expressly conferred, and nothing was said about it." In Strong's Appeal, 68 Conn. 527, 37 Atl. 395, the money was to be paid over to the pastors of certain churches, and two men appointed by the selectmen; who were to pay out and appropriate from time to time for the benefit of the worthy poor people of a certain town. It was claimed that the attempted trust was not for a charitable use, and was therefore contrary to the statute against perpetuities, and that it was void for lack of certainty in the beneficiaries; also, that the trustees were given no power as to selection, but only as to the amount of aid which they could disburse. The court sustained the will, and said: "A construction of the language used, so strict and narrow as this, would be alike contrary to principle and to the decisions in our own state." In Conklin v. Davis, 63 Conn. 377, 28 Atl. 537, the will was: "I give the trustees of the First Baptist Church in Hartford, in trust for the poor of said church, the sum of five hundred dollars; also, the Sunday School of the First Baptist Church the sum of five hundred dollars, under the supervision of the trustees of said church." There were no such officers as trustees of the church, but the deacons had had charge of trust funds for the poor. It was held that, if no trustees were named who were capable to take and act as such, it would not affect the validity of the gift; the court would supply trustees; and the will was sustained. In Hayden v. Connecticut Hospital, 64 Conn. 321, 30 Atl. 50, the language was: "All the remainder of my estate I give and bequeath to my executor for the following purposes: Money and real estate is for the purpose of establishing a free bed or beds at the hospital for the insane at Middletown for female patients, the rents and income each year to be used under the direction of the executor and his successor in office appointed by the court of probate for New Haven." It was claimed that this provision was invalid and uncertain, but the court sustained the will, and held that, if provision could not be made at the hospital at Middletown, provision to effectuate the general intent of the will should be made for female patients elsewhere. In Woodruff v. Marsh, 63 Conn. 125, 26 Atl. 846, the heirs at law contended that the gift was void for indefiniteness, uncertainty, and the absence of any grant of power to select the beneficiaries. The court sustained the gift, saying: "It is now fully recognized as a law of our jurisprudence that gifts to charitable uses are to be highly favored, and will be most liberally construed, in order to accomplish the intent of the donor; and trusts for such purposes may be established and carried into effect where, if not of a charitable nature, they could not be supported." In Dailey v. City of New Haven, supra, the trustee was the city of New Haven, which was held to be incapable to act. There was no trustee having any power to make the selection, but it was held that the probate court might appoint trustees, and, in case of its failure to act, the superior court would do so.

Complainants further insist that a direction to invest "for a term of ten years or more, at the discretion of my said executors," contravenes the rule against perpetuities, and renders the bequest void, because under it the executors may continue to accumulate for an

indefinite period, and rely upon Jocelyn v. Nott, 44 Conn. 55. In Jocelyn v. Nott, the trustees were to hold the real estate until some orthodox church connected with the General Association of Connecticut, and having the ability, with the aid of the estate given, to build and pay for a meeting house upon the land, should make application for the privilege of so doing. There was a strong probability that such an application would never be made. It would probably never be in the power of the trustees to apply the property for the benefit of the cestui que trust. Thus, the time of beginning to apply the gift to the purpose intended did not depend on the trustees, but on a condition not in their control,—a clear and important distinction between that case and this. Moreover, the statute of perpetuities, upon which Jocelyn v. Nott was founded, was repealed in 1895. In the present case the trustees may apply the fund in practical use, at their discretion, after 10 years. If they refuse to do so within a reasonable time thereafter, they can be compelled to make the application. This same objection as to perpetuities has been made many times in the Connecticut courts since Jocelyn v. Nott, and, so far as I am aware, has never been sustained. It was made in Camp v. Crocker's Adm'r, 54 Conn. 21, 5 Atl. 604; in Storrs Agricultural School v. Whitney, in New Haven Young Men's Inst. v. City of New Haven, in Bronson v. Strouse, and in Strong's Appeal, above cited. The will in Woodruff v. Marsh, supra, provides that, from the yearly income of the fund, the sum of $10,000 shall each year be added to the principal for the period of 100 years, and longer if the trustees deem it best. The court say: "If two modes of construction are fairly open, one of which would turn his bequest into an illegal perpetuity, while, by following the other, it would be valid and operative, the latter mode must be preferred." And they add: "Should the trustees continue the accumulation after a hundred years for an unreasonable time, the courts can supply the remedy." This reasoning is applicable to the present case. If the trustees should continue the accumulation for an unreasonable time, there is ample remedy in the courts. On the question of perpetuities, the complainants also cite Perry, Trusts, §§ 393–396; but in section 399, the author states that, in the absence of a statute, a direction to accumulate a fund for charity beyond the common-law limit does not vitiate the gift, and that probably courts would take care that no extraordinary or extravagant term for accumulation should be allowed. The Connecticut statute against perpetuities was repealed, as stated above, on June 29, 1895, and the testator died on November 10, 1895; so that the rule laid down in section 399 would seem to apply. The emphatic language of the closing sentence of the opinion in Strong's Appeal is applicable to the present case: "Surely, the provisions of the testator will 'need only that favorable construction to which all charitable trusts are entitled in a court of equity, to ascertain their meaning and establish their validity.' Such construction has been too often given by this court in such cases to admit of further doubt as to the settled policy and doctrines of our jurisprudence in dealing with public and charitable trusts." 68 Conn. 532, 37 Atl. 397. See, also, Tappan's Appeal, 52 Conn. 412; Coit v. Comstock, 51

Conn. 352; Ould v. Washington Hospital for Foundlings, 95 U. S. 303; Camp v. Crocker's Adm'r, 54 Conn. 21, 5 Atl. 604. Inasmuch as the testator was domiciled in the state of Connecticut, only Connecticut cases have been discussed, as they must control. Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336. The numerous cases from other jurisdictions cited in the able briefs of counsel seem to fully sustain the same principles. The demurrer is sustained. Let the bill be dismissed.

FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. RY. CO.

In re HOLLY et al.

(Circuit Court, D. Washington, N. D. October 16, 1897.)

No. 337.

1. INTERSTATE COMMERCE — ORDERS BY INTERSTATE COMMERCE COMMISSION — ENFORCEMENT BY COURT.
   In a proceeding in the circuit court under section 16 of the interstate commerce law to enforce an order made by the commission, the court has no general power to adjust differences between the litigants, or to correct abuses in the conduct by a railroad company of its business; and, unless a valid order has been made by the commission and violated by the company, no relief can be granted to the petitioners.
2. SAME—POWERS OF COMMISSION—FIXING RATES.
   The interstate commerce commission is not authorized to fix rates either absolutely or relatively; and where the commission has assumed to make an order fixing rates, and a proceeding is brought to enforce such order, it is the duty of the court to declare the same to be null and void.
3. SAME.
   An order made by the interstate commerce commission, which authorizes a railway company to make commodity rates on competitive traffic to terminal points, less than their rates on like traffic to an intermediate noncompetitive point, but directs that such commodity rates must not be lower than necessary to meet competition, nor be applied to articles not actually subject thereto, is a mere general statement of the duty of the railway company as defined by the law, and is too indefinite to be the basis of a decree by the court to enforce obedience.
4. SAME—ROADS OPERATED BY RECEIVERS.
   When a court which has appointed receivers for a railroad company is called upon to enforce an order made before such appointment by the interstate commerce commission, it cannot treat the petition merely as an appeal to the court to regulate the conduct of its receivers in the receivership case, but must apply to them the same rules and principles which would be applied if the railroad were being operated and managed by the officers and agents of the corporation itself. The receivers have the same right to question the validity of the order made by the commission as would the railroad company.

Frank H. Graves, for petitioners.
C. W. Bunn and W. A. Underwood, for Northern Pac. Ry. Co.
M. D. Grover, for Great Northern Ry. Co.

HANFORD, District Judge. This is a proceeding instituted by the merchants and shippers of the city of Spokane, under section 16 of the interstate commerce law, as amended by the act of March 2, 1889 (1 Supp. Rev. St. [2d Ed.] p. 688), to enforce the decision and

order of the interstate commerce commission in the case of Merchants' Union v. Northern Pac. R. Co., 5 Interst. Commerce Com. R. 478–513.

Spokane is one of the most ambitious and promising of the interior cities of the Northwest. It has many natural and acquired advantages as a site for a great manufacturing and commercial city, but it is situated 400 miles from the seaboard, and is wholly dependent upon railroads as carriers of its commerce. The merchants and business men of Spokane, being discontented because the transcontinental railroads were exacting a higher rate for through freight from Eastern terminals to Spokane than they were receiving for through freight from the East delivered at Portland and terminal points on Puget Sound, organized the Merchants' Union, and, by that name, prosecuted a complaint before the interstate commerce commission against the Northern Pacific Railroad Company and the Union Pacific Railway Company, which was then operating connecting lines of railway, under the general name of the Union Pacific System, extending from Omaha to Portland, in the state of Oregon, and with branches reaching to Spokane, which proceeding resulted in the decision and order above referred to, which order is as follows:

(1) The defendants herein, by reason of the competition at their Pacific terminals of carriers not subject to the act to regulate commerce, may make commodity rates on competitive traffic to those terminals which are less than their rates on like traffic to Spokane; but such commodity rates must not be lower than are necessary from time to time to meet such competition, nor allowed in any case on articles not actually subject thereto. (2) In the matter of car-load rates, mixed car-load lots at car-load rates, minimum weight of shipments entitled to car-load rates, and in all other respects, the defendants, and each of them, will furnish, provide, and allow the same privileges, facilities, and advantages on shipments to Spokane as are or may be at any time furnished, provided, or allowed on like shipments to Portland or other Pacific terminals. (3) On or before the 1st day of January, 1893, the defendants in this case, and each of them, will prepare, publish, and put in effect, tariff rates on all classified traffic from their Eastern terminals to Spokane, which shall be approximately eighteen per cent. less than the tariffs now in force at that point, and shall not materially exceed eighty-two per cent. of the class rates now applied both to Spokane and the Pacific terminals; and thereafter the defendants will not, nor will either of them, charge, collect, or receive for transportation from their Eastern terminals to Spokane a greater sum or amount than the rates fixed and prescribed by such reduced tariffs. The following named rates on each of the ten classes, respectively, shall be deemed a compliance with this requirement, viz.: Class 1, $2.90; 2, $2.46; 3, $2.05; 4, $1.64; 5, $1.44; A, $1.44; B, $1.28; C, $1.02; D, $0.90; E, $0.74. In case of any reduction in class rates to Pacific terminals, a further and corresponding reduction will be made on like shipments to Spokane, except as provided in the foregoing opinion. This order will apply not only to rates from St. Paul and other Eastern terminals of the defendants, but is intended to include directions for a corresponding reduction in the grouped rates from points east of St. Paul so far as they are applied to Spokane traffic. As the railroads which join with the defendants in making these rates have not been made parties to this proceeding, the case will be reopened, if necessary, for the purpose of bringing them in, to the end that all carriers affected may be bound by this order unless cause be shown for a different ruling.

In the year 1894, while the Northern Pacific Railroad was in the hands of receivers, the petitioners filed their petition herein, in which they complained that the receivers, in the operation of said railroad, were discriminating against Spokane in the matter of freight rates, in utter disregard of said order. Thereupon the court required the

receivers to answer said petition, and, after the issues had been made up, an order was entered appointing Mr. L. S. B. Sawyer, of San Francisco, master in chancery pro hac vice, and the case was referred to him to take the evidence, and make a full report covering the facts and law of the case. The Northern Pacific Railway Company has been substituted as respondent in place of the receivers, said company having acquired the property of the Northern Pacific Railroad Company, and become the successor of the receivers in the operation thereof, by purchase at the sale under a decree, foreclosing mortgages thereon. In the foreclosure decree it was expressly provided that the purchaser at the sale should take the property and business, subject to the rights of the petitioners in this proceeding, and should be bound by the decree of this court, upon the final determination of the issues involved herein, in the same manner and to the same extent as the receivers would be bound if such decree had been entered while the railroad remained in their control. The Great Northern Railway Company is operating a line from St. Paul, through Spokane, to Seattle; and, as the business of that company must necessarily be affected by the decision of this case, it has been permitted to introduce evidence and to be heard in the argument. Testimony and documentary evidence has been taken by said master, at the cities of Spokane, Seattle, and Tacoma, in the state of Washington, and in Portland, in the state of Oregon, and in San Francisco, Cal., and in St. Paul, Minn.; and said master has made a full and exhaustive report, setting forth the facts and his conclusions from the evidence taken, and his opinion upon the questions of law involved in the controversy. To this report, the petitioners have filed exceptions, and the case has been argued and submitted upon the questions raised by said exceptions.

For a clear and complete presentation of the several propositions advanced by the litigants, and of the merits of the case, I find it most convenient to copy the larger portion of the master's report, which is as follows:

The petition in this case is the beginning of an independent suit or proceeding, in which the finding of fact in the commission's report is made prima facie evidence of the matters therein stated; and although, under said act, "formal pleadings" may be dispensed with, the court must hear and determine the cause "upon proper pleadings and proofs." The court will not grant any relief not prayed or not within the issues. This is a sui generis proceeding, but the fundamental rules of pleading and practice which govern all proceedings in any court apply to it. Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567-614; Interstate Commerce Commission v. Lehigh Val. R. Co., 49 Fed. 177; Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 50 Fed. 295; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 56 Fed. 925 (affirmed in 162 U. S. 184, 16 Sup. Ct. 700); Shinkle, Wilson & Kreis Co. v. Louisville & N. R. Co., 62 Fed. 690, 693; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 64 Fed. 981, 983; and other cases, last, but not least, Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700; Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666,—the last two cases being called respectively the "Social Circle Case" and the "Import Rate Case."

Before examining the pleadings and proofs in this case, let us consider some preliminary points and objections made by respondents. They contend: "(1) That the statute giving the commission, or any company or persons inter-

ested, the right to bring a proceeding to enforce an order of the commission, and customarily, as the cases reported in the courts show, the commission having brought a proceeding in its own name to enforce its own orders, the fact that it has not done so in this case raises a presumption that the commission itself does not consider that its order is being violated." Counsel do not press this point, but we think it worth mentioning. * * * It will be observed by reference to the act that the resort to this court is in the case of the violation of or neglect or refusal to obey or perform a lawful order or requirement of the commission.

Respondents contend: "(2) That the so-called 'order of the commission,' above recited, especially in its first paragraph, is no order at all, within the meaning of the law, capable of enforcement, but only a rule or principle of law, expressly leaving it open for further investigation before the commission to determine what merchandise and what tariffs might fall from time to time within the rule or outside of it." Without any authority on the subject, it would seem that an order that was to be obeyed or enforced should be definite, complete, and perfect, and easily understood. Says the supreme court: "If the commission, instead of confining its action to redressing, on complaint made by some particular person, firm, corporation, or locality, some specific disregard by common carriers of provisions of the act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country. It may be said that it would be impossible for the commission to frame a general order if it were necessary to enter upon so wide a field of investigation, and if all interests that are liable to be affected were to be considered. This criticism, if well founded, would go to show that such orders are instances of general legislation, requiring an exercise of the lawmaking power." And in another part of the opinion it says: "Congress has not seen fit to grant legislative powers to the commission." Texas Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 234, 216, 16 Sup. Ct. 666, 681, 674.

But respondents do not complain of this order for being too general only, but for being imperfect and incomplete, and so, in its present form, incapable of enforcement. The commission found that competition actually existed at the Pacific coast which justified lower rates from Eastern terminals to the coast than to Spokane; but it declined to decide what merchandise was subject to such competition, and what was not, affirming the general principle only that, where competition by water or rail does exist, the respondent may meet it, and reserving the other questions for future inquiry by the commission, and for the making by the commission of such correcting orders as the facts may require. The commission itself, then, seems to have considered its general rule or order as incomplete and unfit for immediate enforcement. According to the commission, facts which it does not find would have to be found by it and other roads would have to be brought in to make its order effectual and enforceable, at least outside of this circuit; and the decisions of the courts confirm the opinion of the commission. The supreme court, in Texas & P. Ry. Co. v. Interstate Commerce Commission, supra, on appeal from the circuit court of appeals, holds, in substance, that the defendant was entitled to have all the circumstances and conditions upon which a legitimate order could be founded, and which could be properly considered, passed upon in the first instance by the commission; and if the circuit court of appeals were of opinion that the commission erred in excluding ocean competition, or any other material fact or facts, from consideration, it should have reversed the decree, set aside the commission's order, and remanded the cause to the commission, to be proceeded in according to law. It says: "If the circuit court of appeals were of opinion that the commission, in making its order, had misconceived the extent of its power, and if the circuit court had erred in affirming the validity of an order made under such misconception, the duty of the circuit court of appeals was to reverse the decree, set aside the order, and remand the cause to the commission, in order that it might, if it saw fit, proceed therein according to law. The defendant was

entitled to have its defense considered, in the first instance, at least, by the commission, upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the commission in the light of all facts duly alleged and supported by competent evidence; and it did not comport with the true scheme of the statute that the circuit court of appeals (or, perhaps, the circuit court) should undertake of its own motion to find and pass upon such questions of fact in a case in the position in which the present one was. We do not, of course, mean to imply that the commission may not directly institute porceedings in a circuit court of the United States charging a common carrier with disregard of provisions of the act, and that thus it may become the duty of the court to try the case in the first instance. Nor can it be denied that, even when a petition is filed by the commission for the purpose of enforcing an order of its own, the court is authorized to 'hear and determine the matter as a court of equity,' which necessarily implies that the court is not concluded by the findings or conclusions of the commission; yet as the act provides that, on such hearing, the findings of fact in the report of said commission shall be prima facie evidence of the matters therein stated, we think it plain that if in such a case the commission has failed, in its proceeding, to give notice to the alleged offender, or has unduly restricted its inquiries, upon a mistaken view of the law, the court ought not to accept the findings of the commission as a legal basis for its own action, but should either inquire into the facts on its own account (with a view to enforce or refuse to enforce the order of the commission), or send the case back to the commission to be lawfully proceeded in." 162 U. S. 197, 238, 239, 16 Sup. Ct. 666, 682. Again, the supreme court, in another case, after condemning the withholding of the larger part of the evidence from the commission, and first adducing it in the circuit court, says: "The commission is an administrative board, and the courts are only to be resorted to when the commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the commission have been disregarded. The theory of the act evidently is, as shown by the provision, that the findings of the commission shall be regarded as prima facie evidence that the facts of the case are to be disclosed before the commission. We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the commission, but that the purposes of the act call for a full inquiry by the commission into all the circumstances and conditions pertinent to the questions involved." Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 196, 16 Sup. Ct. 700, 705.

It seems, then, that, although the commission might bring in this court a direct proceeding to enforce the law, in this proceeding the court, although not concluded by the findings or conclusions of the commission, but at liberty to pursue all needful inquiries and investigations "to enable it to form a just judgment in the matter of such petition," can only enforce or refuse to enforce an order of the commission. The court can investigate all it sees fit and necessary to determine whether to enforce or to refuse to enforce the order of the commission, but it cannot change or modify the order sought to be enforced. The commission may finish its order when it will, but, until definite and complete, it cannot be enforced; for this court is limited in its power and jurisdiction in this proceeding to the enforcement or refusal to enforce the order of the commission, as a whole or in part, just as made by the commission. It cannot enlarge, modify, or change it so as to make it enforceable, and then enforce it. This present order, also, is a permissive, and not a prohibitory, one, and therefore incapable of enforcement. The court, in its power and jurisdiction over the matter, is limited to an approval or disapproval, and to the enforcement or refusal to enforce the order of the commission as a whole or in part just as made by the commission; and the court is without power or authority to treat the case as one originally instituted in this court, and make an order or decree of its own, or to modify the order of the commission for the purpose of making it conform to the opinion of the court, "although * * * the court, of course, may go fully

into the proofs on its own examination to determine whether it will approve the order, and may hear any additional proof adduced." Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409, 413. The circuit court of appeals for the Sixth circuit, in a very careful opinion by Judge Hammond, concurred in by the rest of the bench, speaks to the same tenor and effect: "From what has been already ruled, it is apparent that even if the commission has established, by its inquiry, an abuse to be remedied, the order it gave was not a proper one, and should not be enforced. Large as its powers may be, and plenary as may be the authority of the court to enforce, by mandatory injunctions or otherwise, obedience to its orders, its powers are those of regulation, and not construction or reconstruction. Interstate Commerce Commission v. Baltimore & O. R. Co., 43 Fed. 37-50, 145 U. S. 263, and 12 Sup. Ct. 844. And now see Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700. This is, as the commission has made it, a dispute about discriminating rates; and the easy remedy, on such a complaint, is a readjustment of the rates to cover the discrepancy. As was said in one of the cases we have cited, the method of redress by readjusting the rates must always be left to the choice of the company, at least in the first instance; and in the subsequent St. Louis case, supra, the commission adopted that course, and made the proper order. Here was an arbitrary and peremptory order to abandon the accessorial cartage at Grand Rapids, without regard to any rates, or without option as to readjustment of them, the defendant company not even being allowed the alternative of establishing a like service at Ionia. It is in its nature, not a regulation of commerce, so much as an interference with the rights of property and its use, which possibly even congress could not in this way prohibit. At all events, it is an attempted exercise of a legislative power, which congress has not, we think, conferred upon the commission. Northern Pac. R. Co. v. Washington Territory, 12 Sup. Ct. 283. Nor was there any power in the circuit court to modify or change the order of the commission. Whatever may be the plenary power of a court of equity to command, at the suit of those who are injured, the performance of any duty arising out of a contract or statutory obligation, the jurisdiction it was exercising here is strictly special and statutory, and is limited, as all special jurisdiction is, to the precise power conferred by the interstate commerce act, which is only to compel obedience to the 'lawful order' of the commission. It has not been granted any broader power to exercise the authority of the commission itself by substituting a new regulation or order of its own, or modifying that which the commission has given. It is purely an auxiliary jurisdiction. Interstate Commerce Commission v. Delaware, L. & W. R. Co., 64 Fed. 723. The ordinary jurisdiction of the courts is open to any one injured, to invoke their more plenary powers, except so far as that of an action at law for damages has been made optional with the cumulative statutory remedy by section 9 of the act. The remedy by bill in equity has not been so restricted, and is yet available; but here, the powers of a commission being administrative, and not judicial, the ancillary and supplemental judicial jurisdiction is necessarily limited to the purpose of its creation, and can go no further than to grant or refuse compulsory obedience to the lawful orders of the commission, and as it makes them,"—citing many cases. Detroit, G. H. & M. Ry. Co. v. Interstate Commerce Commission, 21 C. C. A. 140, 74 Fed. 840, 841.

Counsel for petitioners maintains that there is no indefiniteness or uncertainty in this order; that, although the commission did not determine and specify what was and what was not competitive business, "that is certain which can be made certain. In our order all articles carried in class are comprehended. Look at the class, and the order is certain." Respondent shows by testimony and exhibits that class as well as commodity rates are now affected by water competition, which it is expressly permitted by this order to meet, which throws us and the order back upon the question, what articles are and what are not subject to water competition? As to the necessity of bringing in other carriers, the supreme court, in Texas & P. Ry. Co. v. Interstate Commerce Commission, so much quoted in this report, holds that, in proceeding against a carrier of interstate commerce to enforce an order of the commission, another carrier concerned with the defendant in jointly

making the forbidden rate is a proper, but not a necessary, party defendant. "Another objection urged is that as the order of the commission involves rates participated in by the Southern Pacific Company, as owner of a portion of the line over which the through freight is carried, that company was a necessary party. Undoubtedly, that company would have been a proper party, but we agree with the circuit court in thinking that it was not a necessary one." 162 U. S. 197, 205, 16 Sup. Ct. 666, 669, 670, affirming Interstate Commerce Commission v. Texas & P. Ry. Co., 6 C. C. A. 653, 57 Fed. 948, and 52 Fed. 187. See, also, Interstate Commerce Commission v. Southern Pac. Co., 74 Fed. 42, 43.

Again, respondents contend: "(3) That this order sought to be enforced in this proceeding is in its third and principal paragraph invalid and unlawful, in that it attempts to do what neither the commission nor even the court in this case (for the court can in this proceeding only enforce the lawful order of the commission) has power to do, viz. to fix freight rates to Spokane." The supreme court, in Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, supra (known as the "Social Circle Case"), denies power in the commission to fix rates, and, according to Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409, 429, "puts that question at rest." It says: "Whether congress intended to confer upon the interstate commerce commission the power to itself fix rates was mooted in the courts below, and is discussed in the briefs of counsel. We do not find any provision of the act that expressly or by necessary implication confers such a power." The supreme court then proceeds to adopt the view expressed by the late Justice Jackson, when circuit judge, in Interstate Commerce Commission v. Baltimore & O. R. Co., 43 Fed. 37, affirmed in 145 U. S. 263, 12 Sup. Ct. 844, and cited with approval in many cases since: "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law,—free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits." 162 U. S. 184, 197, 16 Sup. Ct. 700, 705. And not only has the commission no power to fix maximum rates, neither has it any power to fix minimum, relative, or any rates. "The commission has no power to make rates, and especially has the commission no power to order that rates from a given point to one city shall bear a certain relation to the rates from the same point to another city." Ninth headnote, approved by the judge, Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409, 410, 428, 429. In Interstate Commerce Commission v. Northeastern R. Co., 74 Fed. 70, 73, the court, after citing the Social Circle Case, says: "The court can only enforce the lawful orders of the commission. As has been seen, the commission is not warranted by the act of congress to fix rates, and to this extent its order is not lawful. The bill [to enforce the orders of the commission] is dismissed." To the same effect is Interstate Commerce Commission v. Alabama Midland Ry. Co., 21 C. C. A. 51, 74 Fed. 715, affirming 69 Fed. 227. In Interstate Commerce Commission v. Lehigh Val. R. Co., 74 Fed. 784, 788, the court, after quoting with approval Justice Jackson's views, adopted by the supreme court, says: "These views of the supreme court decisively show that the interstate commerce commission is not clothed with the power to fix rates which it undertook to exercise in this case. The petition of the interstate commerce commission must be dismissed." This was a sort of percentage case. The first headnote reads: "The fact that the cost of carriage of all coal upon an entire railroad system, from all points of shipment to all destinations, is a certain per cent. of the gross receipts from all coal, is no reason for concluding that upon a particular line or part of the system the cost of carriage bears the same ratio to the coal receipts of that particular line or part."

It follows from these decisions that the interstate commerce commission cannot fix any rate absolutely or relatively, directly or indirectly, by a per-

centage on some other rate or otherwise, but must content itself with pronouncing a rate unjust or unreasonable, leaving the carrier to readjust its rates as often as required so to do. In the case at bar, if it were not for competition found, and found controlling, the commission could have directed the respondents to cease charging a greater rate to Spokane than they might charge to the Pacific terminals on any kind of merchandise, but it should not have attempted to fix any rate, either absolutely or by reference to any other; for, as counsel for the petitioners suggests, "that is certain which can be made certain," and the commission is not empowered to fix any certain rate. We think these cases a sufficient answer to the contentions of counsel for the petitioners under this head.

Respondents also contend: "(4) That the circumstances and conditions upon which the commission passed have so changed with the lapse of time and advance of civilization and commerce that this order, lawful when promulgated, is unlawful and unenforceable now." The circumstances and conditions passed upon by the commission were those existing on and before June 4, 1891, when the evidence before it closed. The circumstances and conditions now before the court are those in existence from June to September, 1896, during which time this testimony has been taken. Therefore, says respondent, this court is now asked to enforce a finding and order necessarily temporary in its nature, notwithstanding the extensive changes in circumstances and conditions during five years, which make this case a very different one from that passed on by the commission. In the strong language of counsel: "If the controlling and essential facts are so changed that the case [before the court] is not the same case as the commission made its order upon, the court has no recourse but to remit the complainant to the commission, to have the new facts and circumstances passed upon by that body." The cases already cited under the two previous heads apply to this objection. A case in which the order of the commission is improper or illegal will, under these authorities, be remitted to the commission for further investigation, findings, and orders.

Counsel for the petitioners insists that, in this objection, respondent seeks to take advantage of its own wrong and the petitioners' long suffering. It denies any material change in circumstances, and alleges that the power to change conditions is to some extent in the hands of respondent itself; and, lastly, that, if any radical change in circumstances and conditions has taken place affecting respondent, it should apply to the commission for a modification of this order, instead of continuing its disobedience or neglect of the order. In Interstate Commerce Commission v. Louisville & N. R. Co., the court says: "An objection is made to the form of the order, in that it is made in terms to operate indefinitely in the future, without any reservation of the power of change or modification, such as changes in traffic conditions might make absolutely necessary. It is argued that, if the order of the commission were made the judgment of this court, it would become a bar to any change in the future. I cannot, however, concur in this view. The order of the commission is essentially an administrative one, and is not final or conclusive in the sense of a court judgment or decree; and the order of this court is one merely to give effect to the order made by the commission, and does not change its character or make it a final judgment. There are no private vested rights in the order of the commission, or that of this court, such as exist in a regular judgment or decree of this court. And, if necessity should arise for a change in the tariff of rates, no reason is perceived why the carrier might not make this on notice to the commission under the act of congress, just as such carrier is permitted to do in regard to the published rates filed with the commission." 73 Fed. 428. According to this, a change in circumstances would not invalidate the order of the commission, but would justify the carrier, on notice to the commission, under the act of congress, in changing its rates without any modification of the commission's order.

If these last three objections are well taken, and the first and third paragraphs of the order are, at the time enforcement is sought, unlawful (and the second paragraph, as we shall see later on, is not involved in this case), the court will be compelled to dismiss this case. In spite of the contention of counsel, we do not think these questions proper to be passed upon by the

master. They address themselves rather to the court, and the court necessarily, if only inferentially and preliminarily, overruled them, as far, at least, as the master is concerned, in its order of reference. Having thus, as far as we are concerned, disposed of these preliminary objections, and endeavored to report fairly, not only the contentions, but even the authorities found, on both sides, we come to the consideration of the pleadings and proofs in this case.

Omitting many immaterial matters, the pecuniary interest of the petitioners in the subject-matter of the petition, and the investigation and order of the interstate commerce commission in the Merchants' Union of Spokane Falls against the Northern Pacific Railroad Company et al., in 1891, are admitted in the pleadings. The petition gives what it claims to be a history of freight rates prior to the hearing by the interstate commerce commission, and alleges that the rule by which the traffic managers of the Northern Pacific Railroad made their freight rates on articles on merchandise from Eastern terminals to Spokane was the through rate to Western terminals plus the local rate back to Spokane. It then alleges that this order of the interstate commerce commission was made to apply to the Union Pacific Railroad as well as to the Northern Pacific Railroad, "but that neither of said roads has attempted to comply with the order of the said commission, but that the discriminations practiced against Spokane, with some few exceptions, have been continued by the management of said roads as well since the said order as before." The petition then gives what it calls a "partial list, by way of illustration," of the articles of merchandise upon which the management of these roads continues to discriminate against Spokane, and in favor of Western terminal points, and showing the extent of that discrimination, many of which articles, it avers, do not at all come to Western terminals by water, and, upon such as do, the discrimination practiced against Spokane by the railroads, considering the service necessary to lay them down by rail at the respective points, is very great. Then follows another "partial list" of articles of merchandise, which, according to the petition, "are confessedly not susceptible of water transportation, and which shows the relative rate maintained by the railroad companies to Spokane and to Western terminal points." The petition continues: "It will be seen from the above that the said railroad companies have treated the order of the interstate commerce commission with contempt, and that they utterly failed to readjust their rates so as to charge Spokane only eighty-two per cent. of the rate maintained on such articles to terminal points." The prayer of the petition is for an investigation by the court of the matter of freight rates to Spokane, and that its receivers be required to so adjust the same that they will be relatively and within themselves reasonable, and that no greater charge be permitted to Spokane from Eastern terminals than is made from Eastern terminals to Western terminals, except on such articles as are truly subject to water competition, and that said receivers be required to comply in letter and spirit with the findings and order of the interstate commerce commission, hereinbefore referred to, et cetera. All the allegations of the petition, with the exceptions mentioned, are denied in the answer. The appointment of, and that the Northern Pacific Railroad was in the hands of, receivers at the time the petition herein was filed, and during the taking of testimony thereunder, is admitted by their appearance and answer. The allegation that neither the Northern Pacific Railroad nor the Union Pacific Railroad has attempted to comply with the order of the said commission cannot of itself make the Union Pacific Railroad a party to this proceeding, and the Union Pacific Railroad is not, as far as the master is aware, a party hereto.

From this examination of the petition it will be seen that it directly and specifically charges the respondent with only one violation of the order of the interstate commerce commission, viz. that on articles not subject to water competition respondent charges shippers in Spokane more than 82 per cent. of its rates on such articles to Western terminals, and, inferentially, historically, and argumentatively, that respondent discriminates against Spokane, and in favor of Western terminals, in all articles of merchandise, and that its through rates to Spokane are unreasonable. Of course, in this proceeding only the allegations of violation of the order of the interstate commerce commission are material. There is no complaint of the rates from the coast back to Spokane, nor

of any local rates out of Spokane, nor of any local rates from points between Spokane and the Eastern terminals; nor is there any allegation of discrimination against Spokane in the matter of car-load rates, mixed car-load lots at car-load rates, minimum weight of shipments entitled to car-load rates, etc.; nor is it alleged that the respondent does not furnish, provide, and allow the same privileges, facilities, and advantages on shipments to Spokane as are or may be at any time furnished, provided, or allowed on like shipments to Portland or other Pacific terminals. Complaint is not made of the reasonableness of the Spokane rates considered by themselves, but of alleged discrimination against Spokane as compared with Seattle, Tacoma, and Portland, seaboard cities, the termini on the coast of the Northern Pacific Railroad. Petitioners do not allege that the rates of the Northern Pacific Railroad return it too much revenue. The aggregate of its income is not said to be too large; nor is any rate challenged as too high, except by comparison. The complaint is against the low rates to the coast, or against the existing comparison of rates which is claimed to give the seaboard cities an undue and unreasonable advantage. The relief which petitioners ask would be granted them either by raising rates to the coast or by lowering them to Spokane. Counsel for petitioners, in his brief, says: "Besides, as I have pointed out again and again, this is a question of relative rates more than absolute rates. * * *" The interstate commerce commission, by its order, did not determine that the commodity rates then prevailing to the coast were unreasonable, and although the commission found (5 Interst. Commerce Com. R. 489) that the commodity rates to coast terminal points were very numerous, covering over 50 pages of the printed tariffs then in existence, yet there was neither any finding nor any order that any single one of those commodity rates was unwarranted by the circumstances and conditions prevailing at the coast, or in any manner unfair to Spokane or its merchants. On the contrary, by the terms of the first paragraph of the order cited, after finding that these commodity rates already exist in large numbers, express permission is given to the carrier to make commodity rates on competitive traffic; but the commission left it, by the terms of this order, to the carrier to fix the rates not lower than necessary, from time to time, to meet such competition, nor in any case on articles not actually subject thereto. Now, if this is an order which can be enforced in any such proceeding as this, when complaint is made that the order is violated so far as these commodity rates are concerned, it must appear that the carrier has either made a commodity rate which was lower than necessary, from time to time, to meet the water competition, or that such a rate was applied to an article not actually subject thereto; and it lies upon the party complaining of a violation of the order to allege and show affirmatively that a rate is made which is lower than necessary to meet the competition, or upon some article or articles which are not affected by such competition. The necessity of allegation and the burden of proof are upon the party complaining. Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409, 410, headnote 12, and whole case; Interstate Commerce Commission v. Baltimore & O. R. Co., 43 Fed. 37, headnote 2; Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 238, 16 Sup. Ct. 666. We have seen how the burden of allegation was borne. How was the burden of proof borne? Petitioners in putting in their proof, introduced—First, the report of the interstate commerce commission; second, they introduced the tariffs; and, third, they put witnesses on the stand who testified that they were engaged in business at Spokane, and that the rates to coast terminals were less than the rates charged to Spokane, although the coast terminals were upward of 400 miles further west, and that, by reason of this, they suffered in their ability to compete in various markets with merchants at coast terminals. They showed that there was a discrimination against Spokane. Did they show that that discrimination was unjust, or that on any of the articles mentioned by them there was want of water competition?

We have thus dwelt upon the pleadings in this matter because we thought that the court might feel bound by them. Counsel, if we understand them, do not desire to take any advantage of informalities, perhaps even of defects in pleadings. We come now to the real questions or issues made or intended to be made in this case: Are respondent's rates from Eastern terminals to Western terminals lower than are necessary, from time to time, to meet the compe-

tition of carriers not subject to the act to regulate commerce, or allowed on articles not actually subject to such competition? Are the through rates from Eastern terminals to Spokane, either absolutely or relatively, unreasonable, and do they materially exceed 82 per cent. of the class rates on articles not subject to such competition at the time of the decision and order of the interstate commerce commission, applied both to Spokane and the Pacific terminals? Whether rates that are allowed to meet competition are lower than necessary to meet it depends, of course, upon the character and amount of competition, and the rulings of the court in this regard. All the cases upon this branch of the subject, as well as Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 56 Fed. 925, 928, affirmed in 162 U. S. 184, 16 Sup. Ct. 700, hold that "competition, the life of trade, cuts an important figure, and cannot well be overlooked or denied"; that a "common carrier cannot be required to ignore or overcome existing differences in transportation facilities of different localities, created, not by its own arbitrary action, but by nature or by enterprise beyond its control,"—citing Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 50 Fed. 295, 306. Judge Ross, in the case just cited, cites with approval Judge Deady in Ex parte Koehler, 31 Fed. 315, 319: "The power of a corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or, as was said in Ex parte Koehler (a previous case), abandon the field, and let its road go to rust." Judge Ross adds: "But, San Bernardino [in this case Spokane] not being a competitive point, it does not get the terminal rates. The proof shows, what is also a matter of common knowledge, that railroads do not make terminal rates unless compelled to do so by competition. Wherever and whenever actual competition exists, the question the carrier has to deal with is not so much what is a fair rate for the service, or what the traffic will bear, but what rate can be got for the service as against the rate offered by the competitor. Especially is this true when the competitor is a carrier by water, because that is the cheapest known kind of transportation, and is unrestricted by law."

Even the interstate commerce commission, in the case in which the order involved in this proceeding was made, says: "They [the railroads] had the alternative of making rates which would attract the business, or leaving it mainly to the ocean carriers;" and, again, on page 498: "The water carriers solicit traffic for transportation from the Atlantic seaboard to Pacific terminals at a cost to the shipper greatly below the commodity rates of these defendants." 5 Interst. Commerce Com. R. 497, 498. As to effect of competition, see, also, Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409–424, which holds that the question of mileage (or length of haul) is by no means controlling or the most important where difference of rates is complained of. In McClelen v. Railway Co. (decided June 6, 1896) 6 Interst. Commerce Com. R. 588, the commission held that what is forbidden by the fourth section of the act to regulate commerce is only a form of unjust discrimination or undue preference. So, it appears that reasonableness and justice are the sole requirements of the law upon the subject of rates. See, also, the leading case, Kentucky & I. B. Co. v. Louisville & N. R. Co., supra, and the Import Rate Case. This makes all the cases on the subject of rates equally applicable to any case under any section of the act involving the question of rates, and any cases that we may cite under this first head will apply as well to our other points. Mr. Justice Brown, in 145 U. S. 263, 12 Sup. Ct. 844, after adopting Judge Jackson's views in Interstate Commerce Commission v. Baltimore & O. R. Co., about the rights of carriers, already quoted, says: "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust and unreasonable." And this language, as well as Judge (afterwards Justice) Jackson's, is also approved and adopted in the Social Circle Case and other cases. The words "'undue or unreasonable preference or advantage,' * * * in the * * * act to regulate commerce, plainly imply that every preference or advantage is not condemned, but such only as are undue or unreasonable." Headnote 7, Interstate Commerce Commission v. Alabama Midland Ry. Co., 69 Fed. 227, affirmed in 21 C. C. A. 51, 74 Fed. 715, 716. The much-cited Social Circle Case and the Import Rate Case confirm these cases, and the first holds that "the very terms of the statute that charges must be reasonable, that discrimina-

tion must not be unjust, and that preference or advantage to any particular person, firm, corporation, or locality must not be undue or unreasonable, necessarily implies that strict uniformity is not to be enforced. * * * The mere circumstance that there is in a given case a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable, within the meaning of the act." This case also holds that every circumstance which would have any weight as bearing upon the fixing of rates must be considered (see, also, Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 420), and that these matters must be looked at as carriers look at them; and "the mere fact that the disparity between the through and the local rates was considerable did not of itself warrant the court in finding that such disparity constituted an undue discrimination." 162 U. S. 197, 219, 239, 16 Sup. Ct. 666, 675, 683.

The interstate commerce commission found in the Spokane Freight Rate Case that these low terminal rates afford a margin of profit over the actual cost of moving the traffic (which is the inside limit of a lawful rate), but would be ruinous to the company if applied even to intermediate stations (5 Interst. Commerce Com. R. 500); and in another case the commission found that a railroad ought not to neglect any traffic of a kind that would increase its receipts more than its expenses, etc. In re Louisville & N. R. Co., 1 Interst. Commerce Com. R. 79. Soulless (so called) corporations are not generally accused or even suspected of charging less than they ought to charge for any service. It is the interest of the carrier to get all he can from terminal or other business. "It must be stated, too, that questions of this kind must be treated broadly and practically. The carrier's business is one which involves so many considerations, and the necessity of taking into account so many conditions, that questions of this kind do not admit of any rigidly theoretical rules in their solution. * * * [An English case is then cited with approval.] The conclusion is one of fact to be arrived at by looking at the matter broadly, and applying common sense to the facts that are proved. * * * It is impossible to exercise a jurisdiction such as is conferred by this section by any process or mere mathematical or arithmetical calculation. Where you have a variety of circumstances differing in the two cases, you cannot say that such a difference of circumstances represents or is equivalent to such a fraction of a penny difference of charge in the one case as compared with the other. A much broader view must be taken, and it would be hopeless to seek to decide a case by any attempted calculation. [Citing another English case; and, according to Interstate Commerce Commission v. Baltimore & O. R. Co., 43 Fed. 37, 51, affirmed in 145 U. S. 263, 284, 12 Sup. Ct. 844, the interstate commerce act having adopted substantially some of the provisions of the English railway traffic acts, the construction given to such provisions by the English courts must be regarded as incorporated into the act.] The other alternative would be to raise the shipping [terminal] rates to the level of the local rates. These shipping [terminal] rates are charged upon traffic of a highly competitive character, and we may take it that they are fixed at the highest point that is consistent with securing a remunerative share of the traffic. I am not introducing competition to justify the preferences, but only as a factor in the result which, it seems to me, will inevitably follow upon the raising of the Southampton dock [terminal] rates, viz. the loss of the whole shipping traffic to the railway. A slight increase would probably have this effect; any approximation to the level of the local rates most certainly so. * * *" Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409, 419, 421, 423, 424. See, also, Interstate Commerce Commission v. Alabama Midland Ry. Co., 21 C. C. A. 51, 74 Fed. 715, 721, affirming 69 Fed. 227; Detroit, G. H. & M. Ry. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 74 Fed. 803, 817; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 56 Fed. 925, affirmed in 162 U. S. 184, 16 Sup. Ct. 700. If rates were raised, even the products of the Mississippi valley would go down the river, or way East, to get here by water; or our merchants would buy the same things in the East, so as to get them by water. The supreme court of the United States does not limit the effect of competition—as is attempted to be done by this order of the interstate commerce commission—to that of carriers not subject

to the act to regulate commerce (see case last quoted from, 73 Fed. 409, 418, 419, and 420, and Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U. S. 263, 284, 12 Sup. Ct. 844), but holds that all or any kind of competition changes conditions and circumstances so as to make discriminations and preferences, which would otherwise be unjust and unreasonable, lawful and proper. The courts in some of the early cases under the interstate commerce act did not deem it their duty to consider the rights and interests of the carriers. They now construe the act so as to treat carriers, as well as shippers, consignees, and everybody concerned, including the public, with evenhanded justice. They allow party-rate tickets (Interstate Commerce Commission v. Baltimore & O. R. Co., affirmed by the supreme court, supra); a difference in summer and winter rates (Interstate Commerce Commission v. Louisville & N. R. Co., supra); and, generally speaking, whatever rates competition or other circumstances over which the railroads have no control may render necessary.

Counsel for petitioners contends that, if the rate forced on the company secures the business, it must be lower than necessary to do this. This is certainly a non sequitur. That it secures the business shows that the company had met the competition which it had a right to meet,—not that it had more than met it, and thrown away income to which it was entitled; and rates that commerce did not avail itself of would be mere paper rates, and absolutely useless. The question whether terminal rates are allowed on articles not actually subject to water competition involves the question what articles are, and what are not, subject to such competition. Counsel for petitioners insists that this is the only point to be determined here, and maintains that, because now almost all articles come to the coast by rail, therefore they are not affected by water competition. Is not this substantially the same non sequitur already pointed out? The interstate commerce commission, in San Bernardino Board of Trade v. Atchison, T & S. F. R. Co., 4 Interst. Commerce Com. R. 104, held that such competition must be actual, not merely possible; but the commission, in a subsequent case (Raworth v. Northern Pac. R. Co., 5 Interst. Commerce Com. R. 234), holds that, perhaps, "a clear case of competition, not strictly speaking actual, but having a potential existence, would be sufficient. Competition has a potential existence * * * where the means of such competition exist, and all the conditions are such that it is morally certain an advance in rates by a carrier will result in developing competition of controlling force. If the facts make out a clear case of this kind, it would seem unreasonable to require the carrier to go further, and demonstrate by an actual advance in rates, resulting in a loss for the time being of the traffic involved, that such advance will so result." Is there any necessary contradiction between actual and potential? Cannot competition be both potential and actual at one and the same time, and very potential, too, in another sense of the word? The circuit court of appeals, in Interstate Commerce Commission v. Alabama Midland Ry. Co., 21 C. C. A. 58, 74 Fed. 715, 717, 723, says: "The Alabama river, open all the year, is capable, if need be, of bearing to Mobile, on the sea, the burden of all the goods of every class that pass to or from Montgomery. * * * When the rates to Montgomery were higher a few years ago than now, actual active water-line competition by the river came in, and the rates were reduced to the level of the lowest practical paying water rates; and the volume of carriage by the river is now comparatively small, but the controlling power of that water line remains in full force, and must ever remain in full force as long as the river remains navigable to its present capacity. * * * The volume of trade to be competed for, the number of carriers actually actively competing for it, a constantly open river to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to us, as they did to the circuit court, to constitute circumstances and conditions at Montgomery substantially dissimilar from those existing at Troy, and to relieve the carriers from the charges preferred against them by its board of trade."

The respondent having shown potential competition, that the means of such competition exist, and that that character of transportation is practicable, is it

necessary for it to show the actual carriage of the goods? A carrier cannot be required to make a separate rate for each separate article, or to take an article out of the class to which it belongs, and put it back again, whenever, according to hearsay, its rivals get or lose the carriage of a small quantity of it. To attempt this would introduce endless detail and confusion in tariffs, and would not be practicable or feasible; for, as similar things generally come packed together, to enforce such a distinction, the carrier would be compelled to open and examine every box or package of goods which was offered it. There is certainly a practical necessity, when the bulk of a certain class of goods is subject to water competition, for putting the whole class which naturally belongs together in a tariff based on water competition. The evidence, including bills of lading, ships' manifests, rate sheets, etc., shows that all articles carried by the respondent had actually been carried to the coast by water, or are capable of being so carried, with very few and trifling exceptions. It is more a question of tinning, casing, and packing than anything else. And, since water carriers have adopted railroad tariff classification and rates, the order of the commission allowing the respondent to meet water rates applies as well to class as to commodity rates. Counsel for petitioners admits that the distinction between class and commodity rates is no longer tenable or useful. Speaking of water carriage, he says: "Now, whether this carriage be done under classification or under commodity rates can make no difference, because, as already pointed out, the railroads are entitled, under the order, by the commodity rate, to meet water competition. The right to do this we do not and have not questioned. It is wholly immaterial whether the steamship companies carry now by the class rate rather than by the commodity rate. * * * But whether the water competition was greater or less, in my view of the law in this case, is quite immaterial, because whatever articles the railroad is compelled to carry in competition with water it may carry at a less rate under its commodity sheet, and the only materiality of that question is touching the articles as to which this competition operates. * * *"

The question whether through rates from Eastern terminals to Spokane are relatively reasonable, or not, is involved in, and has been already considered with, the question whether terminal rates to the coast are lower than necessary. If terminal rates are made by competition, and not by the respondent, of course respondent is not responsible for them or for their disparity with other rates, and they can form no basis of comparison with other rates. Are through rates from Eastern terminals to Spokane on all classes of goods in themselves reasonable? The testimony of Mr. Hannaford and Mr. Clough shows that these rates were and are made up like any other rates, by gradual increase with increasing distance from St. Paul, and that only when they exceed the through rate to Western terminals plus the local rate back to Spokane is that combination rate applied. According to Interstate Commerce Commission v. Alabama Midland Ry. Co., 69 Fed. 227, affirmed in 21 C. C. A. 51, 74 Fed. 715, a combination rate is not violative of the act to regulate commerce. The only evidence of unreasonableness of these rates is the disparity between them and coast rates; but this argument falls before the last decision of the supreme court of the United States under this act,—the Import Rate Case, so often referred to: A reasonable rate, according to Reagan v. Trust Co., 154 U. S. 362, 411, 14 Sup. Ct. 1047, is one which provides sufficient revenue to pay operating expenses (including even betterments), taxes, and a fair return on the capital invested. See, also, Southern Pac. Co. v. Board of Railroad Com'rs of California, 78 Fed. 236. If the rate to Spokane were reduced, all the rates back to Eastern terminals would have to be proportionately reduced.

The aggregate tons for the year ending May 31, 1896, shipped from Eastern terminals to Spokane, Seattle, Tacoma, and Portland, and the aggregate earnings thereon, are shown in exhibits to Mr. Taylor's evidence, taken at St. Paul, as follows:

Destination.	Tons.	Earnings.
Spokane	9,437	$260,087 46
Seattle	11,831	180,908 73
Tacoma	13,041	189,098 17
Portland	13,184	198,225 20

The actual rate per ton per mile on Spokane business (which is high class, mostly merchandise) is therefore about 1.8 cents per ton per mile, instead of 3.43 cents, as the commission made it. The average earning of the Northern Pacific Railroad for the year ending June 30, 1895, was, as shown by its report, 1.11 cents per ton per mile. This includes coal, lumber, wheat, flour, and all classes of freight, while the figure for Spokane is based on merchandise. Coal, lumber, wheat, flour, etc., do not move from Eastern terminals to Spokane. Spokane has a lower rate per ton per mile from Eastern terminals than has any intermediate station. The Northern Pacific Railroad has been earning no dividend on its stock, and since 1893 no interest on the bulk of its bonded debt; paying only operating expenses, and a part of its interest. If relief were granted to the petitioners, the Northern Pacific Railroad, instead of reducing rates to Spokane, would be forced to the alternative of raising its coast rates, and abandoning that business to its competitors. This would hurt the company, and not help Spokane.

Respondent's Exhibit 14, St. Paul evidence, shows tonnage for the year ending May 31, 1896, through Eastern terminals, as follows:

	Tons.	Earnings.
To coast	40,403	$ 609,674 47
To intermediate points	313,690	3,784,337 06

That is, the coast business earns less than one-sixth of the aggregate earnings on business from and through Eastern terminals. Proof was made of the earnings, operating expenses, and other charges of the receivers of the Northern Pacific Railroad for the whole period of the receivership, from August 16, 1893, to May 31, 1896. From this statement it appears that the rates charged and collected—the receivers' net operating income applicable to what are called "fixed charges"—was always insufficient for the purpose, leaving a deficit, to say nothing of any dividend for the stock of the company; and there is no claim made that this road was not economically operated, it being operated by the United States courts, the accounts of receipts and expenses being monthly filed in court for the inspection of all parties in interest. The very fact that this road, like a good many others, was in the hands of receivers, without any charge of bad management on its part, goes to show that its rates could not be reduced. There is no suggestion in the evidence that the management was incompetent, nor does the evidence sustain petitioners' contention that it was swayed by any bias towards Pacific coast terminals, or by any prejudice against Spokane. This case is not the case made before the commission, but a much stronger case for the respondent.

To sum up briefly, before formal findings, the evidence, as we read it, in the light of the authorities, shows: (1) That respondent's rates from Eastern terminals to Western terminals are not lower than necessary, from time to time, to meet the competition encountered at Western terminals, nor allowed on articles not actually subject thereto. (2) That respondent's through rates from Eastern terminals to Spokane are both in themselves and relatively reasonable. This really covers the whole ground, for respondent is not charged with any violation of the second or of the first clause of the third paragraph of the interstate commerce commission's order; and since class, as well as commodity, rates are affected by competition, the distinction and comparison between them in this order is rendered nugatory.

Counsel have requested a good many findings. We shall adopt as many of them as we can. We cannot affirm many of the findings of the interstate commerce commission, as requested by petitioners' counsel, because they contain facts not brought out before us. The completion of the Great Northern Railway, the dissolution of the Transcontinental Association, and other changes in the situation of the respective parties hereto, are noted in our findings, and both past and present rates appear in the tariff sheets in evidence, and need no findings. The tonnage carried to Spokane, Seattle, Tacoma, and Portland during the year ending May 31, 1896, is shown in another part of this report, and may be considered a finding. Counsel for petitioners also requests us to find that there is no water competition upon certain articles (naming them) that, according to the evidence, have come to

this coast by rail; and that there is more or less water competition upon certain other articles (naming them) that have, according to the evidence, come to this coast, sometimes by rail and sometimes by water; and he confesses that, "as to any articles in the tariff sheets concerning which no testimony has been offered, I conclude that there is no water competition," and asks the master to so find. For the reasons already given, and under the decisions of the courts cited, such findings would be untrue, being based on facts insufficient if not immaterial and irrelevant, and the master is therefore compelled to decline to adopt them. As the commission itself says in the Spokane Freight Rate Case: "Special facts relating to particular shipments might be multiplied indefinitely, but their chief value would consist in furnishing instances of ocean (or rail) carriage; while general statements, though leading more directly to correct conclusions, would, doubtless be subject to modifying exceptions." Whether the Northern Pacific Railroad Company would find its account in making cheaper rates to Spokane, because it would thus get not only the original carriage of articles, but also their carriage for distribution; and whether the completion of the Great Northern Railway has diminished the earnings of the Northern Pacific Railroad Company; and whether the president and manager of the Great Northern Railway Company, for a consideration, promised the citizens of Spokane to make any particular rates to Spokane,—do not seem to us very material questions in this proceeding.

Facts.

(1) Since the date of the report of the interstate commerce commission in the Spokane Freight Rate Case, Spokane has grown in population, trade, and relative importance. It has now a population of about 35,000.

(2) The Union Pacific, Northern Pacific, and Great Northern Railway Companies make common rates to Spokane and Pacific coast terminals. (This is what the circuit court of appeals, in Interstate Commerce Commission v. Alabama Midland Ry. Co., 21 C. C. A. 51, 74 Fed. 715, affirming 69 Fed. 227, calls "a matter of business necessity.")

(3) The haul from Eastern terminals to Pacific coast terminals is something like 400 miles longer than the haul from Eastern terminals to Spokane, and the portion of the road embraced within this 400 miles was more difficult and expensive to build, and is more difficult and expensive to maintain and operate, mile for mile, than the road from Spokane eastward to St. Paul.

(4) Regarding this as a proceeding to enforce the order of the interstate commerce commission, referred to in the petition herein, and the findings of fact of the commission as prima facie correct, it appears that, since the order of the commission became operative, ocean competition to North Pacific coast terminals has increased, not only in volume, but in variety of traffic. At the time of the hearing before the commission, such competition was mainly, if not wholly, by clipper ships from Atlantic coast points. There was little, if any, ocean competition by way of the Panama or Pacific Mail Line, which operated steamships from Atlantic coast points to the Isthmus of Panama, across the Isthmus by rail, and steamships to San Francisco. At that time, respondent, with other transcontinental rail lines, was a member of the Transcontinental Association; and, by or through the association, the business by the Panama Line was carried on in such a way as not to be really competitive with the rail lines. The Panama Line was guarantied certain earnings per year for each of its ships. It was used by the transcontinental lines to carry the class of freight sought after by the clippers, and thus to meet clipper competition.

(5) The line of the Great Northern Railway Company, from St. Paul to Seattle and Puget Sound points, was opened for business in January, 1893. About this time, members of the Transcontinental Association withdrew from it, and it ceased to exist. The Panama Line, called in this proceeding the "Columbian Line," and the Sunset Route, became, after the dissolution of the Transcontinental Association, active competitors from Atlantic coast points to San Francisco and Puget Sound points. By the Sunset Route, traffic is transported from Atlantic coast points to New Orleans or Galveston, and by rail

to San Francisco and Portland. To meet water competition, joint tariff, effective February 15, 1893, was adopted. The articles embraced in the commodity list of this tariff covered the class as to which there was active competition by clipper ships, the Columbian Line and Sunset Route, and the rates to Portland and Puget Sound points were justified by reason of such competition. During the life of the Transcontinental Association the rates to Portland and Puget Sound points were kept on substantially the same basis as to San Francisco. After the association was dissolved, the rates by the Columbian Line were lowered, and it commenced to carry a much higher class and greater variety of traffic. The Sunset Route made rates to meet those of the Columbian Line. By such joint tariff of defendant, the rates were higher than the rates by the Columbian Line and Sunset Route to San Francisco, plus the local from San Francisco to North Pacific coast points. In August, 1894, the Columbian Line published and put into effect a tariff of rates according to Western classification, and certain commodity rates from Atlantic coast points to San Francisco and North Pacific coast points. Later it published a class and commodity tariff to San Francisco. These tariffs and that of respondent, except as to the commodity list, came under what is known as the "Western Classification.". The Columbian Line solicited and obtained business under these tariffs, and became an active competitor of respondent, not only as to articles embraced in its commodity tariff, but as to those covered by the Western classification. To meet this competition, actual and potential, respondent adopted and published joint tariff, which became effective February 22, 1896.

(6) The interstate commerce commission did not find as a fact that respondent's commodity rates to the North Pacific coast points, in force when its order became operative, were not justified by ocean competition. Petitioners have not shown that there is not actual and effective water competition covering substantially all the articles embraced in respondent's tariff, effective February 22, 1896, and now in force. There is actual, potential, and controlling water competition, affecting all classes of traffic to North Pacific coast points embraced within the commodity list and classification of respondent's tariff now in force. Since 1893 water competition has increased, not only in volume, but in variety of traffic; and since August, 1894, it has embraced all articles covered by the Western classification and by respondent's tariff now in force. Prior to January 1, 1893, competition was limited to articles embraced in respondent's commodity list.

(7) Under existing rates of the Columbian Line and Sunset Route, and under water competition as it now exists, the effect of any material increase in respondent's class and commodity rates from or through its Eastern terminals to Portland and Puget Sound points would be to practically deprive it of business to those points, except as to perishable freight, certain classes of high-priced goods, and emergency shipments. * * *

(8) Articles sold in the Mississippi Valley and Chicago are largely shipped by rail to North Pacific coast points, because under existing tariffs of respondent, in connection with rail lines from Chicago and Mississippi points, the rates are as low as the rates from such points to Atlantic coast points plus the water rates. Should present rates from Mississippi Valley points and Chicago to North Pacific coast points be materially increased, traffic from such points would be carried by rail to Atlantic coast points, and thence by water to North Pacific coast points. Under existing rates of respondent, taking into account emergency business and the saving of time, traffic to North Pacific coast points from and through Eastern terminals is, to a very great extent, carried by rail. Spokane merchants find it to their advantage to pay the rate to the coast plus the rate from the coast to Spokane, because the combined rate is lower than the class rate to Spokane. Rates to Spokane fixed by the commission as reasonable are: Class 1, $2.90; class 2, $2.46; class 3, $2.05; class 4, $1.64; class 5, $1.44. The combined rate is less, and as stated in respondent's exhibit No. 17, under head of rates from Chicago to Spokane and Tacoma, with locals from Tacoma to Spokane, in effect May 5, 1896. The coast merchants, as a rule, pay car-load rates from the East to the coast, and the less than car-load rates from the coast to interior points of sale and consumption. The Spokane merchant purchases in car-load lots to distribute from Spokane. The coast merchant cannot deliver goods in Spokane as cheaply as the Spokane merchant,

because the local rate from the coast to Spokane in less than car-load lots is much higher than the car-load rate.

(9) Freight in car loads from Eastern terminals to North Pacific coast points is carried principally in cars forming part of trains made up of cars for local points along its line in Minnesota, North Dakota, Montana, and Washington. With its road and equipment, and in view of transpacific business, it is necessary and it is required to haul its cars to Pacific coast points. In view of the manner in which its business is and must be conducted, it is justified in maintaining its existing rates to the coast. Such rates yield an income which would be lost if the rates were materially increased. It is better that it should earn what it can at existing rates than to haul empty cars to the coast or abandon the business.

(10) Should the respondent apply its existing coast rates where they are less than interior rates on business through Eastern terminals to points west of Bismarck, in North Dakota, on the basis of the business of the month of November, 1895, its earnings would be reduced $44,026.03, and for the year $528,312.36. But for water competition, rates to the coast would be higher than they now are, and should be higher than the rate to Spokane.

(11) Existing class rates to Spokane are not unreasonable, nor relatively in excess of rates to any intermediate point. They were made to conform to the order of the commission, and a reduction of class rates to Spokane would enforce a reduction from Eastern terminals to all intermediate points in substantially the same proportion. A reduction of one cent per 100 pounds, through Eastern terminals, to stations on the line between Fargo and Spokane, on the basis of the business for November, 1895, would reduce respondent's earnings $3,375.98, and for twelve months $40,511.76. The business to Spokane is mostly merchandise, and of high class. The average earnings of respondent for the year ending June 30, 1895, were 1.11 cents per ton per mile. The rate per ton to Spokane on the business carried to Spokane was 1.8 cents per ton per mile; the rate to Spokane on high-class merchandise per ton per mile being a little over 7 mills more per ton per mile than the rate on all classes of traffic, of which the lowest is a considerable part. The rate per ton per mile to Spokane is lower than the rate to any intermediate point. The combined rate from Chicago to Spokane, in effect May 5, 1896, is much less than a class rate to Helena, on the line of respondent; Kalispell, on the line of the Great Northern; Winnemucca, on the lines of the Union and Southern Pacific Companies; and The Needles, on the line of the Santa Fé,—the distance from Chicago to those points not varying more than 50 miles from the distance to Spokane. Spokane thus has the benefit of water competition to coast points. A material increase of respondent's rates to coast points would drive it out of the business, largely reduce its earnings, and be of no advantage to Spokane. In that event Spokane would be compelled to pay the existing class rates, or the water rate to Pacific coast points, plus the local rates from such points to Spokane. Respondent's earnings are not in excess of what it is entitled to receive. There is nothing to show that existing rates to Helena, Missoula, Butte, or Kalispell are too high. Whatever disadvantage Spokane is under by reason of competition with coast terminals is the natural result of its geographical location.

And, finally, as conclusions we find:

(1) That competition by carriers subject and not subject to the interstate commerce act exists at the Pacific coast terminals,—Portland, Seattle, and Tacoma,—of controlling force, on all the articles contained in the tariff of the Northern Pacific Railroad.

(2) That no articles are carried to Western terminal points on commodity rates which, if the class rates existing at the time of the order of the interstate commerce commission were imposed, or class rates 18 per cent. higher than the class rates to Spokane were imposed, would still seek rail rather than water transportation.

(3) That the rates from Eastern terminal points to Spokane are reasonable in themselves, and relatively reasonable, on all classes of goods.

And (4) that no violation by the respondent of the order of the interstate commerce commission has been established by the petitioners.

The master has analyzed the pleadings, and shown in his report—First. That the proceeding is founded upon section 16 of the interstate commerce law, and has a specific object, viz. to enforce a decision and order of the interstate commission. Second. In such a proceeding the court has no general power to adjust differences between the litigants, or to correct abuses in the conduct of its business, by a railroad company; and unless a valid order has been made by the interstate commerce commission, and violated by the railroad company, no relief can be granted to the petitioners. Third. The interstate commerce commission is not authorized to fix rates either absolutely or relatively, and, where the commission has assumed to make an order fixing rates for the carriage of merchandise by railroads to a designated point, it is the duty of the court to declare such order to be null and void. Fourth. The order of the interstate commerce commission in the case of the Merchants' Union of Spokane Falls against the Northern Pacific Railroad Company and the Union Pacific Railway Company is in part a mere general declaration of the duty of the defendant corporations, as defined by the law itself, and in part prescribes the maximum rates which may be charged by the railroads for the carriage to Spokane of freight not affected at coast and terminal points by competition of ocean carriers. Fifth. Said order is null and void, and, as there is no valid or definite order of the interstate commerce commission which can be enforced by a decree of this court, the proceedings should be dismissed. The master, however, considered that the court had, in effect, ruled that the petitioners were entitled to have a full investigation and a decision upon the merits of the controversy, and, as counsel for the petitioners insisted upon going to the merits in this proceeding, he received the evidence, and has made a full report, which presents the facts and his conclusions on all the points at issue.

Although the order of the court referring the case to the master, and the rulings preceding it, may have, in effect, overruled the objections to a hearing upon the merits, still the questions brought to view by the master's report were not argued or considered, nor has the court taken any action which can preclude it from putting an end to this case whenever it shall be ascertained that there is no power in the court to grant the petitioners redress for any supposed wrong set forth in their petition. I regret exceedingly to find, after litigation has been carried on at large expense to the parties, that it must come to nothing, by reason of limitations of jurisdiction in the court. I must, however, concur with the master in the conclusions above given, for the reasons which he has assigned, and for the further reason that, since his report was filed, the supreme court of the United States, in the case of Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479–511, 17 Sup. Ct. 896, 905, has considered this subject with great deliberation, and given an exhaustive and comprehensive decision, leaving no way open to avoid the conclusion aforesaid. In the opinion of the court in that case, Mr. Justice Brewer says:

Our conclusion, then, is that congress has not conferred upon the commission the legislative power of prescribing rates either maximum or minimum or absolute. As it did not give the express power to the commission, it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum, or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just.

The first part of the order which authorizes the railway companies to make commodity rates on competitive traffic to terminal points less than their rates on like traffic to Spokane, but that such commodity rates must not be lower than necessary to meet competition, nor be applied to articles not actually subject thereto, is a mere statement of what the law authorizes and prescribes, and is, of course, too indefinite to be the basis of a decree to enforce obedience. In so far as the order is definite and specific, it is invalid, because the commission was not authorized to prescribe rates.

I am unable to find ground for assuming jurisdiction to determine the important questions at issue in the fact that, when the proceeding was commenced, the Northern Pacific Railroad was in the custody of receivers appointed by this court. If I should disregard the prayer of the petitioners to have the decision of the interstate commerce commission enforced, and treat the petition merely as an appeal to the court to regulate the conduct of the receivers so far as to require them to deal with the merchants and business men of Spokane on just and equitable terms, my decision, whether favorable to the petitioners or otherwise, would not settle the controversy between the people of Spokane and the railroads. It is a rule for the future which these petitioners are chiefly interested in having established; and, the railroad having been transferred to a new company, a decision now as to the obligations and duties of the receivers in the past would be profitless to them, even if given in their favor. It is my opinion, however, that, in every view of the case, it must be regarded as having been improperly commenced, and that a decree of dismissal is the only decree which the court can render. The receivers were required to respond to a specific accusation made against them by the petitioners, which is that, in the operation of the railroad, they disregarded and violated the decision of the interstate commerce commission. The court is called upon to adjudge whether or not the receivers are guilty as charged, and I hold that in the determination of that question the same rules and principles must be applied which would be applied if the railroad were being operated and managed by the officers and agents of the corporation. The receivers have the same right to question the validity of an order made by the interstate commerce commission that the corporation would have, and an order which is so inherently defective that it cannot be enforced against the corporation which was originally required to obey it cannot be enforced against receivers having temporary custody and control, in place of the corporation's officers and agents. A decree will be entered dismissing the case.

COX v. BECK et al.

(Circuit Court, D. Oregon. September 4, 1897.)

1. CHATTEL MORTGAGE—KNOWLEDGE OF PRIOR DEFECTIVE MORTGAGES—ESTOPPEL.
One who takes a chattel mortgage on a flock of sheep with knowledge of prior mortgages on a portion of them, will be estopped from asserting the invalidity of such mortgages by reason of such uncertainty in the description that the particular sheep mortgaged cannot be identified thereby.

2. NEW MORTGAGE IN LIEU OF OLD—INTERVENING INCUMBRANCES.
Where the notes secured by two chattel mortgages were canceled, and a new mortgage taken on the same and additional property, to secure a new note given for the notes canceled and an unsecured debt, *held*, that there was not such a renewal of the former mortgages as would preserve the liens thereof against intervening incumbrances.

3. DEPOSIT OF PROCEEDS OF MORTGAGED PROPERTY—DUTY AND LIABILITY OF BANK.
A bank in which the owner of personal property has deposited the proceeds of the sale thereof is under no obligation to apply the money to the discharge of known liens held by others on such property, but may pay it out, in due course of business, on the checks of the owner.

4. MORTGAGE OF SHEEP AND INCREASE — PURCHASE OF INCREASE FROM MORTGAGOR.
Where sheep and their increase are mortgaged, the young lambs and fleece at the time the mortgagee takes possession for foreclosure are necessarily included in the mortgage, but the purchasers of such as have been previously separated and sold by the mortgagor in possession take without reference to the mortgage.

5. MORTGAGE ON SHEEP AND THEIR WOOL—EXPENSE OF MARKETING WOOL.
A mortgage lien on sheep and their wool is subject to the necessary expense of shearing, storing, and marketing the wool.

6. ILLEGAL INTEREST PAID TO NATIONAL BANK — REMEDY TO RECOVER PENALTY.
Where more than the legal rate of interest has been paid to a national bank, the remedy is a penal suit to recover twice the amount paid, and such payment is not available as a defense in an equitable proceeding to collect the debt on which it was paid.

This was a suit in equity by Richard T. Cox, as receiver of the First National Bank of Arlington, against George H. Beck and Joseph T. Beck, partners as Beck Bros., and the National Bank of Heppner, Or.

Wirt Minor, for complainant.
John J. Balleray and J. H. Raley, for defendants.

BELLINGER, District Judge. On the 24th day of July, 1894, the First National Bank of Arlington became insolvent, and was so adjudged by the comptroller of the treasury; and on the 2d day of August following the complainant was, by the order of the comptroller, appointed receiver of such bank. On November 20, 1894, the defendants Beck Bros. executed a chattel mortgage to the complainant, to secure certain promissory notes theretofore made by them to the Arlington Bank, upon 7,450 head of stock sheep, being all the sheep owned by them, "together with the increase therefrom to be born during the season of 1895." The amount secured by this mortgage is $8,903.17. Prior to this, and on August 11, 1894, Beck Bros. executed a chattel mortgage in favor of Frank McFarland, to secure three

several notes of that date for an aggregate amount of $2,513.55. The property mortgaged is described as follows:

"Our band of sheep branded B, consisting of about 2,300 head, there being about 1,800 from one to five years old, and 500 lambs; all the wool on the above-described sheep; all increase of the above-described sheep."

On the same day—August 11, 1894—Beck Bros. executed a chattel mortgage in favor of the defendant the National Bank of Heppner, to secure two promissory notes of that date for the aggregate amount of $1,000. The property mortgaged is described as follows:

"All of our lambs of a certain band of sheep branded B̄ consisting of about eleven hundred (1,100) head; all wool of above-described lambs, and all increase of above lambs; two hundred and fifty (250) head graded bucks running on our ranges; all wool of above-described bucks."

On November 14, 1894, Beck Bros., to secure their note for $1,500, executed to the National Bank of Heppner their chattel mortgage on 2,000 sheep, described as follows, to wit:

"2,000 stock sheep, consisting of ewes & lambs and wethers, branded, portion of them, B, and portion branded B̄. Ear marks: Ewes, smooth crop off left ear & 2 slits in right ear; wethers, smooth crop off of right ear & 2 slits in left ear,—together with wool & increase during continuance of Mtg."

On June 27, 1895, Beck Bros. executed a chattel mortgage to the Heppner National Bank for $3,570.53. This mortgage was intended as a substitute for the last two above mortgages,—that of August 11th for $1,000, and that of November 14th for $1,500,—and was to secure the further sum of $850 and interest due from Beck Bros., for which the bank had no security. The property covered by this mortgage is described as follows:

"Three bands of sheep, consisting of about 6,000 head, all ages and sexes, together with the wool & increase. Ear marks: Ewes, smooth crop off of left and two splits in right ear; wethers marked smooth crop off right ear & two splits in left ear; branded on back each sheep with one of following brands: B, B̲, B̄, J, X. Also all our hay in stacks and barns or growing on our lands in Grant Co., Ogn., consisting of about 500 tons."

On March 30, 1895, Beck Bros. entered into a contract in the nature of a chattel mortgage with H. C. Judd & Root, in the name of the Morrow County Land & Trust Company, for advances of money for clipping, packing, handling, transporting, storing, and selling on commission the wool clip of 1895. The advances provided for were $1,875 down and a further sum within four months from date, not exceeding $500. The property mortgaged by this instrument consisted of "all the fleece grown and now growing on 7,500 sheep marked B̄. On October 17, 1895, a mortgage contract substantially like the above was made by Beck Bros. directly with H. C. Judd & Root for advances already made to the amount of $2,500, and for a future advance, within seven months, of an additional $1,000, for expenses for the wool clip of 1896. For these advances a lien is provided for upon "all the fleece grown and now growing on ten thousand sheep, consisting of all the sheep" then owned by the mortgagors. On March 7, 1896, Beck Bros. executed a chattel mortgage to the Heppner Bank for $1,000 on "all" of their sheep, consisting of about 10,000 head, etc. About July 1, 1895, Beck Bros.' wool clip was sold by the cashier of the Heppner Bank, under instructions from Beck Bros., for $4,768.26. The money

was paid to the cashier, and was by him deposited in the bank to the credit of Beck Bros., by whom it was paid out on checks as follows: To the Morrow County Land & Trust Company, $500.25; to H. C. Judd & Root, $2,195; to National Bank of Heppner, $1,164.52; to sundry parties, $908.49,—$4,768.26. There is in the hands of the receiver, being proceeds of sale of old sheep, the sum of $8,135, and the further sum, derived from the wool and increase of 1896, of $6,602.65.

The question is, how ought these several funds to be distributed between the parties? The complainant contends that the mortgage to McFarland and the three mortgages to the National Bank of Heppner are void for uncertainty in the description of the property mortgaged. But Mr. Cox, the complainant, admits that he was informed by one of the Beck Bros., at the time he took his mortgage, in November, 1894, that Beck Bros. had previously given mortgages as follows: To McFarland, on 2,300 head of sheep, as he believes, for $2,500; to the National Bank of Heppner, on 1,200 head, for $1,000; and to the same bank, on 2,000 head, for $1,500. He knew that these sheep were included in the number upon which his mortgage was taken. Having taken his mortgage with that knowledge, he is precluded in equity from objecting that the particular sheep cannot be identified. As to him, there is no necessity for such identification. His mortgage upon the whole necessarily included the portions of these chattels covered by the prior mortgages, and this is the only question of identity with which the complainant is concerned.

It is contended by complainant that the two mortgages to the Heppner Bank—that of August 11, 1894, for $1,000, and that of November 14, 1894, for $1,500—were discharged by the agreement of the parties of June 27, 1895, and by the execution of the new mortgage of that date. The new mortgage was intended as a substitute for the two existing mortgages, and to secure the additional sum of $850, for which there was no security. The two prior mortgages secure three notes; one for $328.46, one for $671.54, and one for $1,500. Upon the execution of the new mortgage, these three notes were marked "Paid" by the cashier of the bank, and given to Beck Bros. The mortgages were not formally canceled. Subsequently, these notes were returned to the Heppner Bank, and the bank now contends that, if the substituted mortgage of June 27, 1895, does not preserve the lien of the original mortgages, it is entitled to treat the original mortgages as subsisting liens on the chattels mortgaged therein. But a party cannot play fast and loose in this way. The cancellation and surrender of the three notes secured by the two prior mortgages, as between the parties, discharged such mortgages. The cancellation of a debt necessarily cancels the liens by which the debt is secured. If the new mortgage had been upon the same chattels described in the prior mortgages, I should be inclined to give to it the effect of continuing the liens of the canceled mortgages. But the property covered by these two mortgages cannot be identified as the same described in the third mortgage. While it is probable that some of the sheep and wool described in the two original mortgages are included in the substituted mortgage, yet there is no means of knowing how much of such property is covered by the last mortgage. The property

covered by the mortgage of August 11th is described as "our band of sheep branded B, consisting of about 2,300 head, and wool and increase; 1,800 being sheep from one to five years old, and 500 lambs." The mortgage of November 14th is upon 2,000 stock sheep, consisting of ewes, lambs, and wethers, branded, portion of them, B, and portion B̄; together with wool and increase. The substituted mortgage is upon "three bands of sheep, consisting of about 6,000 head, of all ages and sexes, together with the wool and increase." In this and the preceding mortgage there is the same particular description of the earmarks of the sheep mortgaged. But, while the brand of the sheep in the mortgage of August 11th is B, and that of the sheep in the mortgage of November 14th is B and B̄, the brands of the sheep in the last mortgage are B, B̲, B̄, J, and X. So that, while the number of sheep in the last mortgage is much larger than that in both of the original mortgages, it includes five brands, while the former only include two brands. If we assume that all the sheep in the last mortgage branded B and B̄ are included in the two original mortgages, still the number of these sheep cannot be known nor guessed. Nor can it be known whether the sheep described in the mortgage of August 11th are included in those described in the mortgage of November 14th. If they are so included, and if all these are included in the substituted mortgage, the latter still covers nearly three times the number of sheep covered by the original mortgages. The proceeds of the sale of this large number of sheep cannot be applied upon a mortgage subsequent to complainant's, upon any theory of a lien under prior mortgages upon a little more than one-third such property.

It is claimed for the new mortgage that it was merely intended to renew the existing mortgages. But there was no necessity for such renewal. As to complainant, who was charged with notice, and as to all others, the new mortgage could only operate to create a lien, not to continue one. Notwithstanding the statements in the testimony of Bishop, cashier of the Heppner Bank, to the effect that he merely intended to renew the prior mortgages in taking the mortgage of June 27, 1895, I have no doubt that the new mortgage was intended to add to the security of the prior mortgages, as well as to secure a new debt. The acts of the parties at the time are more convincing than their testimony, after the event, as to their intentions in what was done. If it was practicable to identify, in the proceeds to be distributed, the property embraced in the two prior mortgages to the Heppner Bank, yet the conduct of its representative, in canceling the debt secured by these mortgages, in order that a new mortgage, including a large addition of property, and securing a new or unsecured debt, could be taken, should deprive the bank of the benefit of the liens by which the canceled notes were secured. The bank must abide by the election it has made to merge the old debt in a new one, with a new and larger security. The rule by which a party who cancels a mortgage, and takes in lieu thereof a new mortgage upon the same property, to secure the same debt, may have the lien of the first mortgage restored as against intervening incumbrancers, does not apply in a case where the old debt has been canceled, and merged, with other debts, into a new debt, secured by

a mortgage upon property of which at most only a part was included in the old mortgage.

The wool clip of the Beck sheep of 1895 was sold by Bishop, cashier of the Heppner Bank, for $4,768.26, and the money was deposited by the cashier in the bank to the credit of Beck Bros. This money was afterwards disbursed by Beck Bros. as follows: Paid to Morrow County Land & Trust Company, $500.25; paid to H. C. Judd & Root, $2,195; paid to Heppner National Bank, $1,164.52; paid to sundry persons on Beck Bros.' checks, $908.49,—total, $4,768.26. Complainant contends that this money in Bishop's hands was subject to the disposal of the bank, and should have been applied upon the debts of the bank against Beck Bros., and upon the debt of McFarland, of which the bank had notice. So far as the two mortgages held by the bank are concerned, this question is rendered immaterial upon the conclusion already reached, by which these mortgages are postponed to that of complainant. As to the McFarland mortgage, the duty did not devolve upon the bank to apply the proceeds of the wool clip in question in discharge of it. The bank did not own this mortgage at the time, and could not assume to pay it, nor otherwise look out for the rights of those having an interest in the fund. It might have applied this money upon a debt of its own due at the time, but it was not warranted in interfering, on its own motion, between Beck Bros. and their creditors, in matters in which it was not concerned. And so of the payment to Judd & Root, and of other payments made on the checks of Beck Bros. The receipt of this money by the Heppner Bank, and its payment upon the orders and checks of Beck Bros., was in the due course of business. So far as these payments are concerned, the Heppner Bank, having, in the view I have taken, no lien prior to complainant, was under no obligation to apply the money deposited in discharge of liens on the property sold. The obligation of a creditor having a first lien upon a fund towards other creditors interested in such fund does not exist in a case like this. The Bank of Heppner was not called upon to apply the money on deposit to the payment of complainant's mortgage, nor, as we have seen, to the mortgage of McFarland. Furthermore, the Judd & Root debt was secured by a specific lien upon the wool clip of 1895, and this clip was not within complainant's mortgage. Beck Bros. retained the title and right of possession of the mortgaged sheep. The increase of such property at the time the mortgagee takes possession for the purpose of foreclosure is necessarily covered by the mortgage, but this rule is limited to cases where it is impracticable or unnatural to separate the increase from the original stock. Lambs, as such, go with the ewes; but when they are grown they are not within the mortgage of the flock, unless they are made so by the express terms of the instrument. More especially is this so where they have been separated and sold. So, of the fleece, the mortgagee cannot be expected to shear the mortgaged sheep for another's benefit; but when the fleece is shorn, and sold by the mortgagor in possession, the purchaser takes without reference to the mortgage. The complainant, therefore, has no claim upon the proceeds of the wool clip of 1895. A part of the Judd & Root debt was for money paid

upon the McFarland mortgage, and a part of it was for money used in defraying the expense of shearing the sheep and in storing and marketing the wool clip. The payment to the Morrow County Land & Trust Company was for hauling the wool. Any lien upon the wool was subject to these necessary charges.

As to the wool and increase of 1896, the complainant's lien is prior to all others excepting that of the McFarland mortgage. Complainant had begun his suit of foreclosure, and the sheep were in the possession of the receiver, when the lambs for that year were born and the sheep were shorn. The rights of the mortgagee are determined, as to this question, with reference to the time when the mortgaged chattels are taken under foreclosure proceedings. If at that time the lambs are not born, or, being so, it is necessary for their nurture to permit them to follow the ewes, they must be considered, like the unshorn fleece, as included in the mortgage, since a separation is not practicable.

The defendants contend that complainant has received upon his mortgage a higher rate of interest than that allowed by law, and that, under section 5198 of the Revised Statutes of the United States, the complainant has forfeited all right to interest on his debt. The statute in question provides as follows:

"And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged to be a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon; and in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid, from the association taking or receiving the same: provided, that such action is commenced within two years from the time the usurious transaction occurred."

This statute was construed, in Barnet v. Bank, 98 U. S. 555, to define two categories, with their consequences, as follows: (1) Where illegal interest has been knowingly stipulated for, but not paid, there only the sum lent without interest can be recovered. (2) Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt or suit in the nature of such action, brought by the persons paying the same, or their legal representatives. In this case it was held that the remedy given by the statute is a penal suit, and that the party aggrieved, or his legal representatives, must resort to that remedy; that he can have no redress in any other form of procedure. Under such a rule, the fact, if it is a fact, that the complainant received a higher rate of interest than that provided for by law, can only be available in the manner indicated. The penal character of the statute requires that the fact be clearly made out in a proceeding instituted for that purpose, where the party accused of violation of the statute can have a trial of that question by jury. In this proceeding such a defense is not available, and, if the law was otherwise, still the testimony in this case is inconclusive and unsatisfactory. It is attempted to be shown, as a matter of inference from certain checks or memorandums signed by Beck Bros., that unlawful interest was paid. Neither Beck Bros. themselves nor their legal representatives make

complaint, and Beck Bros. are not witnesses to any fact tending to establish such a charge.

It follows that the fund to be distributed should be applied, after payment of costs and expenses of suit, as follows: (1) To pay the McFarland mortgage of August 11, 1894; (2) to pay complainant's mortgage; (3) to pay mortgage of Bank of Heppner of June 27, 1895.

KIRWAN et al. v. MURPHY et al.

(Circuit Court of Appeals, Eighth Circuit. September 27, 1897.)

No. 936.

1. SURVEY OF PUBLIC LANDS—MEANDER LINE OF LAKE—BOUNDARY LINE OF ABUTTING LANDS.
   Where a government survey lays down a meander line next to a lake, and the plat returned to the general land office, and referred to in the patents for identification of the lands granted, exhibits the granted tracts as bordering upon the lake, the waters of such lake, and not the meander line, is the fixed boundary of the lands conveyed.
2. RIPARIAN OWNERSHIP—NONNAVIGABLE LAKES—MINNESOTA LAW.
   The law of Minnesota in regard to the rights of riparian owners is the common law, and the rule applied by the common law to nonnavigable streams is applicable as well to nonnavigable lakes.
3. EQUITY JURISDICTION—REMEDY AT LAW—RESURVEY OF PATENTED LANDS—ENJOINING GOVERNMENT OFFICIALS.
   Where a bill seeks to enjoin a resurvey, by government officials, of patented lands bordering on a lake, and it appears that it will result in the necessary destruction of much valuable timber, cast a cloud upon the title to lands for which the government has already issued its patents, and involve the owner in a multiplicity of suits to defend and maintain his title, his remedy at law is inadequate, and equity will interfere to prevent the threatened trespass.
4. PATENTED LANDS—CONTROL AND REMEDY OF GOVERNMENT.
   When the government has parted with its title to public lands by issuing its patent therefor, it has no right or authority to further control over them. If fraud, wrong, or error has been committed, the government, like any other grantor, must resort to the court for redress.

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

This was a bill in equity by Simon J. Murphy, George O. Robinson, Elisha H. Flinn, and Temple E. Dorr to enjoin P. H. Kirwan, as United States surveyor general for the district of Minnesota, and Thomas H. Croswell, from making a resurvey of certain lands. The circuit court made an order for a temporary injunction, and the defendants have appealed therefrom.

John R. Van Derlip (Edward C. Stringer was with him on the brief) for appellants.

M. H. Stanford, for appellees.

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

RINER, District Judge. This was a bill in equity filed by Simon J. Murphy and others, the appellees, for an injunction restraining and

enjoining P. H. Kirwan and Thomas H. Croswell, the appellants, from making a survey of certain lands surrounding Cedar Island Lake, in township 57 N., of range 17 W. of the fourth Principal Meridian, in St. Louis county, Minnesota, the survey of the lands having been ordered by the land department of the United States. The defendant Kirwan is the United States surveyor general for Minnesota, and the defendant Croswell is a deputy surveyor, with whom a contract has been made by order of the commissioner of the general land office to make the survey. At the time the bill was filed, the circuit court directed that an order to show cause be served upon the defendants, and issued a temporary restraining order, restraining the defendants from entering into or perfecting a contract for the survey until the further order of the court. Subsequently, a motion to discharge the order to show cause was made by the defendants and was overruled. Thereupon the defendants filed their joint and several answer, supported by affidavit, and the cause came on for hearing upon the order to show cause why a temporary injunction should not issue. The court directed a temporary injunction to issue, and it is from this order that the appellants appealed.

The record discloses substantially the following facts: The township was surveyed by the United States government in 1876, and the plat made pursuant to the survey was approved by the government as the official plat of the township on June 11, 1879. All of the lands in the township were, according to the government plat, disposed of and patented by the government to divers persons between December, 1879, and March, 1884, the following lands being owned by the appellees:

"Commencing at the southwest corner of lot four (4) of the northwest quarter (N. W. ¼) of section one (1), and running thence north, on the section line between said section one (1) and two (2), and to the northwest corner of said section one (1); thence west, on the north line of said township, to a point where said town line first meets the shore of Cedar Lake; thence turning south, and following the shore of said lake, to a point where the south line of said lot four (4) in said section one (1), extending westerly into said section two (2), first meets the water of said lake; thence easterly, on said last-mentioned line, to the place of beginning,—the same being lots one (1), two (2), and three (3) of said section two (2), according to the government plat thereof; also commencing on the west shore of said lake at a point in said section three (3) where the west shore of said lake crosses said north town line; thence following said town line to the northeast corner of lot two (2) of section four (4); thence running southerly, on the east line of said lot two (2) in said section four (4), to the southeast corner thereof; thence westerly, along the south boundary line of said lot two (2), to the southwest corner thereof; thence southerly, and to the center of said section four (4); thence southeasterly, on a straight line from the center of said section, to the southeast corner thereof, until it intersects the westerly shore of said lake on said section four (4); thence in a northerly direction, along the shore of said lake, to the place of beginning,—the same being lots one (1) and two (2) of section three (3), lot one (1) of section four (4), and a portion of lots six (6), seven (7), and the whole of lot eight (8) in said section four (4); also commencing at a point in the section line between sections four (4) and nine (9), at a point where the westerly shore of said lake crosses said line; thence westerly, on said section line, and to the northwest corner of said section nine (9); thence south, on the west line of said section nine (9), to the southwest corner of the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of said section nine (9); thence following the south line of said last-described line, and the extension thereof,

until it intersects the center line running north and south through section ten (10); thence north to the center of said section ten (10); thence easterly, on the center line of said section ten (10), to the northwest corner of the southwest quarter of section eleven (11); thence south, on the west line of section eleven (11), to the southwest corner of the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of said section eleven (11); thence east to the southeast corner of the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of said section eleven (11); thence north until it intersects the southerly meander line of said lake; thence turning at right angles to said meander line, and run to the shores of said lake; thence westerly, and following the shores of said lake, to the place of beginning."

The government plat is erroneous in many instances, errors being general throughout the entire township. In the northern portion of the township, Cedar Island Lake is much smaller than shown on the official plat, thus making the fractional lots owned by the appellees, lying about and bordering on the lake, much larger than they appear on the plat. The order for a resurvey covers but a small portion of the township, being only for the fractional lots bordering on Cedar Island Lake in sections 2, 3, 4, 9, 10, and 11. It is not insisted that the appellees or any of their grantors had knowledge of any fraud in connection with the original survey from which the government plat was made. The lands in controversy in this case are described in the patents as fractional lots according to the official plat of the survey. In 1893, certain parties having settled on portions of these fractional lots, application was made by them to the commissioner of the general land office for a survey thereof, and denied. An appeal was taken from the decision of the commissioner of the general land office to the secretary of the interior, and upon a hearing an order was made by the secretary of the interior directing a survey of the portions of the fractional lots lying between the actual waters of Cedar Island Lake and the meander line as shown on the plat. The greater portion of the land is covered by valuable pine timber, and it is insisted by the appellees that a new survey would necessitate cutting a clear transit line through the heavy timber; that the timber would thereby be destroyed; that they would suffer great and irreparable injury, and that a cloud would be cast upon their title.

The government survey made in 1876, upon which the patents were issued, laid down a meander line next to the lake, and the plat of the survey returned to the general land office, and referred to in the patents for identification of the lands granted, exhibited the granted tracts as actually bordering upon the lake. The patents do not contain all of the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey returned to the general land office by the surveyor general, thereby adopting the plat as a part of the instrument. Meander lines are run along or near the margin of nonnavigable streams and inland lakes for the purpose of ascertaining the exact quantity of the upland to be charged for when the land is sold by the government, and not for the purpose of limiting the title of the grantee to such meander lines. The meander lines are intended for the purpose of bounding and abutting lands granted upon the waters whose margins are thus meandered, and the waters themselves, not the meander line, constitute

the real boundary. "Meander lines," said Mr. Justice Clifford in the case of Railroad Co. v. Schurmeir, 7 Wall. 272, 286, "are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows to a demonstration that the water course, and not the meander line as actually run on the land, is the boundary."

We think it is well settled that, in all of the states where the common-law rule is in force, the title of the purchaser from the general government of lands bordering on nonnavigable waters within the state extends to the waters meandered, although the meander line of the survey be found to be not coincident with the shore, and, in a case where the surveyed meander line fails to conform to the shore of the waters meandered, that the fixed boundary or monument is to prevail, and the surveyed line must be disregarded. And, while the price of the land sold by the government is computed upon the assumption that the meander line and the boundary line (that is to say, the shore) are identical, that does not affect the extent of the grant made by the patent, as the stream or other body of water, and not the meander line, must be held to be the fixed boundary of the land conveyed. The rule at common law was that a grant of land bounded by a stream of water, if the stream was a navigable stream, passed the title to the land to high-water mark. If the stream was not navigable, the rights of the riparian owner extended to the center thread of the current. The question whether the common-law rule is in force in the state of Minnesota, and, if so, whether it applies to inland lakes not navigable as well as to nonnavigable streams, is a question to be determined by the local law of the state. Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838.

In the case of Lamprey v. State, 52 Minn. 181, 53 N. W. 1139, it is held that the same rules govern the rights of riparian owners on lakes or other still waters as govern the rights of riparian owners on streams. Mr. Justice Mitchell, in the course of the opinion in that case (at page 197, 52 Minn., and page 1142, 53 N. W.), said:

"The incalculable mischiefs that would follow if the riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts. These considerations certainly apply to riparian ownership on lakes as well as on streams. * * * The owners of lands bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The endless litigation over the location of the original water lines, and the grievous practical injustice to the owner of the original riparian estate, that would follow, would of themselves be a

sufficient reason for refusing to adopt any such doctrine. That the state would never derive any considerable pecuniary benefit—certainly none that would at all compensate for the attendant evils—we may, in the light of experience, safely assume. Our conclusion, therefore, is that upon both principle and authority, as well as considerations of public policy, the common law is that the same rules as to riparian rights which apply to streams apply also to lakes or other bodies of still water."

See, also, Schurmeier v. Railway Co., 10 Minn. 82 (Gil. 59); Everson v. City of Waseca, 44 Minn. 247, 46 N. W. 405; Lamprey v. Mead, 54 Minn. 290, 55 N. W. 1132.

It is contended by the appellants in this case that the land between the meander line as shown on the plat and the actual waters of the lake is not accretion or reliction, and, therefore, that the authorities above cited have no application, and that the title to the land did not pass by patent; that it is not a question of riparian rights, since the lake was the same at the time of the survey as it is now. We think this can make no difference, as the plat of survey returned to the general and local land offices, and referred to in the patent for identification of the land, exhibited the granted tracts as actually bordering upon the lake. These cases, we think, clearly show that the law of Minnesota in regard to the rights of a riparian owner is the common law, and that the rule applied at common law to nonnavigable streams is applicable as well to inland nonnavigable lakes. The fundamental right of riparian ownership consists in the right of access to the water, and it is in order to make this right available and complete that the doctrine is applied to cases of accretion and reliction; but the same principle underlying those cases, namely, the right of access to the water, is equally applicable to the case at bar.

It is insisted, however, that, "if the appellants be allowed to carry out their instructions for a survey, the most that can be complained of is that a mere technical trespass will be committed, provided the appellees establish their ownership of the locus by appropriate proceedings at law," and that equity will not therefore entertain this application, since the appellees, if they show themselves to be the owners of the premises, and if they suffer any damage, can have adequate relief at law. It is undoubtedly the well-settled rule that where the estate or interest of a party is legal in its nature, and full and complete justice can be done thereby, he will be left to his legal remedy; but the remedy at law must be adequate, and afford full and complete protection, and the relief afforded must be virtually as efficient as that given by a court of equity. If the remedy at law is inadequate for this purpose, then equity will interfere.

The bill in this case alleges, and it is supported by affidavit, that, if the appellants are allowed to proceed with this survey, it will necessarily result in the destruction of much valuable timber, and that it will be a cloud upon plaintiffs' title, and involve them in a multiplicity of suits to establish their right to the land in controversy. While an injunction will not ordinarily be granted to restrain a mere trespass, yet where it is made to appear from the record that the trespass complained of may result in great damage to the estate, or where the mischief is remediless at law, a court of equity will interfere by injunction to prevent an injury for which an action at law will not give

complete redress. The very purpose of the proposed survey by the officers of the government in this case is to establish the right of the government to the land, as public land, the title to which we think, upon the facts stated in the bill, it has already parted with by issuing its patents therefor; and the fact that there is a controversy in relation to it would necessarily, from a business point of view, as every intelligent person knows, be a serious injury to the plaintiffs' title, and tend to greatly depreciate its market value. No one would want to buy property while thus affected, nor loan money upon it as security. It further appears by the bill that a number of people have settled upon portions of the land described in the bill, and it is evident that if this survey is permitted, and the land again thrown open to settlement, as it may be, the plaintiffs, in order to maintain their title, would be involved in a multiplicity of suits to defend it against the claims of parties who had settled thereon.

Again, it is insisted that the defendant Kirwan is the United States surveyor general for the district of Minnesota, and that the defendant Croswell is the deputy surveyor, with whom the contract has been made for the work sought to be enjoined, pursuant to the practice and direction of the general land office. Both stand for and represent the department of the interior. They are subordinate officers of that department, subject to its control; and therefore the power of the court, so far as they are concerned, extends only to acts such as are purely ministerial, and with regard to which nothing like judgment or discretion in the performance of their duties is left to them as officers. It is undoubtedly true that the officers of the several departments of the government cannot be controlled by injunction while acting in a judicial capacity in which their judgments are based upon a consideration of facts, but in this case the action of the land department involved a construction of law which is not subject to the same rule, and such officers may be enjoined from the performance of an unlawful act. Noble v. Railroad Co., 147 U. S. 165, 13 Sup. Ct. 271.

In La Chapelle v. Bubb, 69 Fed. 482, the court said:

"Under ordinary circumstances, this court would not grant an injunction to prevent a trespass; but the defendant Bubb justifies his proposed action on the ground that he is an officer of the United States government, acting only in obedience to orders from his superior officers in the Indian department, and for that reason I deem it entirely proper for this court to restrain him from committing a tort while assuming to act in his official capacity."

We have already said that the government parted with its title to the lands in controversy when it issued its patents therefor; and in Moore v. Robbins, 96 U. S. 530, Mr. Justice Miller, speaking for the court, said:

"With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to use for the cancellation of the deed or reconveyance of the land as to individuals, and, if the government is the party injured, this is the proper course."

And again, in the same case, referring to the power of the secretary of the interior after patent has been issued, at page 534, it is said:

"He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, would be always subject to the fluctuating, and, in many cases, unreliable, action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title."

In view of these considerations, we are not satisfied that an error was committed in awarding a temporary injunction. It cannot be said, we think, that the injunction was improvidently issued, and the order appealed from is therefore affirmed.

ADAMS et al. v. HECKSCHER.

(Circuit Court, W. D. Missouri, C. D. November 3, 1897.)

1. PROCESS—SERVICE BY PUBLICATION—ACTION IN PERSONAM.
   The statute of Missouri (Rev. St. § 2022) providing for bringing parties into court on orders of publication "in * * * all actions at law, or in equity, which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court," does not apply to a suit by a vendee to enforce the performance of a contract of purchase and sale of real property, if, instead of demanding, and offering to accept, such title as the defendant may have, he demands as conditions precedent to a decree passing the title, that defendant be required to furnish him, as agreed, with an abstract showing a perfect title, and to pay him money damages resulting from the delay in performing the contract.
2. SAME—FORM OF ORDER.
   Even if the statute applied at all to an action thus restricted, its requirement that the order shall state briefly the "object and general nature" of the petition would not be satisfied by stating that it is "to obtain judgment for specific performance of a contract to convey" specified lands.

Thomas M. Jones, for plaintiffs.
Noble, Shields & Harrison, for defendant.

PHILIPS, District Judge. This suit has been removed from the state circuit court of Phelps county, Mo., to this court, on the petition of the defendant, who is a nonresident of the state. The defendant appeared for the purposes only of such removal, and of the motion hereinafter mentioned. The motion is to dismiss the petition for the reasons that the court has no jurisdiction of the person of the defendant, nor has it jurisdiction of the res, within the contemplation of section 2022 of the Revised Statutes of Missouri, and because no service, as required by law, was made upon the defendant to give the court jurisdiction. This case was removed to this court once before on the petition of the defendant, and the motion to dismiss was therein sustained for the reasons assigned in the opinion of the court filed therein. 80 Fed. 742. The principal difference between that case and this consists in the manner of service by substituted process. In the former case, service was attempted to be made upon the nonresident defendant by delivering to him a copy of the petition and writ by an

officer of the state of the defendant's residence. As the statute in that respect was not observed, the service was held to be bad. The court, in considering the question as to whether proper service could be had after the removal of the case from the state court by following the provisions of the federal statute respecting the mode of service against nonresident defendants, discussed the character and nature of that suit, and reached the conclusion that the proceeding was not one in rem, but was, in its essence, an effort to obtain a decree or judgment in personam against the defendant, and therefore service on the defendant, as a nonresident party, by substitution, would not obtain. The present suit in fact seems to have been instituted again in the same state court before the motion to dismiss in the former case was sustained. And the petition in the present case is in all essential particulars the same as in the former suit. An analysis of the petition, and a consideration of its entire allegations, enforce the conclusion that it is, in legal effect, nothing more than a proceeding in personam. Section 2022 of the Revised Statutes of Missouri provides for bringing parties into court on orders of publication:

"In suits in partition, divorce, attachment, in suits for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens, and all other liens against either real or personal property, and in all actions at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court."

A suit for specific performance of a contract for the conveyance of real estate, where the decree of court may operate in rem, and transfer the title of the property from the defendant to the complainant, under sections 2225–2227, Rev. St. Mo., could be prosecuted upon service by publication. But, to give the court jurisdiction so to proceed, the "immediate object" of the suit must be the enforcement of the right to the real estate. It must be for that, and that alone. Is such the object and purport of this suit? The petition, after setting out the written contract between the parties, specifying the stipulations of the parties respecting the sale and purchase of certain real estate, which provided that the defendant should furnish to the complainants an abstract of title showing such title in the complainants, and for making a good and sufficient deed, with special warranty of title, alleges, as the gravamen of the complaint, that the "defendant has failed and refused to furnish the abstract showing perfect title to said body of land in defendant; that said defendant has failed and refused to perfect the title to the tracts of land included in said body of land hereinbefore described, the title to which was defective, as shown by the abstract furnished by the defendant to plaintiffs, and has failed and refused to make plaintiffs a deed and furnish an abstract as provided in the contract aforesaid." Then, after averring defendant's notification to plaintiffs that it would furnish no other abstract nor make any other deed than the one tendered, the petition further avers that the defendant "does refuse to perfect the title to said lands, and to make, execute, and deliver to plaintiffs a deed correctly describing said body of lands, and that said defendant from thenceforth and now has and does refuse to furnish an abstract of title as provided in

said contract as aforesaid." The petition then proceeds to allege that plaintiffs had been ready and willing to pay the sum of $10,000, as a first payment called for by the contract, upon defendant's compliance with the contract on his part, and that, on account of the retention and holding of this sum of money in readiness to make said payment, plaintiffs have been damaged "by the loss of the use of said money in the sum of $1,000." The prayer of the petition then is for "a decree that defendant be directed to perfect the title to said lands, and furnish abstracts according to said contract hereinbefore set out, and to convey by good and proper special warranty deed said premises, and that it pay to plaintiffs damages in the sum of $1,000 for the loss of the use of the purchase money of $10,000 from the 24th day of January, 1896," and for proper relief.

As stated in the former opinion in this case, it is quite apparent from the whole averments and trend of the petition that the complainants do not ask for, nor propose to take, such title as the defendant may have to the land, nor to perform the contract on their part without the defendant first complying with the contract, by presenting an acceptable abstract of title, and showing a perfect title in the defendant. As stated in the former opinion herein, had plaintiffs offered to take, without more, such title as the defendant had to the land, and asked for a decree compelling him to convey to plaintiffs such title, it would have been such a proceeding in rem as to give the court jurisdiction of the subject-matter by substituted service. But the relief sought by the petition is necessarily a proceeding in personam. A decree requiring the defendant to comply with its contract by furnishing the plaintiffs with the required abstract of title could only operate upon the person of the defendant. Likewise, the judgment for $1,000 damages asked for would be essentially a decree or judgment in personam. And as the plaintiffs do not ask for a decree passing the title to the land, except upon such precedent conditions, this court cannot reach that point in its decree until it has afforded the other relief asked for by the plaintiffs, which relief must operate upon the person of the defendant. And as the court has not jurisdiction over the person of the defendant, he being a nonresident, and not having appeared to the merits, how can it proceed to afford the plaintiffs the relief they seek?

It is, furthermore, very questionable whether the order of publication in this case is sufficient to authorize the court to proceed to a decree under this petition. Said section 2022 provides that the "clerk shall make an order directed to the non-residents or absentees, notifying them of the commencement of the suit, and stating briefly the object and general nature of the petition." The order of publication made in this case merely stated that "the general nature and object of which [the suit] is to obtain judgment for specific performance of contract to convey about 13,500 acres of land known as the 'Knotwell Furnace Lands.'" Does this state the general nature and object of this suit? Had the notice of publication followed the general nature and object of the petition, it would have stated that it was to compel the defendant to deliver to plaintiffs a complete abstract of title to the land, showing title in the defendant thereto, and, furthermore, to

obtain judgment for damages for the sum of $1,000, consequent upon the failure of the defendant to comply with its contract, and then to compel the defendant to convey, by good and proper special warranty deed, the title shown by the abstract. In other words, had the order of publication complied with the statute, the nonresident defendant might very well have refrained from appearing to such action at all, as no operative judgment could have been rendered against him on such notice, as it would have disclosed the fact that the proceeding was in personam, and a decree for the conveyance of the land could not have been rendered to the satisfaction of the plaintiffs, except under the precedent condition of the court compelling the defendant to make a satisfactory abstract showing title to the premises. Any decree the court might render could not be broader than the general nature and object of the suit stated in the order of publication. The motion to dismiss must therefore be sustained.

STATE OF INDIANA ex rel. CITY OF MUNCIE v. LAKE ERIE & W. R. CO.

(Circuit Court, D. Indiana. November 10, 1897.)

1. RAILROAD CROSSINGS—DUTY OF RESTORATION.
   The duty imposed by the Indiana statute (2 Burns' Rev. St. 1894, § 5153, par. 5; Rev. St. 1881, § 3903) on a railroad company to restore any highway crossed by its road to a condition of safety and convenience for public traffic is a continuing one, and includes the duty of maintaining the crossing in such manner as not to unnecessarily impair the convenience, safety, and usefulness of the highway; and where, by reason of the growth of a city and the extension of the city limits, such highway becomes one of its principal streets, and the crossing thereby becomes inconvenient and dangerous, it is the duty of the railroad company so to reconstruct the crossing as to be safe and convenient under the changed conditions, even though the crossing was safe and sufficient when first constructed.

2. TITLE OF COMPLAINT—DEMURRER.
   The title of a complaint constitutes no part of the cause of action, and a defect therein cannot be reached by demurrer.

3. MANDAMUS—WHEN ISSUED.
   Mandamus will lie to require a railroad company having its tracks upon, across, or along the streets or alleys of a city to so construct and maintain the crossings as to render the use of the said streets and alleys and crossings suitable, convenient, and safe for the public. The fact that the company is liable to indictment for the obstruction, or that a penalty may be recovered from it, or that the city may construct a suitable crossing and recover its costs, is no reason why a writ of mandamus should be denied; none of these methods of procedure affording a remedy as convenient, beneficial, and effective as the proceeding by mandamus.

This suit was commenced in a state court by the city of Muncie, Ind., to procure a writ of mandamus against the Lake Erie & Western Railroad Company, and was removed to this court by the defendant.

Rollin Warner, for plaintiff.

Miller & Elam, W. E. Hackedorn, and John B. Cockrum, for defendant.

BAKER, District Judge. This suit was begun in the circuit court of Delaware county, in the state of Indiana, to procure a writ of mandamus to compel the change and reconstruction of an overhead crossing constructed by the defendant upon one of the streets of the city of Muncie, which crossing is alleged to be an unlawful and unnecessary obstruction of the traveling public having occasion to use the street. On the application of the defendant the case was removed from the state court into this court. The defendant, after such removal, moved the court to require the relator to strike out portions of the complaint as redundant and surplusage, and to file a complaint omitting such unnecessary and redundant matter. This motion was sustained, and in obedience to the order of the court the relator filed a condensed and substituted complaint, to which the defendant has interposed a demurrer on the ground that it does not state facts sufficient to entitle the relator to the mandatory relief asked for.

It is first urged that the condensed and substituted complaint is entitled, as was the original, in the circuit court of Delaware county, Ind., when it ought to have been entitled in this court. Assuming, but not deciding, that the condensed and substituted complaint should have been entitled in this court, the objection is unavailing. The title constitutes no part of the statement of the cause of action, and a defect therein cannot be reached by demurrer. The objection is purely technical, and is one which might be reached by a motion to correct the title, or perhaps by a motion to strike the pleading from the files, but not by a general demurrer to the complaint for want of facts.

The complaint shows upon its face that at the time the railroad and crossing were constructed, in 1879, and at the time the present defendant came into the ownership and possession thereof, the crossing complained of was not within the limits of the city of Muncie, and that whatever rights the city has in the premises have been acquired since the construction of the railroad crossing, by the annexation, as a part of the city, of the territory which embraced the highway upon which the crossing complained of had been constructed. The annexation took place in 1891. The defendant's contention is that since the railroad and crossing in question were constructed in 1879, about 12 years before the territory including them was annexed to the city, the relator must take "the situation as it found it, and cannot now be heard to insist that the situation was in violation of law." The relator is not concerned with the question whether the crossing, as originally constructed, or as it existed at the time the limits of the city were extended, was sufficient or insufficient to accommodate the public travel. The question here involved is whether the crossing, at the time the suit was brought, constituted an unlawful obstruction of the highway. When the crossing was constructed, in 1879, the highway was a country road, outside the city limits. In 1891 the growth of the city required the annexation of contiguous territory, and thereby the highway and crossing were brought within its limits, and became one of its streets. From a town of a few thousands, Muncie has grown to be a city of about 20,000 inhabitants, largely due to the discovery and development of natural gas. The

highway in question has become one of the most important streets in the city, and the crossing, which may have been sufficient before the extension of the limits of the city and its great increase in population, has now become wholly insufficient to accommodate the public wants.

As stated by counsel, the crossing of the highway by the railroad was not per se unlawful. The statute for the incorporation of railroads, approved May 11, 1852, found in 2 Burns' Rev. St. Ind. 1894, § 5153 (Rev. St. Ind. 1881, § 3903), par. 5, provides that a railroad corporation shall have the power "to construct its road upon and across any stream of water, water course, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream, or water course, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises." The statute further provides that "whenever the track of such railroad shall cross a road or highway, such road or highway may be carried under or over the track, as may be most expedient." 2 Burns' Rev. St. Ind. 1894, § 5172 (Rev. St. Ind. 1881, § 5915). These sections are to be read together, and, thus read, they impose the duty of restoration on the company, whether the railroad crosses the highway at, above, or below grade. The duty thus imposed is also a common-law duty, incumbent upon the company without any statutory requirement. Indianapolis & C. R. Co. v. State, 37 Ind. 489; Railroad Co. v. Claire, 6 Ind. App. 390, 33 N. E. 918; Railroad Co. v. Crist, 116 Ind. 446, 454, 19 N. E. 310. The right to interfere with the highway is coupled with the duty to restore it to the condition of safety and usefulness in which it was before it was disturbed, or at least to restore it in such manner as not unnecessarily to impair its utility for public travel. This duty is violated if there is a failure to restore it to its former condition, in all cases where such restoration can be effected by the exercise of reasonable care and skill. The rule governing in such cases is well stated in 2 Wood, Ry. Law, § 271:

"Whenever an act is authorized to be done in a highway that would otherwise be a nuisance, the person or company to whom the power is given is not only bound to exercise it strictly within the provisions of the law, but also with the highest decree of care to prevent injury to the persons or property of those who may be affected by such acts. Hence, where a railroad company has been permitted to lay its track along or across a highway, it is bound to the use of every reasonable precaution to prevent injury to those passing along the highway, or crossing its track that is laid along or across the highway: and, if it fails to exercise a proper degree of care,—not only such as is provided by the statute, but also such as is rendered necessary by the character of the obstruction and its location, having reference to a like reasonable care on the part of those approaching the obstruction,—it becomes a nuisance, to the extent of its injury to individual rights, and renders the company liable in damages for all the consequences."

The duty of restoration also includes the duty of maintaining the crossing in such manner as not unnecessarily to impair the convenience, safety, and usefulness of the highway. See authorities supra, and also Board of Com'rs of Franklin Co. v. White Water Val. Canal

Co., 2 Ind. 164; Railway Co. v. Phillips, 112 Ind. 59, 13 N. E. 132; Railroad Co. v. Clem, 123 Ind. 15, 23 N. E. 965; Cott v. Railroad Co., 36 N. Y. 214; Gale v. Railroad Co., 76 N. Y. 594; Masterson v. Railroad Co., 84 N. Y. 247; Gilmore v. City of Utica, 121 N. Y. 561, 572, 24 N. E. 1009; Com. v. Proprietors of New Bedford Bridge, 2 Gray, 339. The railroad company must so improve and maintain the crossing as reasonably to subserve the growing needs of the public. It does not perform the full measure of its duty by making a sufficient crossing over a highway, when by the growth of population and travel the crossing becomes inadequate to accommodate in a reasonable manner the increasing needs of the public. In the case of Railroad Co. v. Smith, 61 Fed. 885, 887, this court stated the duty of a railroad company as follows:

"The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population, or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public. Cooke v. Railroad Co., 133 Mass. 185. Under a fair construction of section 3903, Rev. St. Ind. 1881 (section 5153, Burns' Rev. St. Ind. 1894), it is the duty of a railroad company to construct its road, when it intersects any highway or stream, in such manner as to afford security for life and property; and this is so whether the way is laid out and opened before or after the construction of the railroad. Railway Co. v. Smith, 91 Ind. 119; National Waterworks Co. v. City of Kansas, 28 Fed. 921."

This statement of the law is quoted with approval by the supreme court of this state in the case of Railroad Co. v. Cluggish, 143 Ind. 347, 350, 42 N. E. 743. The same doctrine is affirmed elsewhere. Little Miami R. Co. v. Commissioners of Greene Co., 81 Ohio St. 338; State v. St. Paul, M. & M. Ry. Co., 35 Minn. 131, 28 N. W. 3; English v. Railway Co., 32 Conn. 240; Railroad Co. v. Henry (Kan. Sup.) 45 Pac. 576; Manley v. Railway Co., 2 Hurl. & N. 840; Cott v. Railroad Co., supra; Gale v. Railroad Co., supra; Gilmore v. City of Utica, supra.

This duty rests upon the owner of the railroad, and must be performed by it at its own expense. If, by the growth of population, or otherwise, the crossing has become inadequate to meet the present needs of the public, it is the duty of the railroad company to remedy the defect by restoring the crossing so that it will not unnecessarily impair the usefulness of the highway. The cases cited by counsel for the defendant are not in conflict with the doctrine here announced, and a review of them would subserve no useful purpose.

It is further contended that mandamus, being an extraordinary remedy, will not lie, because relief for the wrong complained of can be had by the ordinary and usual processes of the court. It is said that under section 1970, 1 Burns' Rev. St. Ind. 1894 (section 1897, Rev. St. Ind. 1881), the railroad company may be prosecuted by indictment or information for erecting, continuing, or maintaining a public nuisance, and that the remedy by indictment or information is adequate, and hence that proceedings for a mandamus will not lie. And it is further claimed that this action is not maintainable because section 6837, 3 Burns' Rev. St. Ind. 1894, provides that any person who unnecessarily obstructs any highway, to the hindrance of public travel, shall be liable, at the suit of the road supervisor, to a penalty of five

dollars for every day such obstruction is continued. Counsel principally rely on the case of Marshall v. State, 1 Ind. 72, 74, where it is said:

"One of the principles of law governing applications for writs of mandamus is that they will not be granted where the party applying has a different legal remedy. Ex parte Hoyt, 13 Pet. 279; Ex parte Whitney, Id. 404; People v. Superior Court, 5 Wend. 114; Id., 10 Wend. 285; People v. Mayor, etc., of New York, Id. 393, 12 Petersd. Abr. 440."

The language here quoted states the rule somewhat too broadly. In order to justify the denial of a writ of mandamus, not only must the party have a different remedy, but that remedy must be equally as adequate, convenient, and complete as the proceeding by mandamus; and the case of Marshall v. State, supra, when carefully examined, will be found to decide nothing in conflict therewith. The controlling question is not, has the party a remedy at law? but, is that remedy fully commensurate with the interests and rights of the parties, under all the circumstances of the particular case? Or, as was said in one case:

"To supersede the remedy by mandamus, the party must not only have a specific remedy, but one competent to afford relief upon the very subject-matter of his application, and one which is equally convenient, beneficial, and effective as the proceeding by mandamus."

It is equally settled that neither liability to indictment nor to a penal action under the statute constitutes a bar to relief by mandamus. Such remedies, if remedies they may be called, are merely cumulative. 2 Dill. Mun. Corp. (4th Ed.) §§ 829, 831a; High, Extr. Rem. (2d Ed.) §§ 17, 20; 2 Spell. Extr. Relief, § 1375; Indianapolis & C. R. Co. v. State, 37 Ind. 489; Frisbie v. Fogg, 78 Ind. 269; Clawson v. Railway Co., 95 Ind. 152; Cummins v. Railroad Co., 115 Ind. 417, 18 N. E. 6. Mandamus proceedings will lie to require a railroad company, having its track upon, along, or across the streets or alleys of a city, to so construct and maintain the crossing of the track as to render the use of the streets and alleys and the crossing suitable, convenient, and safe for the public; and that the railroad company is liable to indictment for the obstruction, or that a penalty may be recovered from it, or that the city may construct a suitable crossing and recover its costs, is no reason why a writ of mandamus should be denied. None of those methods of procedure would afford a remedy so convenient, beneficial, and effective as the proceeding by mandamus. It follows that the demurrer must be overruled, and it is so ordered. Exception allowed.

WHITMAN v. NATIONAL BANK OF OXFORD.

(Circuit Court of Appeals, Second Circuit. July 21, 1897.)

No. 135.

1. CORPORATIONS—STOCKHOLDERS' LIABILITY—TRANSITORY ACTIONS.
An action by a judgment creditor of an insolvent Kansas corporation to charge a stockholder with the amount of the judgment under Gen. St. Kan. 1868, c. 23, § 32, is transitory in its nature, and may be brought in a federal court in another state against a stockholder who resides there.

2. SAME—JUDGMENT—PRESUMPTION OF VALIDITY.

In an action to charge a stockholder with the amount of a judgment recovered against an insolvent corporation, an objection that the judgment was void because the cashier of the corporation made a voluntary appearance, and waived issuance of process, after the corporation had ceased to do business, is without merit, it appearing that an attorney appeared and filed an answer for the defendant. The presumptions are in favor of the regularity of the judgment, and it is for the defendant to show that it was collusive, or that the attorney was an intruder.

3. SAME—PROOF OF CHANGE OF CORPORATE NAME.

A properly authenticated copy from the office of the secretary of state of the state of Kansas of an original certificate of a change of corporate name, filed in his office by the corporation's president or secretary, as required by the state law, is sufficient proof of the change of name, until its truthfulness has been successfully attacked.

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 National Bank of Oxford, Pa., against George L. Whitman, to charge him, as a stockholder, with the amount of a judgment obtained by plaintiff against a Kansas corporation. The circuit court directed a verdict for the plaintiff, and entered judgment accordingly (76 Fed. 697), and the defendant brought the case to this court on writ of error.

The constitution of the state of Kansas provided prior to the year 1866, and still provides, in section 2 of article 12, as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes." Section 32 of chapter 23 of the General Statutes of Kansas of 1868, section 40 of the same chapter as amended in 1883, and section 44 of the same chapter, which are still the statutes of the state, provided as follows:

Section 32: "If an execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Section 40, as amended: "A corporation is dissolved: First, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation so suspended from business shall for three months after the passage of this act fail to resume its usual and ordinary business." Laws 1883, p. 88.

Section 44: "If any corporation created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolutions without joining the corporation to such suit; and if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of disso-

lution for the recovery of the portion of such debt for which they were liable and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The Arkansas City Bank was formed in 1886, under the laws of the state of Kansas, to do a banking and real-estate business with a capital of $20,000, divided into 2,000 shares of $100 each, and was located in Arkansas City, in said state. The original stockholders, their residences, and the number of the shares of each stockholder were as follows: George L. Whitman, New York City, 1,000 shares; Samuel Newell, New York City, 649 shares; James L. Huey, Arkansas City, 349 shares; Mary L. Newell, New York City, 1 share; Mary E. Huey, New York City, 1 share. In 1889 the name of the bank was changed, and became the Arkansas City Investment Company. In December, 1890, it made a general assignment for the benefit of its creditors, and from that time completely suspended its business, and thereafter, at the expiration of one year, was deemed to be dissolved under the provisions of section 40 for the purpose of enabling its creditors to sue its stockholders. About four months before its failure it indorsed and guarantied for value two promissory notes, together amounting to $4,875, which were discounted by the plaintiff, the National Bank of Oxford, located in Pennsylvania. The assignee made payments upon these notes from time to time, but in 1895 the plaintiff duly obtained judgment against the bank, in a state court of Kansas, for the sum of $3,468.30, the bank having appeared, and having made answer to the complaint. An execution upon this judgment was returned to court wholly unsatisfied, and it appeared that the bank had at that time no assets or property. The plaintiff thereupon brought an action at law in the circuit court for the Southern district of New York against the defendant George L. Whitman, being the owner of 1,000 shares of the stock of this bank, to recover from him the amount due to the plaintiff from said bank. The complaint in the action alleged all the foregoing facts. The defendant had not theretofore been subjected to any liability as a stockholder of the bank. At the close of the trial of this suit before a jury each party moved for the direction of a verdict in its favor. The court directed a verdict in favor of the plaintiff for the amount of the Kansas judgment, with interest. To reverse the judgment entered upon this verdict a writ of error was brought. The principal question presented by the assignments of error was as to the character of the remedy, provided by the Kansas statutes against a stockholder of an insolvent corporation,—whether it was a special, peculiar, and local remedy created by the statute and without force and not capable of being enforced outside of the limits of the state of Kansas.

William G. Wilson and Joseph H. Choate, for plaintiff in error.
William B. Hornblower, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). It will be observed that the complaint contains the averments which are required either by section 32 or section 44, and seeks to enforce an alleged liability of the defendant, whether he is to be charged with the amount of the Kansas judgment or with the amount of the debt due to the plaintiff from the corporation; and it is to be further noticed that not only the fact of the judgment was proved, but that also all the facts upon which the judgment was based, such as the guaranty, the discount, and the nonpayment, were proved, so that the question which is often raised as to the force and effect of the original judgment, and how much it establishes against the stockholder, is immaterial. The

plaintiff has proved all the facts that are to be proved,—whether the judgment conclusively established against the stockholders the indebtedness of the bank, or was only prima facie evidence of it, or was no evidence of the indebtedness, but was merely a condition precedent to a suit against the stockholder. The main question in the case—whether a suit to enforce the liability declared by the constitution of Kansas, and provided by its statutes, was transitory in its character, and could be brought by an action at law in a court of another state against a single stockholder, who was a resident of such state—has already been stated. It is to be premised, as was clearly shown by Justice Clifford in Morley v. Thayer, 3 Fed. 739, with respect to this particular constitutional provision, that it is not self-executing in its character, and that statutory legislation was, therefore, required to carry it into effect. Groves v. Slaughter, 15 Pet. 449; Wells v. Robb, 43 Kan. 201, 23 Pac. 148. It is also to be premised, as stated in Pollard v. Bailey, 20 Wall. 520, and reaffirmed in Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757, that the statutory remedy is exclusive. "A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action. But when the provision for a liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed." Two other decisions have been recently given by the supreme court, which do not undertake to construe this class of statutes, but which are important because they declare the conclusion which must naturally follow if the plaintiff's construction has been established by the highest court of Kansas, and because they show the particulars in this class of statutes which the supreme court regards as especially significant upon the question of construction. The case of Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, was based upon a provision in a general act of the state of New York for the formation of corporations that all the stockholders of every company incorporated under it shall be severally individually liable to creditors of the company until the whole amount of the capital stock shall be paid in and certified. The court, after saying that great, if not conclusive, weight must be given to the construction which the highest court of New York had placed upon the statute, and that, following such construction, the liability was in contract, said that "it can be enforced by an action sounding in contract against a stockholder found in another state," and that a resort to equity was not necessary, but an action at law was adequate. Upon the last point the court said:

"Lastly, it is objected that the declaration sets out a case which should have been prosecuted in equity, and not at law. There is no ground for this objection to rest on. In the cases of Pollard v. Bailey, 20 Wall. 520, and Terry v. Tubman, 92 U. S. 156, to which we are referred in its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefore, only liable for his proportion of his debts. This proportion could only be ascertained upon an account of the debts and stock, and a pro rata distribution of the indebtedness among the several stockholders. This, the court held, could only be done by a suit in equity. But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the com-

pany, and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder; and no other creditor can."

This decision was not novel in its character, although its doctrine had not been universally controlling in the state courts, but in Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, the supreme court stated its position in regard to the duty of a court of one state to enforce a statute of another state, which was penal in the popular sense, and a position which was not in accordance with the obiter remarks of the justice who delivered the opinion of the court in Steam-Engine Co. v. Hubbard, 101 U. S. 188, 192. The Huntington Case grew out of a statute of the state of New York, which made the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock liable for all its debts; and the question was whether such a statute was so penal in its character that it could not be enforced in the courts of another state. The court said:

"As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But, as it gives a civil remedy at the private suit of the creditor only, and measured by the amount of his debt, it is, as to him, clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country."

It becomes, therefore, of prime importance to ascertain what the highest court of Kansas has said in regard to the transitory character of an action to enforce the statutory remedy, or what it has said upon the nature of the stockholder's obligation, and whether it was several or joint, definite, or adjustable according to a proportion. The germ of the present statutes of Kansas is found in the territorial laws of 1855. The entire body of statutes which were enacted at that session was afterwards repealed, and statutory provisions in regard to the individual liability of stockholders seems to have been passed with respect to particular classes of corporations, and not to have been reproduced in a condensed form, until the revision and codification of 1868.

The first judicial decision of Kansas in regard to the individual liability of stockholders was upon the proper construction of section 14, c. 31, Laws 1863, in regard to the incorporation of insurance companies, which was as follows: "The stockholders of any company organized under this act, shall to the amount of stock by them held, be jointly and severally, liable for all debts or responsibilities of the company." The supreme court of Kansas, in Grund v. Tucker, 5 Kan. 70, held that "under this statute, a creditor may maintain an action at law against one or more stockholders in an insurance company organized under the act of 1863, to recover a debt due by the corporation." The court thus anticipated the decision in Flash v. Conn, regarded "each stockholder as individually liable for the debts of the company to an amount equal to the amount of his stock," rejected the idea of a proportionate liability or a pro rata distribution of debts among stockholders, and consequently rejected the idea that the creditors' remedy must be in equity. In Hentig v. James, 22 Kan. 326, the Kan-

sas court, in discussing the mode of procedure under section 32, said that the creditor has two modes, either by the issuance of an execution against the stockholder, or by an action to charge him with the amount of the judgment against the corporation, but said nothing either in favor of or against the exclusive jurisdiction of the Kansas court over the second mode of procedure. In Howell v. Manglesdorf, 33 Kan. 194, 5 Pac. 759, the question of the transitoriness of the action at law was closely touched. A creditor had obtained an unsatisfied Kansas judgment against a Kansas corporation, had given notice to a nonresident stockholder, who was sought to be charged, and had moved the court in which judgment was rendered to order execution to issue against such nonresident. The question of the power of the trial court to grant such a motion came before the supreme court, which said that the first mode of procedure was not applicable to a nonresident stockholder, and that the second mode was "an ordinary action to be instituted wherever personal jurisdiction of the stockholder can be acquired"; and further said that the ruling "does not deprive a creditor of a remedy against the stockholder residing in another state, and upon whom service cannot be obtained here." "While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory,"—citing Flash v. Conn, supra. It is true that this language is obiter in the sense that it was not absolutely necessary to the decision of the question before the court, which was whether, by notice to a nonresident, the Kansas court could order execution to issue against him, but it clearly stated the theory of the court respecting the nature of the statutory remedy and the way in which it is to be worked out, and in a certain sense was not obiter, because it answered the argument that the liability of nonresident stockholders must be enforced by notice and the levy of an execution, or was not enforceable, and that, therefore, in many instances, the creditors were without remedy.

Inasmuch as the answer to the question in regard to the transitoriness of the action is much aided by the fact that the remedy of the statute is several and individual, and that the liability of the stockholder is a definite and fixed one, the next decision of the highest Kansas court, in Abbey v. Dry-Goods Co., 44 Kan. 415, 24 Pac. 426, is important. The case was under section 44, and the complaint joined several stockholders as defendants, against whom several judgments were recovered, the aggregate of which amounted to the debt of the creditor against the corporation. The court held that the liability of stockholders to creditors under this section was not joint, but that each must be sued separately. The statute was, in substance, a copy of the Missouri statute in regard to stockholders' liability, and the decision of the Missouri court of appeals upon the same subject (Perry v. Turner, 55 Mo. 418), and the decisions in Bank v. Ibbotson, 24 Wend. 473, and Paine v. Stewart, 33 Conn. 516, upon analogous statutes, are to the same effect. The drift and tendency of the Kansas decisions, other than the one in the Howell Case, in regard to the character of the stockholders' liability and of the creditors' remedy under section 32, are manifest. The means

which the statutes provided to enforce the individual constitutional liability determined and fixed the extent of the amount which must be paid by each stockholder individually, and which in no manner depended upon what any other stockholder could or ought to pay. As the statute was not penal, it is not important whether the liability is called statutory or one based upon contract. It is statutory because it did not exist at common law, and it is contractual because "every one who becomes a member of the company by subscribing to its stock assumes this liability." Flash v. Conn, supra. Section 32 has thus, by the decisions of the state court, the indicia of a transitory action, and, although these indicia might be overcome by a manifest intent of the legislature that the action should be local, yet, when their intent has been interpreted by the highest court of their state, as in the Howell Case, supra, we are not disposed to read into the statute another intent, unless such a construction is demanded. In our opinion, another construction is not called for, but the legislature intended that the action against a nonresident stockholder was not necessarily to be under the jurisdiction of the courts of Kansas. Two modes of procedure were provided,—one of a summary character, which could be used in the case of resident stockholders, but which was useless against nonresidents, and, if no means had been provided to make the liability of nonresident stockholders effective, creditors might, in many instances, lose entirely the benefit of the constitutional provision for their protection. The second mode was, therefore, provided of a transitory character, and the amount of the liability was made definite and certain, so that each stockholder could be severally sued. There is more color for the conclusion that the action under section 44 is local, because any stockholder who has paid a judgment against himself may sue the body of the stockholders, and obtain contribution from them; and this part of the proceeding looks eventually towards a proportionate division among them. It does not necessarily follow that the original judgment must have been obtained in Kansas. However this may be, we are satisfied that the proceeding against a stockholder under section 32 is transitory.

It is said that this construction has not been sustained by the highest courts of the states of Massachusetts, Illinois, and New York. It is true that in Bank v. Rindge, 154 Mass. 203, 27 N. E. 1015, which was a suit in Massachusetts to enforce the provisions of section 32 against a Massachusetts stockholder, the question of the construction of the statute was attempted to be raised, but it is also true that the attempt was not successful. The defendant demurred to the sufficiency of the cause of action as stated in the declaration, but the court was unable to decide whether the statute authorized an action in another state, for the "declaration does not, in terms, set forth any statute of Kansas, nor show to what extent the laws of Kansas above set forth are statutory or rest in judicial decisions. We are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the courts of that state; but we must take the case as the parties present it to

us." But in Bank v. Ellis, 166 Mass. 414, 44 N. E. 349, the pleader was more careful, and upon demurrer to a declaration upon the same statute against a Massachusetts stockholder the court said: "A declaration which sets forth that, according to the law of Kansas, the defendant stockholder of a corporation organized under the laws of that state is liable to a judgment creditor of the corporation as upon a contract, which is suable anywhere, is good;" and, further, that "jurisdiction exists here [in Massachusetts] to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration." It thus appears that the courts of Massachusetts have not yet stated their own opinion upon the statute in question. In Fowler v. Lamson, 146 Ill. 472, 34 N. E. 932, the plaintiff had recovered a judgment against a Kansas corporation before the superior court for Cook county, Ill.; an execution had been issued upon that judgment, which was returned unsatisfied, and the plaintiff then brought a bill in equity in the courts of Cook county against stockholders to recover the amount of the judgment. This bill was dismissed upon the ground that the Kansas statute was local. In Tuttle v. Bank, 161 Ill. 497, 44 N. E. 984, the question upon the Kansas statute came before the court, as it is presented here, and it was held that an action to carry this statute into effect would not lie in another state; three of the seven judges dissenting. In Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, the question arose upon the defendant's demurrer to the sufficiency of the complaint, and because all the necessary parties to the action were not included. The constitution and statutes of Kansas were fully set out in the complaint, but the judge who spoke for the court remarked that there was no allegation as to the meaning or effect of the statutes or of the constitutional provision under the adjudication of the courts of Kansas, and that, therefore, the court was obliged to construe them by itself. Among the various suggestions which were given in favor of sustaining the demurrer, the court was of opinion that the statutes provide for a special and peculiar remedy under the laws of Kansas. The Kansas decisions were not referred to in the opinion. It is well understood that the tendency of the decisions in the state courts has been to avoid taking jurisdiction of suits to enforce the liability of stockholders in a foreign corporation under the statutes of a foreign state, because, in the language of the court in the Rindge Case, supra, the suit is one "which involves the relation between it [the foreign corporation] and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created." But when the statutory remedy is one which does not involve any relation between stockholder and corporation, but touches only the liability of the stockholder to creditors (Guerney v. Moore, 131 Mo. 650, 32 S. W. 1132), the argument is simply one against the expediency of the statute. The decisions in the federal courts which affirm the jurisdiction of federal courts in other states to enforce this particular statute of Kansas are Bank v. Rindge, 57 Fed. 279, Rhodes v. Bank, 13 C. C. A. 612, 66 Fed. 512, McVickar v. Jones, 70 Fed. 754. Decisions, in addition to those al-

ready cited, in favor of jurisdiction of courts of foreign states to enforce similar or analogous state statutes, are Paine v. Stewart, 33 Conn. 516; Cuykendall v. Miles, 10 Fed. 342; Auer v. Lombard, 19 C. C. A. 72, 72 Fed. 209.

The technical points which were made by the plaintiff in error are without solidity. It is said that the Kansas court did not acquire jurisdiction to render judgment against the corporation, because the cashier made a voluntary appearance, and waived the issuance of process, at the commencement of the suit in 1895, when no business had been done by the bank after its insolvency on December 15, 1890. But an attorney at law appeared, filed an answer, to which the plaintiff replied; and the presumptions are in favor of the regularity of the judgment. It was for the defendant to show that it was collusive, or that the attorney was an intruder. Tenney v. Townsend, 9 Blatchf. 274, Fed. Cas. No. 13,832. It is next said that there was no competent evidence of the change of name of the corporation. The minutes of the proceedings were taken away with him by the president "when he left" in May or June, 1889, and some secondary evidence was given of their contents, when perhaps an insufficient foundation had been laid for it. But the statutes of Kansas provide that a corporation can change its name, and section 12 of chapter 23 of the General Statutes of 1868 provides as follows:

"Such change of name * * * shall take effect and be enforced from the date at which the president or secretary of the corporation shall file with the secretary of state an affidavit setting forth the name adopted, * * * together with the date at which such change was voted by the stockholders of such corporation."

A properly authenticated copy of the original certificate filed in the office of the secretary of state was produced, and was certainly sufficient proof of the change of name, until its truthfulness had been successfully attacked. The judgment of the circuit court is affirmed, with costs.

BOARD OF COM'RS OF KIOWA COUNTY, KAN., v. HOWARD.

(Circuit Court of Appeals, Eighth Circuit. September 27, 1897.)

No. 844.

1. COUNTY REFUNDING BONDS—VALIDITY—BONA FIDE PURCHASERS—ESTOPPEL.
When county bonds issued under an act authorizing the county commissioners "to compromise and refund its matured and maturing indebtedness of every description" contain a recital of the act, and a statement that all its provisions have been strictly complied with, and that the issue does not exceed the amount of the county's outstanding indebtedness, the county is estopped, as against an innocent purchaser, from setting up that a part of the indebtedness refunded consisted of railroad aid bonds which were void.

2. SAME—COUNTY WARRANTS—AUTHORITY OF COMMISSIONERS.
When the statutes provide that the power of a county as a body politic and corporate shall be exercised by a board of county commissioners (Gen. St. Kan. c. 25, § 3), an act authorizing counties to refund "matured and maturing indebtedness of every description whatsoever" (Act Kan. March 8, 1879), gives the commissioners authority to refund outstanding warrants

as well as bonds, and to do so without submitting the question to a vote of the people.

3. SAME.

Statutory authority to the board of county commissioners to compromise and refund the indebtedness of the county carries with it power to fix the time and terms of payment of the refunding bonds.

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

This was an action by George R. Howard against the board of county commissioners of Kiowa county, Kan., to recover upon certain interest coupons detached from county refunding bonds. In the circuit court a demurrer to the answer was sustained, and judgment given for the plaintiff, to review which the defendant has sued out this writ of error.

S. S. Ashbaugh (L. M. Day was with him on the brief), for plaintiff in error.

C. F. Hutchings (L. W. Keplinger was with him on the brief), for defendant in error.

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

RINER, District Judge. This was an action brought by George R. Howard in the circuit court for the district of Kansas to recover certain interest claimed to be due upon 237 interest coupons detached from 79 refunding bonds issued by the board of county commissioners of Kiowa county. The petition was the usual form of petition in such cases, alleging the citizenship of the parties; that the amount in controversy exceeded the sum of $2,000 exclusive of interest and costs; that the bonds in controversy were duly issued under and in pursuance of an act of the legislative assembly of the state of Kansas entitled "An act to enable counties, municipal corporations, the board of education of any city and school districts to refund their indebtedness," approved March 8, 1879; that the plaintiff became the owner and holder of the bonds and coupons, for value, before maturity, and was, at the time the action was brought, the owner and holder thereof; and that when the interest coupons became due they were duly presented to the defendant for payment, but payment was refused. The petition concludes with a prayer for judgment in favor of the plaintiff for the sum of $7,110, with interest. To this petition the defendant answered, in substance, that the indebtedness for which these refunding bonds were issued consisted of 44 "railroad aid bonds" issued by the county to the Chicago, Kansas & Nebraska Railway Company, and $30,000 worth of outstanding county warrants. It further alleged that the "railroad aid bonds" were issued within one year after the organization of the county, were issued for an amount beyond the statutory limitation, were void "to the knowledge of all persons whomsoever," and therefore did not, at the time the refunding bonds were issued, constitute a matured or maturing indebtedness against the county within the meaning of the statute; that the refunding bonds were ordered executed, signed, and issued by the board of county commissioners, the chairman thereof, and the county clerk of the county,

without any vote or assent having first been taken or given by the electors of the county upon the proposition of the issuance of said bonds; and that the bonds were therefore void, and no recovery could be had thereon, or upon the coupons in suit. To this answer the plaintiff demurred. The circuit court sustained the demurrer, and entered a judgment in favor of the plaintiff for the amount claimed in his petition.

Each of the bonds in controversy contains the following recital:

"This bond is one of a series of bonds of like amount, tenor, and effect, executed and issued by the county commissioners of said Kiowa county to refund its matured and maturing indebtedness heretofore legally created by said county, and in accordance with an act of the legislature of the state of Kansas entitled 'An act to enable counties, municipal corporations, the board of education of any city, and school districts, to refund their indebtedness,' approved March 8, 1879, and it is hereby certified that the total amount of this issue of bonds does not exceed the actual amount of the outstanding indebtedness of said county, and that all the requirements of the provisions of the foregoing act have been strictly complied with in issuing this bond."

It is no defense to an action brought by an innocent purchaser who has invested his money in municipal bonds containing such recitals to allege that the "railroad aid bonds," which constituted a part of the indebtedness refunded, were void to the knowledge of all persons whomsoever, or that the county commissioners knew that the county had no matured or maturing indebtedness to refund. This recital was evidently made for the very purpose of enabling the county to negotiate and sell these bonds on the market. The statement on the face of the bonds that they were issued to refund the matured and maturing indebtedness of the county pursuant to the authority conferred upon the county by the act of March 8, 1879; that the total amount did not exceed the actual amount of the outstanding indebtedness of the county, and that all of the provisions of law in relation to the issuance of said bonds had been complied with, fairly imported that nothing remained to be done in order to make the bonds binding obligations upon the county in the hands of bona fide purchasers. It was upon the statements contained in the recital upon the face of these bonds, doubtless, that the plaintiff was induced to purchase them. He had a right to rely upon them as true, and by every principle of justice the county is estopped to deny that the bonds were issued to refund the matured and maturing indebtedness of the county. These bonds, containing the recitals above mentioned, were made by the county commissioners, the officers of the county, intrusted and clothed with full power, under the statute, to determine whether or not there was a matured or maturing indebtedness, and the amount thereof. This question has been so often decided by the courts that it would serve no useful purpose to here repeat the reasoning on the question. Ashley v. Supervisors, 8 C. C. A. 455, 60 Fed. 55; West Plains Tp. v. Sage, 32 U. S. App. 725, 16 C. C. A. 553, and 69 Fed. 943; Rathbone v. Hopper (Kan. Sup.) 45 Pac. 610; Graves v. Saline Co., 161 U. S. 359, 16 Sup. Ct. 526; Hackett v. Ottawa, 99 U. S. 96; National Bank of Commerce v. Town of Grenada, 41 Fed. 92.

It is further contended by the plaintiff in error that the act of 1879 does not authorize a county to issue bonds for the purpose of re-

funding outstanding warrants, nor the issue of bonds for the purpose of refunding any indebtedness, without a vote of the electors of the county. This contention cannot be sustained. The statute in express terms authorizes the county "to compromise and refund its matured and maturing indebtedness of every kind and description whatsoever," and confers the power upon the board of county commissioners to do this without submitting the question to a vote of the people of the county. We think the language of the act is broad enough to include not only bonds, but county warrants as well, and confers upon the board of county commissioners, as the representatives of the county, express authority to compromise and refund any outstanding indebtedness which the county may have. This question was recently before the supreme court of Kansas in two cases. In the case of Riley v. Garfield, 49 Pac. 85, that court said:

"It would be difficult, indeed, to select words more comprehensive than those contained in the act. In 1871 the section containing the language above quoted was amended by the legislature so as to authorize the refunding of bonded indebtedness only. This indicates a legislative construction of the act of 1879. The contention that the refunding act does not authorize warrants to be refunded into bonds without a vote of the people of the county is also answered by the act itself, and section 3 of chapter 25 of the General Statutes of 1889, relating to counties and county officers, which reads: 'The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners.' The refunding act authorizes a county to refund its indebtedness. No vote of the people is required in the case of a county, but the act expressly requires a compromise by a township or school district to be submitted to a vote at an election called for that purpose. The argument that the compromise is distinct and separate from the refunding, and that the question of refunding must be submitted to the people in every case, and that of the compromise only by townships and school districts, is too nice to be sound. The compromise and the refunding together constitute but a single transaction. The long list of special acts cited in the brief shed no light on the case in hand. The validity of the bonds must be determined under the law authorizing their issuance, not under other acts having no application. We are unable to perceive any evidence of legislative intent affecting the refunding acts of 1879 to be drawn from the numerous special acts cited." State v. Scott Co. Com'rs, Id. 663.

It is further insisted by the plaintiff in error that, because the "railroad aid bonds" which constituted a part of the indebtedness refunded were payable in 20 years, and were refunded by bonds payable in 30 years, the board of county commissioners exceeded the authority conferred upon it by the statute, and that therefore the refunding bonds must be held to be invalid. We think it is sufficient to say that the power conferred upon the board of county commissioners to compromise and refund the indebtedness of the county carried with it, as incident thereto, the power to fix the time and terms of payment. The judgment of the circuit court is affirmed.

ROSEN v. CHICAGO G. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. September 27, 1897.)

No. 861.

1. NEGLIGENCE BY USE OF LOCOMOTIVE—ADAPTABILITY AND EQUIPMENT—THROWING SPARKS.

Where an engine used in suburban service is sufficient in size and capacity for the purpose, properly equipped, and carefully and skillfully operated, the mere fact that in its ordinary and proper operation it emits more and hotter sparks than would the ordinary and proper operation of a larger engine doing the same work, and thereby increases the danger from fire to adjacent property, does not of itself amount to negligence.

2. ACTION FOR DAMAGE BY FIRE—PRESUMPTION OF NEGLIGENCE OVERCOME.

In an action for damages by fire communicated by sparks from a locomotive, the presumption of negligence arising under the Minnesota statute is overcome by satisfactory proof that the engine was provided with suitable appliances to prevent the escape of sparks, that they were in good order, and that the engine was carefully and skillfully operated.

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

Jared How, for plaintiff in error.

Dan W. Lawler, for defendant in error.

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

RINER, District Judge. This action was brought by Adolph T. Rosen against the Chicago Great Western Railway Company in the circuit court of the United States for the district of Minnesota to recover damages for the destruction by fire of the plaintiff's building, situated upon land owned by him adjoining the defendant's railroad, in the city of St. Paul. The evidence in the case showed that the plaintiff was the owner of lot No. 27, with the buildings thereon, in block No. 23 of South Park addition No. 10; that the defendant owned and was operating a line of railway running from St. Paul in a southerly direction, through South St. Paul and beyond; that the plaintiff's lot was adjacent to, and on the easterly side of, the right of way of the defendant's road; that the building was a large frame building, 50 feet in width by 90 feet in length and 2½ stories in height, with a brick addition thereto 1½ stories high; that the building and addition contained a large amount of machinery, tools, material, and appliances, which were owned by the plaintiff, and used by him for the purpose of carrying on a tannery and fur-dressing establishment, the building in question being located about 50 feet westerly from the main railway tracks of the defendant company, and that on the 11th of August, 1895, within a short time after one of the defendant's trains had passed the plaintiff's building, the building was discovered to be on fire, and was wholly destroyed. There was also evidence offered by the plaintiff tending to show that among the locomotive engines used by the defendant in operating its trains was a small motor engine, known as engine No. 13, which was used by the defendant in drawing suburban trains daily operated by it and at frequent intervals from the city of St. Paul to South St. Paul and beyond, upon the main tracks of its road; that

this motor engine No. 13 was used by the defendant on the day that the plaintiff's property was destroyed, and was the engine attached to the train which passed the premises owned by him, in a southerly direction, a short time before the fire was discovered; that the property belonging to the plaintiff was of the value of about $27,000; that, at the time of the passage of the engine and train and of the destruction of the building, a strong breeze was blowing in the locality in which said building was situated, from a westerly direction, across the tracks of the defendant, and towards the building; that South St. Paul was situate about five miles southerly from the city of St. Paul; that the plaintiff's factory was situated about four miles southerly from the main depot of the defendant in the city of St. Paul; that the region between the city of St. Paul and South St. Paul, through which the defendant's road ran, and upon which a train was then being operated, was devoted largely to manufacturing purposes; that there were a number of manufacturing establishments of various kinds along the tracks of the defendant between the stations mentioned; that, as the engine was passing the building of the plaintiff, it was observed to discharge from its smokestack a large quantity of sparks and cinders, which sparks and cinders fell on and about the building; that the ordinary locomotive road engine of the smallest size used by the defendant in operating trains upon its road was one having cylinders 17 by 24 inches, and drive wheels of 64 inches, in diameter; that the motor engine No. 13 had a cylinder of only 12 by 20 inches, and drive wheels of about 49 inches, in diameter; that the power or capacity of the motor engine was only about one-half that of the smallest sized road engine; that the flues in its boiler were considerably shorter than the ordinary road engine, and its fire box considerably shallower; that in drawing a train of the size which the motor engine was engaged in operating on the 11th of August, 1895, it was necessary to push or work the motor engine much harder than it would have been necessary to have worked or pushed an ordinary road engine of the smallest size drawing the same train; that, in the harder working of the engine, the draught would be much increased; that the engine, when pushed or worked hard, would throw out a larger quantity of sparks and cinders than it would when worked with more moderation; that the quantity of sparks and cinders which would be thrown out in operating any engine when in good repair and condition depended upon the amount of force or power with which such engine was accompanied; and that an engine of the size and capacity of motor engine No. 13, in drawing the train to which it was attached at the time of the fire, would throw out a much larger quantity of sparks and cinders than an ordinary standard road engine even of the smallest size would do in drawing the same train; and that, by reason of its short flues, shallow fire box, and small drive wheels, the draught of the engine was made greater, and sparks and cinders would be carried through and thrown out of the smokestack in much greater quantities and in a much more highly-heated condition in developing the same amount of speed, than would be the case with an ordinary road engine even of the smallest size, having longer flues and a less shallow fire box.

The testimony of the engineer operating engine No. 13 on the day in question was to the effect that the train was a suburban train for the accommodation of passengers, carrying no freight; that on that day, on its south-bound trip, the engine was run in the ordinary manner; that it worked with a light throttle at all times in pulling these trains; that, in his experience, this engine worked better in that way than when it was crowded; that it was an easy matter for this engine to haul this train with two coaches; that it could easily handle three coaches and make its time; that, if there was any grade at the point in question, it was so slight that it could not be seen with the naked eye; that, at the time of passing the plaintiff's factory, he saw no sparks or cinders issuing from the smokestack; that in fact it was not possible to see such sparks or cinders, if any were thrown, in daylight, according to his experience of 16 years; that he had no recollection that any such were thrown at the time in question; that he was on the west side of his engine, or the opposite side from the factory, on both the south and north bound trips, the engine not being at the end of its run; that he saw no one in the neighborhood of the factory on his down or return trip; that his duty required him to keep a lookout on the track ahead; that from his engine he had a clear view of everything around him; that he saw no fire on the roof or any part of the factory on either the north or south bound trip; that on both trips the engine was worked as light as it was possible to work it,—that is, with a light throttle; that the engine experienced no trouble in pulling the train, which he thought consisted of two eight-wheeled coaches, though one might have been an ordinary twelve-wheeled coach; that there was nothing in regard to the throwing of the sparks or fire by this engine on either of the trips that attracted his attention; that the ordinary cinders thrown by the engine are not larger than one-eighth of an inch in diameter; that there was no difference between the spark-throwing powers of this motor engine and an ordinary locomotive engine; that they are about one and the same thing, only that the motor engine is on a smaller scale; that he ran the engine the next morning until it was called in, some time before noon; and that at noon he examined the nozzle and other parts, making as careful examination as he could, and found them in first-class order.

The fireman's evidence was to the effect that on leaving a station he generally put in about 2 shovelfuls of coal, which would be sufficient to carry it to the next place, so that on the whole trip he would use about 20 or 25 shovelfuls of coal, there being 10 stops; that they always stopped at South Park station, and stopped there on this day; that he saw no sparks or cinders thrown from the smokestack at the time in question, nor was his attention called to anything of the kind; that he did his work as fireman in the ordinary manner on that trip, was on the left-hand side of the engine on both trips, did not notice any fire or sparks on the plaintiff's factory when he went by it, and that there was nothing in the working of the engine in any way that attracted his attention as being out of the ordinary run.

The conductor testified, in substance, that the motor cars are somewhat lighter than ordinary cars, with doors at the side; that there are

no brakemen on these motor trains; that there was nothing unusual in the running or management of the train on the day in question on the north or south bound trips; that he was familiar with locomotives in general use, and that, according to his observation, there is no difference in the manner of ejecting sparks or throwing fire between the ordinary road engine and a motor engine. The defendant also offered evidence tending to show that, when the plaintiff's building was first discovered to be on fire, the fire was not on the roof, but on the southerly gable end of the factory, in such manner as to indicate that the fire had originated on the inside of the building; that at the time of the fire the wind was blowing in a direction parallel with the factory building and the railway tracks, and not across the tracks towards the building; that, from an early hour in the morning of the day the fire occurred, the doors and windows of the factory were open, and two or more workmen were employed in and about the factory during that day, before and at the time of the fire; that the motor engine No. 13 was of a modern type, fitted with the best and approved modern appliances in general use for the prevention of the escape of fire or sparks; that said appliances had been thoroughly overhauled and replaced shortly before the fire; that upon an examination of the engine, made immediately before and immediately after the fire, all of the appliances for arresting the escape of fire were found in perfect order and condition; that, at the time the examination was made after the fire, no change or alteration had been made in the appliances; and that, on the day the fire occurred, the engine was properly and skillfully managed, by careful and competent operators.

At the close of the testimony, the plaintiff requested the court to instruct the jury:

"(1) If the jury find from the testimony that, in order to do the work performed by engine No. 13 in the motor service, it was necessary to so operate said engine, or the ordinary operation of said engine was such, as to cause it to throw out a greater quantity of sparks than would have been thrown out in the ordinary and proper operation of a larger engine, or one of a different construction, doing the same work, and the throwing out of such a greater quantity of sparks would increase the danger from fire caused by the engine to adjacent property, the failure to make use of such larger engine, or of different construction, for the purpose of doing the work performed by 13, is an act of negligence on the part of the defendant company."

"(2) When the fire is shown to have originated from sparks from the engine, it must be presumed to have been caused by some negligence of the company or its employés, either in the character, construction, or management of the engine, unless the contrary is shown to your satisfaction; and the burden of proof is on the defendant to show that it was not negligent in any particular that may have operated to cause the injury."

The court refused to give either of the instructions requested, and its refusal to do so is now assigned for error.

By statute in the state of Minnesota, when it is established in cases of this kind that the fire complained of resulted from sparks or cinders thrown from the cars or engines of a railway company, the burden is cast upon the railway company to show that it was not negligent. The statute is in the following words:

"All railroad companies or corporations operating or running cars or steam engines over roads in this state shall be liable to any party aggrieved for all damage caused by fire being scattered or thrown from said cars or engines, without

the owner or owners of the property so damaged being required to show defect in their engines or negligence on the part of their employés; but the fact of such fire being so scattered or thrown shall be construed by all courts having jurisdiction as prima facie evidence of such negligence or defect. * * *" Gen. St. 1894, § 2700.

Under this statute, the presumption of negligence, however, is a disputable one, and may be rebutted by showing that the defendant did use due care, and was not negligent. The defendant was operating its road under lawful authority upon its own land, and could not be made liable for the destruction of the plaintiff's building upon an adjacent lot unless it was negligent in its management or the condition of its engine. The action is based upon the negligence of the defendant, and it cannot be made liable to adjacent property owners for unavoidable or usual consequences of the proper operation of its road. We think the first request was properly refused. The gist of the action is negligence. The evidence shows that this engine was used in the suburban service, pulling a light train, consisting of two coaches; that there was no perceptible grade at the place where the fire occurred; and that the engine was sufficient for the service in which it was used; and the mere fact that, in the ordinary and proper operation of this engine, it would throw out a greater quantity of sparks than would have been thrown out in the ordinary and proper operation of a larger engine doing the same work, and thereby increase the danger from fire to adjacent property, would not of itself amount to negligence. Negligence is a breach of duty, unintentionally and proximately producing an injury to another possessing equal rights. It is the omission to do something which a reasonable man, guided by circumstances which ordinarily regulate the conduct of men in the transaction of their affairs, would do, or the failure to observe for the protection of the interests of another that degree of care, precaution, and vigilance which the circumstances justly demand. A railway company must exercise reasonable care in the use of its property and in the operation of its trains to avoid injury to others; hence the rule requiring "it to avail itself of the best mechanical contrivances and inventions in known practical use which are effective in preventing the burning of private property by the escape of sparks and coals from its engines"; but to say that the use, instead of an ordinary road engine, of a smaller engine, which emitted more and hotter sparks than the ordinary road engine, but which was in every way suitable for the service in which it was employed, and was equipped with suitable appliances, and was carefully operated, was negligence, would be going far beyond the rule applicable to this class of cases. Daly v. Railway Co., 43 Minn. 319, 45 N. W. 611; Frace v. Railroad Co., 143 N. Y. 182, 38 N. E. 102. The two Minnesota cases, Karsen v. Railroad Co., 29 Minn. 12, 11 N. W. 122, and Burud v. Railway Co., 62 Minn. 243, 64 N. W. 562, and Piggot v. Railway Co., 3 C. B. 229, do not change or announce any different rule. The Minnesota cases turn upon the question whether or not there was evidence to support the verdict of the jury, and the court finds that there was. The case of Piggot v. Railway Co. was a different case in its facts from the case at bar. The evidence in that

case was to the effect that the engine in question threw sparks and small particles of coke of an unusual size from the smokestack; that they fell in an ignited state on the premises destroyed, and that there was no contrivance in the way of a netting to arrest the escape of fire from the smokestack, and therefore there was no check on the size of the sparks which might escape. There was also evidence tending to show that the danger might have been avoided by using engines of such power that they need not be worked to their utmost capacity. In this case there is no evidence tending to show that this motor engine was not of sufficient size and capacity to operate the train to which it was attached. On the contrary, the testimony shows conclusively that the engine was not worked to its full capacity, and was entirely sufficient to do the work in the service in which it was employed.

The second request was fully covered bv the instructions of the court. The court instructed the jury as follows:

"If you should determine that the evidence satisfies you that the plaintiff has proved the communication of the fire to the building from sparks or cinders from this motor engine, then the burden of proof is shifted upon the defendant, and he must overcome the prima facie case,—that presumption. He must show that there was no defect in the engine; that there was no negligence in the manner of its operation by defendant's employés; and that they were skillful men. In other words, he must prove that there was no negligence, within the definition of the term as I have described it to you. And I told you that negligence was the failure to do something which an ordinarily prudent man under the circumstances would do, or doing something which an ordinarily prudent man under the circumstances would not do. This is the definition of negligence; and it is necessary for the defendant company to show that it used all reasonable and proper care, caution, diligence, and skill in the construction of the motor engine, and that at the time of the fire it was skillfully operated. That is all the railroad company would be required to do,—to use all due and reasonable care and caution in providing appliances for the prevention of the emission of sparks and cinders from the locomotive, and skill in the management of it by its operators at the time."

"Of course, when a railroad company equips its engines with appliances for the prevention of the emission of sparks and cinders, it must have the apparatus complete as far as the appliances used for the prevention of the escape of sparks and cinders from its smokestack are concerned. It cannot comply with the law by merely having the form of the appliance in common use, but it must have the details complete. Everything must be properly constructed, and the appliances must be perfect in form. It must exercise reasonable care and skill in using these expedients for the prevention of fire, and use such expedients as are in common use for the prevention of fire being emitted from its smokestack."

We think these instructions were as favorable to the plaintiff as he could properly ask. There being no error in the record, the judgment of the circuit court is affirmed.

Ex parte DAWSON.

(Circuit Court of Appeals, Eighth Circuit. October 5, 1897.)

No. 908.

1. INTERSTATE EXTRADITION—EXTRADITION WARRANT—SUFFICIENCY OF RECITALS.

An extradition warrant reciting that it is issued pursuant to the requisition of the governor of another state, that said requisition is accompanied by a copy of the indictment against the party demanded, and that said copy of the indictment is certified by the governor of the demanding state to be "in due form," is sufficient, under the statutory requirements of section 5278, Rev. St. U. S.; the expression, "certified to be in due form," being equivalent to, and in substantial compliance with, the statutory words, "certified as authentic."

2. SAME—HABEAS CORPUS.

A federal court will not, on habeas corpus, discharge a prisoner charged with the violation of the criminal laws of one state, and apprehended in another, where it appears by the recitals contained in the warrant by virtue of which he was arrested, and by the record of the extradition proceeding, that no right, privilege, or immunity secured him by the constitution and laws of the United States will be violated by remanding him to the custody of the agent of the demanding state. And the court will seek to uphold the actions of the executive, provided they appear to be in good faith.

Appeal from the District Court of the United States for the Western District of Arkansas.

W. A. Falconer, for appellant.

Before BREWER, Circuit Justice, SANBORN, Circuit Judge, and RINER, District Judge.

RINER, District Judge. In November, 1896, L. P. Dawson filed his petition for a writ of habeas corpus in the district court for the Western district of Arkansas; alleging that he was unlawfully restrained of his liberty by one M. C. Rushin, contrary to the constitution and laws of the United States. The writ was issued, and on the return day the respondent made his return thereto, as follows:

"Comes M. C. Rushin, and produces herein the body of Oliver P. Jones, who describes himself in the petition herein as L. P. Dawson, and states to the court that he has the said Dawson, alias Jones, in his custody under and pursuant to the following authority: The said Oliver P. Jones was indicted by the grand jury of Marion county, in the state of Georgia, for the crime of murder, and became a fugitive from the justice of the state of Georgia. That the governor of the state of Georgia appointed your respondent, M. C. Rushin, agent of the state of Georgia, to arrest, receive, and convey back to the state of Georgia the aforesaid Oliver P. Jones, and, pursuant to such appointment [your respondent], proceeded to the state of Arkansas with a requisition from the governor of the state of Georgia to the governor of the state of Arkansas for the arrest and surrender to said Rushin of the said Oliver P. Jones, and accompanied therewith a copy of the indictment, certified by the governor of Georgia to be in due form. That pursuant to said requisition the governor of the state of Arkansas did on the 12th day of November, 1896, issue his warrant to the sheriff of Sebastian county, commanding him to take into custody the body of Oliver P. Jones, and deliver him to this respondent, M. C. Rushin; and pursuant to his duty in the premises this respondent, on the 13th day of November, 1896, received said Oliver P. Jones from the custody of the sheriff of Sebastian county, and is detaining him under said authority, and desires to proceed forth-

with with him to the state of Georgia, and would have proceeded ere this but for the writ from this honorable court. Your respondent herewith tenders his appointment as agent of the state of Georgia, and the warrant of the governor of Arkansas, a copy of which is attached, and the return of the sheriff of Sebastian county, and prays that he be discharged herewith, and permitted to proceed with his duties, as agent of the state of Georgia, in conveying said Oliver P. Jones to be delivered to the justice of that state.

"M. C. Rushin."

"State of Arkansas to the Sheriff of Sebastian, Greeting: Whereas, W. Y. Atkinson, governor of the state of Georgia, has, by his writ or requisition, accompanied by a copy of indictment in said state of Georgia, demanded the body of Oliver P. Jones, charged in the said state with the crime of murder, and said governor has certified that the accompanying indictment against said Jones is in due form: To the end, therefore, that justice may be done in the premises, you are hereby commanded to take the body of said Oliver P. Jones, and safely keep, and that you cause him to be delivered to M. C. Rushin, the agent of the state of Georgia, to be taken to said state, that he may be dealt with as law and justice may require. And all sheriffs, coroners, constables, and other officers to whom this writ may be shown are enjoined herein to aid and assist you in the execution thereof; and do you make due return of this writ.

[Great Seal.] "In testimony whereof, I have hereunto set my hand, and caused to be affixed the great seal of the state of Arkansas. Done at the city of Little Rock this the 12th day of November, in the year of our Lord one thousand eight hundred and ninety-six.

James P. Clarke,
"Governor of Arkansas.

"H. B. Armistead,
"Secretary of State."

"State of Arkansas, County of Sebastian.

"I certify that, having the within-named Oliver P. Jones in my custody, I did on the 13th day of November, 1896, deliver his body to the within-named M. C. Rushin, as herein commanded. T. W. Bugg, Sheriff."

To this return the petitioner demurred, and the demurrer was overruled. The petitioner then filed a reply to the return, and on the hearing the issues of fact raised by the reply were determined in favor of the respondent, and the petitioner was remanded to the custody of the respondent. Thereupon he prayed an appeal to this court.

The only assignment of error urged upon the attention of the court by the petitioner as a ground for reversing the order of the district court is in the following words:

"It does not appear therein [by the return or the warrant of the governor of Arkansas] that the copy of the indictment accompanying the requisition of the governor of Georgia had been certified by said governor of Georgia to be duly authenticated."

While it is not necessary to the sufficiency of an extradition warrant, when attacked on habeas corpus, that it shall set out in full a copy of the indictment or affidavit upon which it is based, or that it be accompanied by such affidavit or indictment, yet a warrant for the arrest and return of the fugitive criminal must recite or set forth, in substance, the evidence necessary to authorize the state executive to issue it; and, where the requisition, and the copy of the indictment accompanying it, are not made a part of the return, and the warrant alone, as in this case, is before the court, it must show (1) that a demand by requisition has been made for the party in custody, as a fugitive from justice; (2) that the requisition was accompanied by

a copy of an indictment or affidavit charging the commission of an offense; (3) that the copy of such indictment or affidavit was certified by the governor of the state making the demand as authentic. Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291; Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148; In re Doo Woon, 18 Fed. 898; Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968; People v. Donohue, 84 N. Y. 438. The sufficiency of the warrant issued by the governor of Arkansas for the arrest and return of the petitioner is not questioned, except in one particular. It is insisted that the recital in the warrant that the governor of Georgia "has certified that the accompanying indictment against said Jones is in due form" does not comply with the requirements of the statute, and is therefore illegal and void. Section 5278 of the Revised Statutes of the United States makes it the duty of the executive authority of the state to which a person charged with crime has fled to cause the arrest of the alleged fugitive from justice whenever the executive authority of any state or territory demands such person as a fugitive from justice, and produces a copy of an indictment found or affidavit made before a magistrate of any such state or territory, charging the person demanded with having committed a crime therein, certified as authentic by the governor or chief magistrate of the state from whence the person so charged has fled. The question presented for our determination is whether the recital, certified to be "in due form," is equivalent to a recital that the copy of the indictment accompanying the requisition was "certified as authentic," and therefore a substantial compliance with the requirements of the statute. The rules by which this question must be determined are the rules applicable to the construction of statutes by which the intention of the lawmaker is to be arrived at. As between the states of the Union, the whole subject of extradition is regulated and governed by positive law. The law of congress was passed in conformity to the provisions of the federal constitution upon the subject, and we must suppose that the object of the law was to furnish the means by which the constitutional provision could be fairly and impartially carried into effect between the states. It is a copy of the indictment found or affidavit made charging the person demanded with having committed a crime that is required to be certified as authentic by the statute. The statute makes this requirement because otherwise the executive of a state upon whom the demand is made might be imposed upon by what purported to be a true copy of such an indictment, but which in fact might be a spurious copy. The genuineness of the copy, however, is not to be ascertained by a resort to any technical rule for ascertaining the fact; nor need the fact be made to appear in any set form of words, or even in the words of the statute requiring the authentication. All that can be required is that the language employed by the demanding governor, in the requisition, understood in its ordinary meaning, shall show that the copy of the indictment upon which the requisition is made is genuine. The language of the recital in the warrant is, certified to be "in due form"; and it is now insisted by the petitioner that this is not the equivalent of the statutory words, "certified as authentic," and means only that the indictment, according to the established method of ex-

pression or practice in Georgia, regularly and legally charges a crime. We cannot adopt this construction of the recital. The language of the recital, fairly construed, we think, is the equivalent of the statutory words, and is a substantial compliance with the act of congress which requires the copy to be "certified as authentic," for the reason that it negatives the idea that the copy is spurious or fictitious, and shows that it is genuine, which is the only purpose of this provision of the statute.

That the federal courts have jurisdiction in cases of interstate extradition has never been questioned. Undoubtedly the courts of the United States have jurisdiction, on habeas corpus, to discharge from custody a person who is restrained of his liberty in violation of the constitution or laws of the United States, although he may be held under state process for an alleged offense against the laws of such state. The right of one state of the Union to demand from another the delivery of a person who has fled from justice depends upon the constitution of the United States, and the mode of proceeding and the evidence necessary to support such demand are prescribed by the statute of the United States. It therefore follows that, when the executive of a state, upon whom a demand has been made for the surrender of a fugitive from justice, causes, by virtue of his warrant, the arrest of the person charged as a fugitive from the justice of another state, the prisoner is in custody under color of authority derived from the constitution and laws of the United States, and is entitled to invoke the judgment of its courts as to the legality of his arrest. A federal court will not, however, on habeas corpus, discharge a prisoner charged with a violation of the criminal laws of one state, and apprehended in another, where it appears by the recitals contained in the warrant by virtue of which he was arrested, and the record of the extradition proceedings, that no right, privilege, or immunity secured to him by the constitution and laws of the United States will be violated by remanding him to the custody of the agent of the state demanding him. While the liberty of the citizen is, of course, always to be carefully guarded, yet, when the executive of a state in which the alleged fugitive from justice is found is satisfied of the integrity of the proceedings to secure his surrender, the federal courts will not be technical in seeking excuses for the purpose of overthrowing the decision of such executive, and discharging the alleged fugitive. They will rather seek to uphold any such proceedings carried on in apparent good faith. The order of the district court remanding the appellant to the custody of the respondent, as the agent of the state of Georgia, is affirmed.

CONLEY v. MARUM.

(Circuit Court, S. D. New York. November 12, 1897.)

PATENTS—INVENTION—TOBACCO WRAPPERS.

The Conley patent, No. 526,517, for an improvement in wrappers for tobacco, consisting of a combined paper and foil wrapper made by securing the sheet of foil to the sheet of paper, not over the whole meeting surfaces, but only in narrow zones, leaving the remaining portions of the meeting sur-

faces disunited, *held* void on demurrer for want of patentable invention appearing on the face thereof.

This was a suit in equity by John Conley against Simon C. Marum for alleged infringement of a patent for an improvement in wrappers for tobacco. The cause was heard on demurrer to the bill for want of patentable invention.

Arthur v. Briesen and H. M. Turk, for complainant.

Harry E. Knight and George H. Knight, for defendant.

COXE, District Judge. This is an infringement suit based upon letters patent, No. 526,517, granted to the complainant September 25, 1894, for an improvement in wrappers for tobacco. The alleged invention consists in a combined paper and foil wrapper made "by securing the sheet of foil to the sheet of paper, not over the whole meeting surfaces, but only at small areas thereof." The claims are as follows:

"(1) A wrapper consisting of sheets of paper and foil laid together face to face secured to each other at small portions of their meeting surfaces only, leaving the remaining portions of said meeting surfaces disunited, substantially as described.

"(2) A wrapper consisting of sheets of paper and foil secured together by narrow zones of adhesive material c, d, substantially as described.

"(3) As a new article of manufacture, a wrapper consisting of separate pieces of foil and paper united together by means of an adhesive substance applied to portions only of their meeting surfaces, the portions of the sheets of said compound wrapper not in contact with such adhesive substance being composed solely of the separate pieces of foil and paper, substantially as described."

The defendant demurs upon the ground that the patent shows upon its face that it is void for lack of novelty and invention. That this question may be presented by demurrer is now firmly established. Locomotive Works v. Medart, 158 U. S. 68, 84, 15 Sup. Ct. 745; Richards v. Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831; Id., 159 U. S. 477, 16 Sup. Ct. 53; Button-Fastener Co. v. Schlochtmeyer, 69 Fed. 592; Cleveland Faucet Co. v. Vulcan Brass Co., 72 Fed. 505. Indeed, the practice of disposing of this question in limine is not only permitted but encouraged by the courts. Strom Manuf'g Co. v. Weir Frog Co., 75 Fed. 279. Patent litigation is so expensive, dilatory and, ofttimes, vexatious, the record frequently containing a mass of irrelevant matter not even alluded to at the argument, that it would seem to be in the interest of both parties that the question of patentability should be determined before the flood gates of testimony are opened. In plain language the patent is for a sheet of tin foil and a sheet of paper stuck together by paste which does not cover the entire surface of the sheets. A person who pastes these sheets together at the four corners only, infringes the first and third claims. Should he adopt the plan which, for many years, has been familiar to compilers of scrap books, and which in one of its well-known varieties bears the name of a popular American humorist, he would infringe all the claims. What is referred to in the patent as "a narrow zone of adhesive material" may be created by drawing a brush of mucilage across the paper in a straight line. The patentee did not originate the use of tin foil

as a wrapper for tobacco, or its use in connection with a sheet of paper, or its use when pasted to a sheet of paper. All this appears from the specification. It can hardly be said that he was the first to discover that it is more economical to use a small amount of paste than a large amount or that paper covered with paste is liable to become damp; although the extravagant use of paste by former operators and the evils which follow from the humidity thus occasioned are some of the "difficulties" pointed out in the specification as having been "overcome" by the patentee when his mind finally and securely grasped the idea of using less paste. The first form of wrapper described in the specification showed the patentee how to avoid the wrinkled, stiff appearance which he deemed disadvantageous, the second form showed him how to avoid the difficulties occasioned by handling the sheets of tin foil and paper separately. He simply utilized what was plainly shown in the structures which he describes. Every advantage pointed out by him is found in one or the other of the prior wrappers. It cannot be that where two sheets have been used to produce a given result, both when pasted together and when not so pasted, a valid patent can issue to one who produces the same result with the identical sheets, simply because he uses less paste or applies it in a different manner or to a smaller surface. The wrapper of the patent is used in all respects as were the old wrappers. The alleged advantages are due to the method of applying the paste and that method is so old and simple that nothing but ordinary common sense was needed to apply it. It is safe to assert that there is not in the land a lawyer, editor or bookbinder of mature age who has not pasted papers together with mucilage applied in zones and spots. This method is probably as old as the use of paper and paste; certainly it was venerable in 1893 when the application in question was filed. The demurrer is allowed.

THE LAURA.

NORIEA et al. v. CASTELLANO.

(Circuit Court of Appeals, Fifth Circuit. June 1, 1897.)

No. 573.

SALVAGE COMPENSATION.

An award of $400 for the services of a tug, consuming 16 hours, in pulling a bark from the mud at the mouth of one of the passes of the Mississippi river, said amount to go, five-eighths to the tug's owners, and the remainder to the crew, in proportion to their wages, *held*, on appeal, to have been proper both as to the amount and its distribution.

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

This was a libel in admiralty by Nicholas Noriea and others, members of the crew of the towboat Elmer E. Wood, against the Italian bark Laura and her cargo, to recover compensation for alleged salvage services. Subsequently the Gulf Towing Company, a corporation owning the towboat Elmer E. Wood, filed an intervening libel also set-

ting up a claim of salvage against the bark in respect to the same transaction. The services in question consisted of a trip by the tug from Port Eads to where the bark was ashore in the mud of Pass L'Outre, and pulling that vessel off, and towing her from there to Port Eads; the time consumed being 16 hours. The claimants of the bark set up an alleged agreement whereby the tug was to receive $25 an hour if successful. The time consumed in the operation was 16 hours, and the district court gave a decree for the sum of $400, of which five-eighths, or $250, was awarded to the owner, and the remaining $150 was divided among the crew in proportion to their salaries or wages. From this decree several of the original libelants appealed, an order of severance having been granted in respect to the others and to the intervening libelant.

John D. Grace, for appellants.

Girault Farrar, Hunter C. Leake, and Gustave Lemle, for appellee.

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

PER CURIAM. The errors assigned relate wholly to the proper exercise of the judgment and discretion of the trial judge in determining the amount of salvage and the apportionment of the same between salving vessel and crew. As we are not prepared to say that in regard to either there was any violation of well-recognized admiralty rules and principles, the decree appealed from is affirmed.

THE BULGARIA.

(District Court, N. D. New York. February 20, 1897.)

1. COLLISION—ELEMENTS OF DAMAGE—TOWAGE.
   The expense of towing a vessel injured by collision to a place where it was necessary to take her in order to repair her injuries, is recoverable as part of the damages.
2. SAME—COST OF SURVEY.
   The expense of a survey of a vessel injured by collision is recoverable as part of the damages against the vessel in fault.
3. SAME—DEMURRAGE—DETENTION DURING REPAIRS.
   A vessel injured by the fault of another is entitled as part of her damages to recover, as demurrage, the amount she would have earned during the period necessarily occupied in repairs, less the expense of earning it. In ascertaining this amount, where there is no charter party or market price, it is proper to take as a basis the average net profits during the trip of the collision and the trips immediately preceding and succeeding it.
4. SAME—INTEREST.
   Interest is allowable on the various items of damage recoverable in a collision case.
5. ADMIRALTY—EXCEPTIONS TO COMMISSIONER'S REPORT—OBJECTIONS TO EVIDENCE.
   Where a witness having charge of a vessel's books, testifies before a commissioner as to facts which might be shown by the books themselves, and such evidence is objected to only on the grounds that it is irrelevant and immaterial, the court, on the hearing of exceptions to the report, will not exclude the evidence as incompetent because the books were not produced.

This was a libel in rem by the Union Transit Company against the steamer Bulgaria to recover damages sustained by the steamer W. H. Stevens in collision with the Bulgaria. The court heretofore, on June 12, 1896, rendered an opinion finding the Bulgaria solely in fault. 74 Fed. 898. The cause is now heard on exceptions to the commissioner's report on the question of the amount of damages. The commissioner allowed damages as shown in the following schedule attached to his report:

Schedule A.

Tonnage.					Net Earnings.		
Trip.	Days.	West Bd.	East Bd.	Total.	Per Trip.	Per Day.	8¾ Days.
2	11	153	1,227	1,380	$1,188 62	$108 06	$ 945 53
3	14	621	1,258	1,879	2,658 59	191 85	1,668 68
4	13½	626	1,295	1,921	440 91	32 62	285 42
		1,400	3,780	5,180	$4,288 12	$332 53	$2,899 63

Demurrage—Average net earnings for 8¾ days		$ 966 54
Interest thereon from June 28, 1895, to date of report,—1 year, 6 months, 17 days		89 64
Add time of crew while repairs were being made:		
Captain, 8¾ days, at $1,100 season (7½ mo.), $157 mo.	$42 70	
Chief engineer, 8¾ days, at $103 per mo	30 00	
2nd engineer, 4½ days, at $63 per mo	9 45	
1st mate, 2½ days, at $74 per mo	6 18	
2nd mate, 2½ days, at $56 per mo	4 67	
2 wheelsmen, 4½ days, at $31 per mo	4 64	
1 watchman, 2 days, at $27 per mo	1 80	
1 cook, 2½ days, at $50 per mo	4 17	
1 porter, 1½ days, at $20 per mo	1 00	
4 deckhands, at $15 per mo	2 00	
		106 61
Interest thereon from Nov. 27, 1895, to date of report,—1 year, 1 month, 18 days		7 19
Bill of Maytham Tug Line		42 00
Interest thereon from July 24, 1895, to date of report,—1 year, 5 months, 22 days		3 73
New line	$24 00	
Survey	25 00	
		49 00
Interest thereon from November 27, 1895, to date of report,—1 year, 1 month, 18 days		3 34
Bill Union Dry-Dock Co		782 52
Interest thereon from December 18, 1895, to date of report,—1 year, 27 days		50 44
		$2,101 01

All of the above interest at 6 per cent. per annum.

Norris Morey, for libelant.
Harvey D. Goulder, for respondent.

COXE, District Judge. I have read all the testimony and have reached the conclusion that all of the principal findings of fact in the report of the learned commissioner are correct.

Collision Damages. The amount found due the libelant for the

damages occasioned by the collision appears to be a conservative award. It represents the sum actually paid for repairs made necessary by the collision. That these repairs were necessary and the amounts paid reasonable sufficiently appears. Indeed, a much larger bill might have been incurred for the reason that in the hurry to put the vessel again at work several items of injury were hastily and not permanently repaired. Surely the testimony was sufficient to prove a prima facie case. The America, 4 Fed. 337.

Towage. The allowance of $42 for towage was proper. It appears that it was absolutely necessary to tow the Stevens as stated in the proof in order to repair the injuries resulting from the collision. The bill for these services was rightly allowed. The Fannie Tuthill, 17 Fed. 87.

Hawser. The proof submitted is insufficient to sustain the allowance of $24 for a new hawser. This is hardly disputed, but the libelant contends that the proof at the trial shows that a six-inch hawser was parted by the collision, and the brief states that the amount allowed represents the difference between the value of the old line and the new. The evidence taken at the trial has not been submitted, and after careful search I am unable to find any testimony supporting the statement of the brief. As the matter is now presented the finding rests solely upon testimony of a witness who had no personal knowledge of the collision. In any view, assuming that evidence at the trial shows all that is asserted by the libelant, it would still seem that there is insufficient proof upon which to charge the respondent with "forty-five fathoms of six-inch manilla hawser."

Survey. The item for the survey was properly allowed upon the authority of The City of Chester, 34 Fed. 429; New Haven Steamboat Co. v. Mayor, etc., 36 Fed. 716.

Wages of Crew. The latter case is also authority for allowing the sum of $106 paid the crew of the Stevens while she was repairing. The fact of the payment of this sum and the necessity therefor is sufficiently established by the libelant and is wholly uncontradicted by the respondent.

Demurrage. The Stevens was delayed at Buffalo 8¾ days during the season of navigation. This is undisputed. She is entitled to recover as demurrage what she would have earned during this period, less the expense of earning it, namely, her net profits. This proposition is also conceded. In arriving at this amount the commissioner ascertained the earnings of the Stevens by taking an average of her net profits during the trip of the collision and the trips immediately preceding and succeeding. He fixed the amount at $966.54 or $110 per day in round numbers. The court might almost take judicial knowledge of the fact, based upon a large number of cases in which the per diem value of similar vessels has been in issue, that this award is not exorbitant. If it were the respondent would have no difficulty in proving the fact. The earnings of the Bulgaria, during the same period, would furnish some criterion at least by which to estimate those of the Stevens and detect any attempt at fraud. The respondent has remained silent. There is not a word disputing the libelant's testimony.

The net earnings of the Stevens during the three trips in question were established by the testimony of the secretary and treasurer of the Union Transit Company, the libelant. He testified that he had charge of the disbursements and the receipts of freight during the time in question and that the books relating thereto were kept under his supervision and direction. It is now objected that his evidence is incompetent because the books were not produced. This objection was not taken before the commissioner; if it had been he could and probably would have ordered the production of the books. The only objections taken were that the evidence would not furnish a proper measure of damage and that it was hearsay and immaterial. Subsequently a motion to strike out was made upon the ground that the testimony was irrelevant and immaterial. The absence of the books was not referred to until the witness was recalled and then only when a motion was made to strike out certain testimony. There being no market price and no charter party it would seem that the method adopted by the libelant of proving the value of the vessel was the only one that could be resorted to. The Potomac, 105 U. S. 631. That the Stevens was in demand, that she would have received a cargo immediately but for the collision, is conclusively proved. I am inclined to think that a witness having the experience and knowledge shown by Mr. Meyers is competent to state what amount his vessel earned upon a given trip without producing all the papers and entries relating to her receipts and disbursements. But it is not necessary to decide this question for the reason that he was not requested to produce the books and papers at any time, nor was the question suggested until after the testimony had all been taken.

Interest. The commissioner was right in allowing interest. The America, 11 Blatchf. 485, Fed. Cas. No. 285; New Haven Steamboat Co. v. Mayor, etc., supra.

It follows that, after deducting item of $24 for the new line and interest thereon, the report should be confirmed and the exceptions overruled.

THE EARNWOOD.

FRANKLIN SUGAR-REFINING CO. v. THE EARNWOOD.

(District Court, E. D. Pennsylvania. July 2, 1897.)

1. SHIPPING—DAMAGE TO CARGO—INSUFFICIENT DUNNAGE.
   A ship which neglects to provide dunnage for sugar cargo, in consequence of which the bags in the lower tier are allowed to rest on the floor, in the moisture caused by drainage from above, is liable for the damage, including both natural drainage and such as arises from soaking by sea water.

2. SAME—ASCERTAINMENT OF DAMAGES—SALE OF GOODS.
   The value of goods damaged through neglect of the ship is best determined by a public sale thereof within a reasonable time after arrival. Where a cargo of sugar was delivered on March 12th, and the damaged portion was sold on April 3d, *held*, that the sale was within a reasonable time, and that intermediate fluctuations of the market for sound sugar were not to be regarded.

In Admiralty.

This was a proceeding in admiralty by the Franklin Sugar-Refining Company against the steamship Earnwood, in which the following state of facts appeared: On or about the 27th day of January, 1894, Francke Hijos & Co., the vendors of libelant, entered into charter party with the Earn-Line Steamship Company, time charterers of the said steamship Earnwood, for the transportation of a cargo of sugar from a port in Cuba to Philadelphia, at the rate of freight therein mentioned. Bills of lading were signed and delivered by the master for 20,523 bags, shipped in apparent good order and well conditioned. The cargo of sugar after being shipped from Cuba was duly purchased by libelant, who became the owner thereof, and to whom the said cargo was to be delivered at the port of Philadelphia. The steamship sailed from the ports of Cardenas and Matanzas in Cuba, where she had taken on board the said cargo, and subsequently arrived at the port of Philadelphia, on the 7th day of March, 1894, and was unloaded of her cargo on the 12th day of March. Of the said cargo of sugar, it was then claimed by the libelant that 821 bags were greatly stained and damaged, owing to the neglect on the part of the ship to provide proper dunnage under the cargo in the hold, and between the decks. Appraisement and surveys were made by the direction of both the libelant and respondent, separately, which differed both as to the condition of the cargo and the stowage of the same. The bags which the libelant claimed were damaged, were placed by the libelant in the hands of a competent auctioneer, who after due notice, by advertising, sold the same at public sale, on April 3d following, by which time the market price of sugar had fallen. This proceeding was then begun by the libelant to recover damages which had, it was alleged, accrued to it by the sale of the damaged sugar, the libelant having paid the respondent in the meantime the latter's freight, reserving the right to bring the present action. After proofs were taken by each party, the case was argued upon its merits before BUTLER, J., who subsequently delivered the following opinion:

"The water tanks had covers, and an open space existed between them and the floor of the hold. The sides of the vessel were battened so as to prevent cargo from resting directly against them. The only ground of complaint is that the vessel was not provided with dunnage under the cargo in the hold, and the between-decks. No such dunnage was provided; and the failure to provide it is just cause for complaint. The drainage from the sugar pressed down to the floors and injured so much of the sugar as was contained in the lower tier of bags. That such drainage is usual and unavoidable, the evidence does not leave in doubt. Even with proper storage, the sugar will be more or less affected by sweating, and for the loss thus sustained there is, of course, no liability; but with the lower tier of bags placed immediately on the floor, precluding the circulation of air, and subjected to the drainage from above, this cargo was rendered liable to injury which should have been avoided. The use of such dunnage is customary, and it should have been employed in this instance. The case differs in some circumstances from Robinson v. Refining Co., 70 Fed. 792, but in principle is similar. For the loss resulting from the failure to use it in this instance, the respondent is liable. The suit must therefore be sustained, and a commission be appointed to ascertain the extent of this loss."

Accordingly, the case was referred to Francis C. Adler, Esq., as commissioner, who after hearing testimony, in pursuance of his appointment, reported that 821 bags of sugar, as claimed by the libelant, which had been stowed on the lower tier in the hold, had been damaged by neglect on the part of the ship to provide proper dunnage. The damage to the sugar, the commissioner found, was brought about by the presence of sea water, which could have been avoided had proper care been exercised. The commissioner reported that from March 12th, to March 19th, the damaged bags of sugar were held by the libelant at the special order of the respondent. He further found that the best method of ascertaining the value of the damaged sugar was by a public sale of the same within a reasonable time after the arrival and delivery of the goods, and that the sale which had been made of them, on April 3d, was in every particular properly conducted, and was within a reasonable time after the arrival. Upon the question of what damages, if any, libelant was entitled to recover, the commissioner reported that the market value of sound sugar which upon the day of delivery, March 12th, was $3\frac{3}{16}$ cents per pound, had fallen to $2\frac{7}{8}$ cents per pound on the day of the sale, and that on the latter day, the damaged bags

were sold for 2½ cents per pound. He also found that 324 pounds of sugar had been lost by rehandling. In his opinion, the proper measure of damages for the injury to the sugar was the difference between the market value of sound sugar on the day of delivery, and the market value of damaged sugar on the day of the sale, together with an allowance for the 324 pounds lost by rehandling, for wharfage, and for auctioneer's expenses. This sum the commissioner ascertained to be $2,131.81. The commissioner, however, reported that inasmuch as his authority was confined strictly to the ascertainment of the damage done to the lower tier of bags by the drainage from above, or from want of circulation of air, due to the lack of dunnage, he was compelled to report that the libelant's evidence fell short of that, because in his opinion the damage was due to the presence of salt water. He therefore reported that the libelant was not entitled to a recovery, unless the court be of a different view than that expressed in its opinion (supra); if the court, however, was of opinion that the libelant was entitled to recover under the circumstances, he reported that it was entitled to recover the sum of $2,131.81.

Exceptions were filed to the commissioner's report by both parties.

J. Rodman Paul, for libelant.

I. The ordinary rule for the measure of damage in cases of goods injured in transit is the difference between the sound and damaged goods, in value, at the time and place of arrival. Hale, Dam. p. 254; Suth. Dam. § 933; Sedg. Dam. (1891) § 845 et seq.; The Mangalore, 23 Fed. 463; Manufacturing Co. v. The Guiding Star, 37 Fed. 641. This is admitted to be the general rule. Where, however, the relation of vendor and vendee exists between shipper and consignee, the contract price of the sound goods forms the basis of value, rather than the market price. In the present case the contract price and the market price on the day of arrival coincided, so that this element need not be considered here.

II. But how is the value of the damaged article to be determined? There are only two methods: First, the views and opinions of experts, which, as is well known, are apt to differ widely, and, in the final result, to inflict hardship upon the carrier, since there are always to be found those who would not wish the damaged article at any price. As Judge Morris said in the case of Hamilton v. The Kate Irving, 5 Fed. 634: "It may be that damaged goods of the particular kind are not often dealt in. It is often difficult to find merchants who will buy unmerchantable goods at any price, although to the consumer they may be as serviceable as before they were damaged. In this case one of the principal iron merchants called as a witness said he would not have taken the damaged cotton ties at any price." And yet, on a sale, these ties brought not far below their sound value. But the uncertainty and the unsatisfactory character of expert testimony is sufficiently well known, and it is unfair that either party should be subjected to it, especially the innocent receiver of the goods, who should be left in no doubt as to his proper course in order to liquidate or determine the exact amount of damage. The only other, and the universally preferred, method of ascertaining the value of damaged articles, is a public sale, after due advertisement, and opportunity for bidders to be present. In Henderson v. The Maid of Orleans, 12 La. Ann. 352, the court said, after stating the general rule for the measure of damage: "That difference in value should have been ascertained by a public sale to the highest bidder. Greenwood v. Cooper, 10 La. Ann. 796. It was in the power of plaintiffs to have subjected them to this test, as the clocks have always remained in their possession in the warehouse. It was their duty to have done so." In the case of The Ship Thirlmere, No. 35 of 1894, in this district (unreported), the precise point was fully discussed by the learned commissioner, Mr. Morton P. Henry, and his report was confirmed by the court. There a cargo of chalk arrived, somewhat damaged by manganese dust. The consignee refused to accept it, although it had been delivered at his yard; merely notifying the shipowner that it was held subject to his order, and requesting him to remove it. On the assessment of damages before the commissioner, the chalk was still in the possession of the libelant, and he attempted to prove the extent of the damage by the opinions of various experts who had examined the chalk. The commissioner ruled that a sale was the only proper and satisfactory way of ascertain-

ing the character and extent of the damage. The commissioner further held that a month was a reasonable time within which the sale should have taken place, and allowance was made for storage, expenses, etc., only up to the period of one month after the arrival of the damaged chalk. The commissioner here has found as a fact, and it is not seriously disputed, that, for the purpose of securing a proper public sale, the time intervening between the arrival of the Earnwood and the date of sale (between two and three weeks) was not unreasonable, in view of the necessity of advertisement, the delay occasioned by the attachment for freight, etc. Indeed, precipitous and hasty sales have been properly condemned by the courts. In The Marinin S., 28 Fed. 664, a cargo of licorice was damaged to some extent by iron-ore dust, which might have been prevented by sufficient dunnage. The whole lot of licorice was at once sold at auction, after survey, without attempting to separate the bundles that were sound from those that were injured. "To throw a large quantity of goods," said Judge Brown, "on the market, for sale at auction as damaged goods, upon such slight examination, at the assumed risk and loss of the vessel, appears to me to be as unreasonable and unjust as it would be ruinous in its results to carriers. Looking to the just protection of the interests of carrying vessels, as well as of consignees, a court of admiralty cannot support any such unreasonable and precipitate action. The good bundles should have been separated from the bad, and the carrier charged with only the damages to those actually injured, togetner with the expense of the examination and separation, when that course is practicable, and for the evident interest of all concerned. The master is entitled to the same protection against unreasonable and indiscriminate sales by the consignee in the port of discharge on the vessel's account and risk, that is imposed on the master, in favor of the owner, on a sale by the master in a foreign port." The sale, therefore, must be deliberate, with a careful regard for the rights of all concerned. This requires time, and the time in the present case was not excessive.

III. A public sale being not only the best, but perhaps the proper, method of determining the value of damaged goods, and such sale, in order to be fair, requiring the lapse of a certain time after arrival of the goods, the intermediate fluctuations of the market are not to be regarded in liquidating the value of the damaged goods as of the date of arrival. Any other rule would put upon the innocent receiver of goods the risk of the market, and compel him to abandon the best and fairest method of ascertaining the damage, and rely upon the opinions of experts, thus introducing into the commercial world an unfortunate element of doubt as to the course of action to be pursued in each case. The authorities sustain the position that intermediate fluctuation of the market for sound goods between arrival and sale of damaged goods should not be regarded in determining the value of the latter, as of the prior date of arrival. In Collard v. Railway Co., 7 Hurl. & N. 77, the carrier was held liable for damage to certain hops consigned to a purchaser, and rejected by him. The shipper, to whom they were returned, dried the same hops, which were rendered as good as ever for actual use, but their market value was depreciated. A sale of the hops was then had, but at that time the market price of hops had considerably fallen from what it was at the time when they should have been delivered to the consignee. It was held by the court of exchequer that the plaintiff "was entitled to recover as damages the difference between the market price on the day when the hops were sold, and the day when they ought to have been delivered." Said Baron Channell: "It must be ascertained what they were worth at the time they became available to the plaintiff as marketable goods, contrasted with what they would have been worth if the defendants had performed their contract. I do not know what other test can be applied for ascertaining the damage." It will be observed that in deciding this case the court did not consider how far more speedy action on the part of the plaintiff might have brought the damaged hops into the market when higher prices were ruling for sound hops. The sale was merely the reasonable method of liquidating and ascertaining the real value of the damaged hops, irrespective of intermediate changes of the market. A case very much in point was decided by Judge Wales in 1888. In Morrison v. Steamship Co., 36 Fed. 569, the syllabus reads as follows: "A cargo of prunes, which should have been delivered not later than April 28th, was, by the negligence of respondent, not delivered

until June 11th, and then in a damaged condition. They were sold on July 8th, on which day the market price for sound prunes was 6 cents per pound, but on account of their damaged condition a portion of the prunes brought only 5½ cents. The market price on April 28th, when they should have been delivered, was 5 cents. Held, that libelant was entitled to recover the difference between the market price on the day of delayed delivery and the price for which the damaged prunes sold. Respondent cannot be allowed to escape liability by reason of the advance in price in the interval between the dates of required and actual delivery. Respondent has no cause to complain of the delay in making sale of the damaged prunes. It was the libelant's duty to prevent a sacrifice, and to obtain the best market price, and it does not appear that an unreasonable length of time was taken to do this." It will be observed that the sale in this case of the damaged prunes took place nearly a month after arrival, and the price of prunes had considerably advanced. It might equally well have been assumed there, as here, that the price of the damaged prunes would have been less on the day of arrival than on the day of sale, supposing the ratio of values between sound and damaged fruit to be always the same, yet the court did not so estimate the value of the damaged fruit, but took the actual proceeds of sale as the only test, and awarded the libelant "the difference between the market price of sound prunes on June 11th, the day of delayed delivery (5¾ cents), and the price for which the damaged prunes sold on the 8th of July (5¼ cents)." See page 571. On the question of the time elapsing before the sale, Judge Wales said: "Nor have the respondents any just cause to complain of the postponement of the sale of the damaged prunes. The interval of time that elapsed between the day of delivery and the day of sale was not long. It was the duty of the libelant to prevent a sacrifice of his property, and to obtain the best market price, and this course was equally advantageous to the respondents; for, if the damaged prunes had been sold immediately on their arrival, it is quite probable that they would have sold for less than they did. There is no evidence that they might have brought more. Moreover, it is questionable whether the libelant would have been justified in making an immediate sale, and without an endeavor to secure the highest attainable price." Citing The Marinin S., supra. Now, in this case, neither the libelant, on the one hand, nor the respondent, on the other, was allowed to profit by the incidental rise in prices. The libelant was not permitted to compute the value of the damaged prunes as of the day of arrival by relation to the lower value of sound prunes on that day; nor was the respondent permitted to urge the increased market value of sound prunes as a recoupment to the libelant for his loss. The present case is the exact converse of the foregoing, and is ruled by it. The Earnwood should no more profit by the accidental fall in the price of sound sugar than the libelant was permitted to profit by the accidental rise in prices in the prune case. Any other rule is based upon the assumption that there is a constant ratio between the values of sound and damaged articles having a market rating. This is a fallacy. Peculiar circumstances, quite outside of those influencing the general market, affect the prices of damaged goods. A thousand matters outside of the ordinary rules of trade will vary the prices of damaged articles at different dates. Opinions differ as the poles in regard to the value of damaged goods. A thousand matters will make the price of one day no test for the price of another. The only reasonable method is to determine the value of damaged goods on the day of arrival by their selling value at auction within a reasonable time thereafter, irrespective of the fluctuations of the market. In the present case it is submitted that there should be no distinction as to the measure of damage between the case of the consignee, who manufactures (as here), and the consignee, who sells. In the latter case the hardship of affecting the importer with all changes of the market occurring between the day of arrival and the day of sale is very apparent. He sells the sound sugar on the day of its arrival, at its then market price. He would have sold the damaged sugar for the same price if the negligence of the carrier had not injured it. To be indemnified, he is entitled to precisely the difference between the value of the sound on the day of arrival, and the proceeds of a public sale of the damaged. Whether the market for sound sugar rises or falls prior to the sale is of no consequence. If it rises, the damaged sugar may or may not realize a higher price; but, if it does, the

damages payable by the ship are less. If the market falls, and the price of damaged is thereby affected, then, as a matter of fact, the ship has to pay more. But surely the risk of such fluctuation should be placed upon the wrongdoer who has rendered a sale necessary, rather than the receiver of the goods, who can only be indemnified by receiving the difference between what the sound sugar would have realized on the day of arrival and what the damaged sugar actually realized on the date of the auction sale. By keeping clearly before us the position of the consignee for sale, the matter is plain enough,—difference between what the damaged sugar would have sold for if sound and what it did sell for as damaged. Fluctuations of the market meanwhile having nothing to do with it, since, if the market value of sound on the day of auction sale is to be taken as the basis, we have not the value of sound on date of arrival as one of the factors in accordance with the rule, but the difference between sound and unsound at some subsequent date, viz. the date of the auction sale. It would be injurious to the commercial community if the receiver of cargo damaged in transit must either sell instantly, without proper care or deliberation, or must take the risk of fluctuations in the market if he waits a reasonable time. It would be equally unfortunate to assume as a measure of damage a supposed constant ratio between the market value of a sound article and the auction value of a damaged one.

Henry R. Edmunds, for respondent.

BUTLER, District Judge. The commissioner has construed the language of the court too narrowly. The terms "drainage from the sugar," used in the opinion, did not contemplate drainage from sweating only, but such as might arise from any cause, including of course the soakings from sea water. The liability of the respondent, as the opinion states, arises from the neglect to provide dunnage, in consequence of which the lower tier of bags rested on the floor, in the moisture from above, with no opportunity for drying, such as proper dunnage would have afforded. It is clearly unimportant therefore from what source the moisture came. The commissioner has found that 821 bags were damaged from neglect to provide such dunnage; and that the loss therefrom is $2,131.81 with interest from April 3, 1894. A decree will therefore be entered for $2,547.51—which the court finds to be the amount of loss.

The exceptions filed by the respondent are dismissed. They are fully considered in the report; and I am satisfied with the conclusions there stated. The point made that account should be taken of the change in market value of sound sugar between the date of arrival and of the subsequent sale, in ascertaining loss, is interesting, and if new would present difficulty. It has, however, been involved in numerous cases; and in no instance has it been decided as the respondent contends it should be; nor does any elementary authority so qualify the general rule governing the subject. I do not deem it necessary to add to what the commissioner has said; but as the point is well considered, and the authorities cited in the libelant's brief, I will annex it hereto.

It is worth while to note that the question is not very important here, in view of the commissioner's finding that nearly all the fall in sugar occurred while this sugar was held under the respondent's special order. It would certainly be unjust to put the consequences of this fall on the libelant.

HAMILTON et ux. v. FOWLER et al.

(Circuit Court, W. D. Tennessee. August 25, 1897.)

1. REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURT—PROCEEDINGS BEFORE NEXT TERM.

After the filing in the state court of a proper petition and bond for removal, and before the first day of the next term of the federal court, the latter court has plenary jurisdiction over the case, and may do with it anything that it could do with a case originally brought therein; but, in the doing of those things, it is governed by the rules of practice and procedure applicable to the case in hand. And, as the removal acts have prescribed the next term as the earliest day when the parties are required to appear in the federal court, they cannot be compelled until that time to appear and proceed in the ordinary way to final judgment, or to the hearing of any application requiring a determination of the whole merits of the controversy. But, on due notice, if any extraordinary procedure be necessary to preserve the property in litigation, or the rights of the litigants, either party may be required to appear for that purpose, and either may file the record for a proper hearing of the application.

2. SAME—ORDER STAYING FORECLOSURE SALE—MOTION TO DISSOLVE.

Where, in a suit to enjoin a sale of property under a mortgage, the state court, according to the state statutes and practice, has granted a temporary stay of the sale, and defendant then removes the cause, the federal court cannot hear a motion to dissolve the stay, before the first day of its ensuing term.

3. SAME—APPLICATION FOR INJUNCTION—ABANDONMENT.

On the filing of a suit in a Tennessee court, to enjoin a sale under a mortgage, the chancellor, pursuant to the state statute (Mill. & V. Code, §§ 5181, 5182), granted an order staying the sale until a day stated, and until the application for injunction should be disposed of. Defendant then removed the case to a federal court. *Held*, that, by so doing, he voluntarily incurred the postponement of the hearing on the injunction until the ensuing term of the federal court, according to the procedure under the removal acts; and that the plaintiffs did not abandon their application for an injunction by not appearing to prosecute it in the federal court on the day fixed by the state court.

Motion to Dissolve Injunction.

This bill was filed on the 28th of June, 1897, in the chancery court of Shelby county, Tenn. It prays for an injunction against the sale of real estate mortgaged by the plaintiffs to secure a loan of $10,000 by the Jarvis-Conklin Mortgage Trust Company of Missouri, upon the ground that the contract was invalid, because of the failure of the Jarvis-Conklin Mortgage Trust Company to comply with the statutes of Tennessee requiring all foreign corporations to file their charters and abstracts of them with the secretary of state and in the registers' offices of the several counties, and prohibiting them from doing business in Tennessee until a compliance with that statute; also, because the contract was usurious, oppressive, and unconscionable, in requiring the plaintiffs to pay unreasonable lawyer's fees in case of a foreclosure.

Upon the filing of the bill, and according to the practice of the state chancery court, on the fiat of the chancellor the following stay order was issued, and served upon the defendants: "We therefore command you that you, and every of you, do stay the sale of the following described property, to wit [description of the property], until July 19, 1897, and until any application made for an injunction on the bill filed herein, under proper notice, shall be disposed of, and until further order of our court to the contrary. And this you shall

in no wise omit, under penalty prescribed by law." This order being duly served upon process of publication had, the defendants, on the 14th of July, 1897, appeared, filed their petition for a removal to this court, alleging that two of them were citizens of the state of New York, and the other a citizen of Ohio, and having tendered a sufficient bond as required by the statute, on the 15th day of July the chancellor granted the order removing the case to this court. The first day of the then next session of the circuit court of the United States for the Western division of the Western district of Tennessee to which the case was removed will be the fourth Monday in November next. On the 26th of July, 1897, the defendants, having entered a transcript of the record of the state court, without any leave of the court previously obtained, filed their several answers to the bill as they appear of record, and also a motion to dissolve or dismiss the "stay order" granted by the state court, upon the grounds: First, that there is no equity on the face of the complainants' bill to support the injunction; second, because the statements in the bill upon which the supposed equity rests are fully met and wholly overcome by the positive denials of the answers; and, third, because complainants have shown a want of diligence in the prosecution of their suit for an injunction, in this: that they have abandoned their application for an injunction. Upon due notice to the plaintiffs, this motion has been argued and submitted.

The act of the Tennessee legislature of 1873 (chapter 10) enacts as follows: "No judge or chancellor shall grant an injunction to stay the sale of real estate conveyed by deed of trust or mortgage, with a power of sale executed to secure the payment of loaned money, unless complainant gives twenty days notice to the trustee or mortgagee of the time when, place where, and of the judge or chancellor before whom said application for injunction is to be made, and no judge or chancellor shall act upon the said application unless the same is accompanied by proof, evidenced by return of a sheriff, constable or attorney, that said notice has been served on the said trustee or mortgagee, or he is not to be found in the county of his usual place of residence, or is a non-resident." "In order that the complainant may have time to give the required notice, the sale of the property so conveyed shall be advertised at least thirty days, and the sale shall be postponed until the judge or chancellor acts upon the application for injunction and makes his orders in the matter." Mill. & V. Code Tenn. §§ 5181, 5182.

Wolsen & Fitzhugh, for plaintiffs.
Bell & Horn, for defendants.

HAMMOND, J. (after stating the facts). The objection by the plaintiffs to the hearing of this motion is that it is premature, it being contended that the court has no jurisdiction or at least no power to dispose of this matter until after the first day of the next term of the court, on the fourth Monday in November next. They contend that this is a statutory regulation in the practice of removed cases, which cannot be changed by any action of the court before that time. The question thus presented has never been passed upon by the supreme court of the United States nor the circuit court of appeals, so far as we are advised, and the authorities are confusing and conflicting.

The removal act of March 3, 1887 (24 Stat. 552), as amended by the act of August 13, 1888 (25 Stat. 433; 1 Supp. Rev. St. pp. 611, 613), by section 3 provides that the condition of the removal bond shall be that the removing party shall enter in the circuit court a copy of the record in such suit "on the first day of its then next session"; also for the payment of costs; and also "for their appearing and entering special bail in such suit if special bail was originally requisite therein." The removal act of 1875 (18 Stat. 470; 1 Supp. Rev. St. p. 83), of which the later act is an amendment, contained this provision:

"Sec. 7. That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the state court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court and enter appearance therein. * * *"

The old removal acts, prior to 1875, as codified by the Revised Statutes, at section 639, provided that:

"Any suit commenced in any state court * * * may be removed, for trial, into the circuit court, for the district where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section. * * *" Rev. St. 639.

Also, by the same section, it is provided that the removing party should give a bond "for entering in such circuit court, on the first day of its session, copies," etc., and for their appearing and entering special bail in the case if special bail was originally requisite therein.

The latest act, of 1888, also provides, by section 3 (1 Supp. Rev. St. p. 613), as follows:

"And the said copy being entered as aforesaid in the said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court."

With only changes of phraseology, this last provision was also contained in the prior removal act (Rev. St. § 633, last clause).

These statutes would appear on their face to be mere practice regulations, intended to secure the prompt removal of the case to the federal court, and the appearance of the removing party in that court. When originally this particular phraseology was adopted, in 1789, and for a long time after, the federal courts, having but little business, would meet only at stated terms, as prescribed by law, and no doubt this language was originally employed with reference to the fact that the earliest time at which the court would be open after the removal would be the first day of the next session or term. It was not then contemplated that in a hundred years the growth of the business of the courts would be such that they are substantially like courts of equity,—always open, and judges in ready attendance to hear causes at adjourned sessions of the courts, almost wholly without reference to the technical terms of the court, which regulate only the issuing of process, appearance thereto, pleadings, and such like matters of practice. Confusion arose, however, by an inclination on the part of some of the courts, or at least some of the judges, to treat this provision of the statute as jurisdictional, and not as a mere matter of procedure; and applying the well-known rule of judgment that such statutes must be strictly construed, and pampering somewhat the always sensitive prejudice against the exercise of this jurisdiction, they held that, unless the record was duly filed, the jurisdiction was gone, as it could be acquired only by exact compliance with the regulations of the statute; other courts and judges holding to the view that it was a mere matter of procedure, and, like other practice regulations, open to enlargement by the indulgence of the court in its sound discretion. This delusive contention still influences the argument of the question whenever it occurs, and the assertion is continually made, as in this case, that the court can have no jurisdiction of

the case until the return day of the removal petition. As remarked by Judge Dyer in McGregor v. McGillis, 30 Fed. 388–390, "it is now idle to discuss that question, as it is settled by the decision of the supreme court in Railroad Co. v. McLean, 108 U. S. 212, 2 Sup. Ct. 498." By that and numerous other cases it is settled that a failure to file the record as required by the statute is not fatal to the jurisdiction, and the time may be enlarged by the court according to the circumstances of the case, in its sound discretion. Railroad Co. v. Koontz, 104 U. S. 5, 16; Removal Cases, 100 U. S. 457; Railroad Co. v. Mississippi, 102 U. S. 135; Duncan v. Gegan, 101 U. S. 812; Wooldridge v. McKenna, 8 Fed. 650; Hall v. Brooks, 14 Fed. 113; McLean v. Railroad Co., 16 Blatchf. 309, Fed. Cas. No. 8,892; Stoutenburgh v. Wharton, 18 Fed. 1.

But these decisions of the supreme court that the statute in respect of this filing the record was only directory, and not mandatory,—only a regulation of procedure, and not an imperative element of jurisdiction,—did not remove the confusion relating to the subject, because it is yet undetermined by the supreme court to what extent the jurisdiction of the federal court attaches during the time between the filing of the removal petition and bond in the state court, and the coming around of the first day of the next term of the federal court. Some of the courts, indulging the widest latitude, hold that the removing party may file the record at any time before the day fixed by the removal act, though it is generally said that previous leave of the federal court must be had for the filing, or that the adversary party, by like leave, may also file the record at any time before the first day of the next term of the federal court, and that thereupon, when the record is filed by either party, the court acquires the fullest power to proceed with the case, and may do anything that could be done in any other case pending in the court, except, perhaps, enter a final decree; for it seems that this class of decisions does stop short of doing that, in deference to the statute, but otherwise that the court has the liberty of full action, and, in some of the circuits or districts, rules have been adopted to regulate the practice on this view. Other courts, however, within narrower limits, maintain that until the coming of the first day of the next term of the federal court, which is fixed by the statute as the time for the completion of the act of removal, the court has only the power to do what inexorable necessity requires shall be done to protect the thing in litigation and the rights of the parties against irremediable mischief, and that it will not do anything else except to preserve the property and the status quo until the coming of the first day of the next term of the court at which the record is due under the statute. Not one of the courts, so far as I am advised, now adheres to the rule that no jurisdiction to do anything can be acquired until the coming of that day; but, between the two lines of judgment indicated, there has been considerable oscillation of decision. All agree everywhere that the jurisdiction of the state court immediately ceases upon the filing of the petition and bond for removal if the case be a removable one, and that eo instanti the jurisdiction of the federal court attaches. This must be so; otherwise, the case would be outlawed, and, thus outstanding, there would be

no power anywhere to protect the parties and the property by the ordinary processes of procedure until the occurrence of the next term of the federal court to which the case was removed.

In Railroad Co. v. Koontz, supra, it was said by the court:

"The entering of the copy of the record in the circuit court is necessary to enable that court to proceed, but its jurisdiction attaches when, under the law, it becomes the duty of the state court to proceed no further." Page 14.

Again: "As has been already seen, the jurisdiction has changed from one court to the other when the case for removal was actually made in the state court. The entering of the record in the circuit court after that was mere procedure, and in its nature not unlike the pleadings which follow the service of process, the filing of which is ordinarily regulated by statute or rules of practice." Page 17.

In Kern v. Huidekoper, 103 U. S. 485, 490, it is said that the filing of the transcript of record within the time prescribed by the statute invests the circuit court of the United States with full and complete jurisdiction of the case. That was, however, only incidental phraseology, used in an opinion sustaining the position that, after the removal of a suit, the state court loses its jurisdiction, and all that it does if the case be removable after that time is utterly null and void, and the question of the condition of the case meantime was not involved.

In Steamship Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, where the question relating to the moment of time when the state court loses its jurisdiction, and the federal court acquires it, was somewhat more directly involved, it is said:

"Upon the filing, therefore, of the petition and bond (the suit being removable under the statute), the jurisdiction of the state court absolutely ceased, and that of the circuit court of the United States immediately attached."

And further on this language is used:

"The jurisdiction of the latter court attached, in advance of the filing of the transcript, from the moment it became the duty of the state court to accept the bond, and proceed no further."

—Which language is afterwards reiterated in Railroad Co. v. McLean, 108 U. S. 212, 216, 2 Sup. Ct. 498.

In the case of Railroad Co. v. Dunn, 122 U. S. 513, 7 Sup. Ct. 1262, the then chief justice, adverting to the want of a clear and distinct utterance on the part of the supreme court in relation to the power of a state court over a case after the petition and bond for removal had been filed, upon the authority of Railroad Co. v. Koontz, supra, and other cases, holds that, after the petition and bond for removal have been filed in a removable case, the jurisdiction of the state court ceases eo instanti.

Hence I think it must be taken as settled authoritatively that the jurisdiction of the federal court attaches immediately upon the filing of the bond and petition in the state court, and does not await the filing of the transcript by either party in the federal court. Of course, no court can proceed with any jurisdiction that it may have, limited or unlimited, until it has possession of the record of the case; and whatever jurisdiction the federal court has over the case prior to the filing of the record under the statutory regulation cannot, in the nature of the thing, be exercised without some kind

of inspection of the record; and I take it that, for the practical purposes of exercising any authority that it may properly exercise over the case, it may inspect the record, however and whenever presented by the parties interested, upon due notice of the proceeding, and this for whatever purpose such inspection may be required in the exercise of its jurisdiction. It is my own judgment that, technically, the most plenary jurisdiction that it is possible for any court to have attaches in the federal court at the very moment that the jurisdiction of the state court is ousted by the filing of the petition and removal bond, and ever thereafter the case is in the federal court subject to whatever power it may have in the premises.

Using the analogy suggested by the court in the quotation made from Railroad Co. v. Koontz, supra, this jurisdiction seems to me altogether like the jurisdiction a court has when, in a case originally commenced, process has been served requiring a party to appear at a future day, to wit, the first day of the next term of the court, or some other day to which the writ is returnable. In such a condition the court has absolute jurisdiction of the subject-matter of the suit, and control of the parties, and may, upon proper notice, do anything that is required in the case that may be done prior to the time when the statutory or other law regulating the practice requires the defendant to appear and plead or answer to the action which the plaintiff has brought. It has as much jurisdiction in the interim between the commencement of the action by service of process and the coming in of the defendant as it ever has, but it does not follow from this that it may at any and all times do any and all things that may be done in the progress of the case at some time, until the end. There must be regular steps of procedure and practice, and, although having the most plenary jurisdiction of the case, it has not the authority to do anything until the time comes in the regular order of procedure to do that thing. Because a court has jurisdiction of the parties and of the case, it does not follow that it would be proper to do anything which, according to the rules of practice and procedure, cannot be done at that particular time. These rules of practice and procedure, if regulated by statute, are imperative, and control the power of the court, for statutory rules of procedure and practice cannot be changed by precedent of decision or by rule of court, but the statute must govern in all cases. As here, when the statute says that the parties shall have until the first day of the next term of the court to file their record, it means that they shall have that time, and, when the statute says that "the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court," it means that it shall not thus proceed before that time, and anything that has not already been done in the case cannot be done until that time, in the normal and orderly course of procedure; but if any extraordinary steps are necessary for the preservation of the thing within the jurisdiction, or the protection of the rights of the parties to the thing within the jurisdiction, or to the use of the thing within the jurisdiction, the court may deal with these extraordinary conditions according to the circumstances of the case, and upon such due and regular notice as may be prescribed by

rules of practice or otherwise; but it is only as to these extraordinary and necessitous conditions that the power of the court can be invoked to proceed with the case before the time appointed by the statute for proceeding with it. This distinction is one of practical importance, because, under the statute, both parties understand that the first day of the next term of the federal court to which the case is removable is the day when they are expected to be in court to proceed with the case; and like a party served with a writ in an original case, returnable to a particular day, it is not to be expected that they will appear at any time prior thereto, in the ordinary course of practice, while, as to extraordinary emergencies, they may be expected and required to appear whenever rules of court or notices to that end are served upon them; and this is in full analogy to all other methods of practice generally known to our courts.

Keeping in mind, then, the proper distinctions between the jurisdiction over the case and the power and authority to proceed according to the law governing the practice of the court, whatever that be, there is no difficulty in maintaining at the same time the jurisdiction of the case and the rights of the parties as to the matter of procedure, and, along with both, of preserving the thing in controversy against any impairment or destruction by reason of any delay. If this delay be inconvenient to the party who has removed the case, and he should like to get along with it faster than the statute allows, it need only be said in reply to him that he has brought about the delay by his own conduct, in asking for a removal of the case to another court, where the procedure is arrested by his own act in the premises. If he could have got along more speedily in the state court, he should have stayed there, and he ought to have calculated upon the statutory delay when he filed his petition and bond for removal.

This was the view taken of the subject by our Brother Severens, of the Western district of Michigan, in the case of Torrent v. Lumber Co., 37 Fed. 727. In that case the defendant had removed. and, before the first day of the next term of the court, the plaintiffs appeared, and took leave to file a transcript of the record, gave notice to the defendant of the order allowing the transcript to be filed, and upon the next day took a default, for want of a plea. The default would have been proper in the state court, and was taken upon the theory that it was still the duty of the defendant to plead in the federal court without any suspension of that right by the act of removal. Upon an application to set aside this default, the learned judge granted it, and used this language:

"I do not agree to the proposition that there is an intermediate state in which a case is resting after the filing of the petition and bond in the state court, and before the day when the record must be filed in the federal court, and in which the jurisdiction of the latter court is inchoate, and can only be exercised piecemeal, as necessity requires. On the contrary, it appears to me that the correct view of the matter is to regard the jurisdiction over the case as being absolutely and completely required by the federal court upon the instant when the state court loses it, and that is upon the proper filing of the petition and bond in the latter court. And it seems to me that the concession that the court may exercise its authority over the case upon its own views as to the necessity

for it is tantamount to an admission that its jurisdiction is fully vested. But, in the exercise of its jurisdiction, the federal court is bound to follow the course of practice prescribed by law. If it fails to do this in dealing with the case, its authority is erroneously exercised. It is not therefore a question of jurisdiction, but of regularity only. This appears to me to be the view of the subject taken by the supreme court in Railroad Co. v. Koontz, 104 U. S. 5, where it is said in the opinion delivered by Chief Justice Waite, at page 15: 'We are aware that in the Removal Cases, 100 U. S. 475, and Kern v. Huidekoper, 103 U. S. 485, it is said, in substance, that, after the petition for removal and the entering of the record, the jurisdiction of the circuit court is complete; but this evidently refers to the right of the circuit court to proceed with the cause. The entering of the record is necessary for that, but not for the transfer of jurisdiction.' "

This also seems to me to be a full recognition by the supreme court of the distinction which is so forcibly put by Judge Severens in the language I have quoted.

Just what may be done, intermediately, between the filing of the petition and bond for removal in the state court and the filing of the transcript of record in the federal court, according to the statute, is a matter depending upon the circumstances of each case, and there is a contrariety of opinion about it. In the case of Judge v. Anderson, 19 Fed. 885, Judge Nelson, of the Minnesota District, says that, where the defendant had removed the case from the state court, the plaintiff might file the transcript in the then current term of the federal court, and that, "the jurisdiction then appearing of record, all proceedings necessary to prepare the case for trial at the next session of the court can be taken by either party. The court then has jurisdiction of the cause as if it had been commenced there by original process." He cites the case of Kern v. Huidekoper, 103 U. S. 487, for this position, and holds it to be an authority that the case can go on for the purpose of perfecting the issues, and of granting provisional remedies, but that the removing party is not required to try the issues until the term next ensuing after the time at which the removal was had. It is true that the procedure in Kern v. Huidekoper was as stated by Judge Nelson in this opinion, but the inference he draws from it was not directly ruled in judgment. The jurisdiction of the federal court was sustained, to be sure, and there is now no doubt about that; but, as far as I can see, there was no question made as to the regularity or irregularity of the proceedings in making up whatever issues were involved in that case; and Judge Severens, in the case already cited, calls attention to the inadvertence of the language used, in saying that the jurisdiction of the federal court was completed by the act of entering the transcript of record, as was acknowledged by the chief justice himself in the subsequent case of Railroad Co. v. Koontz, supra.

In the case we have in hand, the defendants have filed their answers, but as yet no objection has been taken to the regularity of that proceeding; and the point is not in judgment now, except so far as it is involved in the contention of the plaintiffs that nothing can be done in this case until the fourth Monday of November next, when the transcript is due under the statute. It is therefore not necessary to decide this point at the present time.

In Delbanco v. Singletary, 40 Fed. 177, Judge Sabin, of the dis-

trict of Nevada, takes the broad ground that, at any time after the petition for removal has been filed in the state court, either party may file the transcript of record in the federal court, and that the court will take jurisdiction of the case for all purposes. In that case he took jurisdiction for the purpose of remanding it. That was done, however, under a rule of the circuit court in that circuit which provides that either party may, at any time after the filing of the petition for removal, file the transcript required by law in the federal court, and serve written notice of such filing upon the adverse party or his attorney, and requires that, upon the filing in court of said evidence of service, the clerk shall enter the action upon his register, and that the same proceedings shall be thereafter had as if the transcript had been filed by the party removing the case at the time prescribed by law. It is said that this rule was the outgrowth of the case of Mining Co. v. Bennett, 4 Sawy. 289, Fed. Cas. No. 8,968, and was intended to cover all cases where long delay might occur by reason of the neglect of the removing party to file the record in the federal court. The power to make the rule is claimed under Rev. St. § 918, which gives the several circuit and district courts of the United States the power to prescribe rules of practice not inconsistent with any of the laws of the United States; and it is ruled that under the authority of Mining Co. v. Bennett, supra, this ruling is not inconsistent with the removal acts, because the statute contains no prohibition directly against filing it at any other time than that mentioned in the statute itself. Seemingly, this rule and this judgment establish a different rule of practice from that prescribed by the act of congress, but it was followed and approved by Judge Nelson of Minnesota in the Eighth circuit, in the case of Mills v. Newell, 41 Fed. 529, and the broad position is taken that, whenever the record is filed by either party, the court should not hesitate to look into it, and, if it finds that it has no jurisdiction, remand the case. This ruling, possibly, may also be justified as to the practice of remanding a case before the time fixed for the filing of the transcript, upon the statutory requirement that, whenever and however it shall appear to a federal court that it has no jurisdiction of a case, it will be dismissed or remanded. The cases of Delbanco v. Singletary and Mills v. Newell, supra, were also approved by Judge Sanborn, in the Minnesota district, in the case of Thompson v. Railway Co., 60 Fed. 773, and that case was remanded two months before the next session of the court, upon written notice of the motion.

In the case of Pelzer Manuf'g Co. v. St. Paul Fire & Marine Ins. Co., 40 Fed. 185, Judge Simonton, in the district of South Carolina, seems to adopt the rule that the removing defendant may file the transcript of record in the federal court before the next term thereof, and, upon proper notice, the parties will be required to proceed to make up their issues, and to hold that the effect of the filing of the petition for removal in the state court is to suspend the efflux of time in the matter of pleadings only until the transcript actually is filed in the federal court, and not until the time fixed by the statute for the filing of it.

In the case of Consolidated Traction Co. v. Guarantors' Liability & Indemnity Co. of Pennsylvania (in the district of New Jersey) 78 Fed. 657, Judge Kirkpatrick holds that, after the defendant has filed his petition for removal, the opposing party may file a transcript of the record in the federal court before the expiration of the time limited for the removing party to do so, and thereupon the removing party will be required to plead; and this is ruled upon the authority of Arthur v. Insurance Co., Fed. Cas. No. 565.

In Kansas City & T. Ry. Co. v. Interstate Lumber Co., 36 Fed. 9, Judge Phillips, of the Missouri district, had a case in which there was an application to condemn lands for railroad purposes. The defendant appeared, and filed a petition to remove. Before the record was due, at the next term of the federal court, the plaintiff appeared, filed a transcript of the record, and moved to remand the case, and, if the case should not be remanded, then to appoint commissioners, and proceed, according to the state statute, to a decree of condemnation. Both motions were refused, upon the ground that they could not be properly made until the regular time appointed by the statute for the filing of the transcript; and the intermediate authority of the court was confined to what he calls "provisional remedies," or orders designed to preserve the essential rights of the parties in preventing a failure of justice. He says it would be a forced construction to extend the rule justifying this intermediate procedure to the hearing of a motion to remand the case, or to proceed with it in its interlocutory stages to a final hearing before the "return day," and that, "if the case is remanded, that is a final determination of the case, and a final judgment, so far as the federal court is concerned. It is not reviewable on writ of error or appeal, and therefore it is a final disposition of the case." He observes that such a final judgment is not contemplated until after the time fixed by the removal acts has elapsed, when the party removing may file the record, which is the time given him for the preparation to hear such final questions; and, in conclusion, he says that he does not overlook the argument of the great inconvenience and injustice which operate, through delay, to the parties to the suit, but that with such imperfections of the law the courts have nothing to do.

In Re Barnesville & Morehead Ry. Co., 4 Fed. 10, which was also a condemnation case, in the district of Minnesota, the defendant filed a petition to remove, and immediately the plaintiff filed a transcript of the record in the federal court, two months before the next regular session of that court, and asked the court to proceed with the case by the appointment of commissioners and taking other necessary proceedings. Judge Nelson in that case held that the court could not proceed until the regular term came around. He put it upon the ground that the statute was jurisdictional, and the court would have no jurisdiction to proceed.

In the case of New Orleans City R. Co. v. Crescent City R. Co., 5 Fed. 160, in the district of Louisiana, Judge Billings refused to entertain an application to dissolve an injunction before the return day of the removed case, where a dissolution of the injunction would have

been a final determination of the whole merits of the case, and could not be granted without changing the status of the parties with reference to the thing to be finally adjudged. He approves a quotation from Judge Dillon in his treatise on the Removal of Causes, as follows:

"If the record be entered before that time, it has been made a question whether the jurisdiction will then attach. For some purposes it would seem that it might; as, for example, if it became necessary meanwhile to issue an injunction or appoint a receiver, which should be done, however, only upon notice, in order to protect the rights of the parties, or to preserve the property in litigation."

Judge Billings says that an analysis of the authorities shows that receivers may be appointed, property may be sold, and its proceeds placed in the registry of the court; an injunction may be granted, and, when a defendant is in possession of property, an injunction which prohibited him from using it during the pendency of the suit may be dissolved, upon such terms as would protect the adversary party, and allow the court to proceed with the consideration of the case upon its merits; but, where the sole question presented to the court is the possession of a franchise, the court could not proceed one step in the hearing of an application to dissolve the injunction without entering upon the consideration of the case as an entirety, and could not grant the dissolution of the injunction without completely changing the status of the parties. Indeed, after dissolving the injunction, nothing would be left for the court to do but to dismiss the bill, and in such a case he holds that the court has no jurisdiction to dissolve the injunction. More properly, perhaps, he might have held that, while the court had jurisdiction to dissolve the injunction, it ought not, under the circumstances, to dissolve it until the return day of the removed cause; that is to say, until the day appointed by the act of congress for the case to proceed to final judgment, in the regular order of its procedure.

Judge Deady, in the Oregon district, in the case of City of Portland v. Oregonian Ry. Co., 6 Fed. 321, reached the same conclusion, and in that case he entertained a motion to modify the injunction allowing a defendant who was restrained in the use of his property to continue in its use upon giving a bond to indemnify the plaintiff against any loss that might come to him by such intermediate use. This was clearly within the principle that the court must and should proceed to do whatever is necessary to protect the parties by interlocutory orders and decrees, or whatever is required to preserve the property itself or the status of the parties.

The case of Railroad Co. v. Rust, 17 Fed. 275, so confidently relied upon by defendants' counsel in this case, is precisely to the same effect, and in line with these last-named cases. In that case there was a bill filed by the plaintiffs to enjoin the defendants from removing their machinery, construction appliances, and general plant from a railroad bridge which they had engaged to construct. Their property was seized, and put in the hands of a receiver. They removed the case to the federal court, and immediately, without waiting for the return day of the next term, moved to dissolve the injunction, and vacate the order appointing the receiver. This was done

by Judge Caldwell, sitting in that case, in a somewhat indignant opinion, in which he held that it was a violation of the property rights of the defendants to take from them, on such flimsy claims as those presented by the bill, their property, without any hearing or trial, and he was right about it; and it is just this class of cases which the federal courts will unhesitatingly hear before the return day, in order that no irremediable mischief may be done to the citizen by depriving him of the rightful use of his property, pending the litigation. It was the preservation of the right of the defendant to the immediate use of his property that constituted the necessity and provisional character of that order, and the case is precisely analogous to that before Judge Deady, just cited, in which he required the giving of a bond, which, however, Judge Caldwell did not require. This case was in no sense a final determination of the rights of the parties, by dissolving the injunction.

We now come to the case of Mining Co. v. Bennett, 4 Sawy. 289, Fed. Cas. No. 8,968, which is so much relied upon for the doctrine of the cases in the Eighth and Ninth circuits, as justifying the most unrestricted and unlimited authority over the case before the return day; and the case seems to me to have been misapprehended in that regard. That opinion was intended to establish the now undisputed doctrine that it was competent for the court to receive the record before the return day, and to act upon it on the application of either party for such interlocutory proceedings as were necessary to preserve the property and the rights involved in the litigation from injury. Before the petition for removal was filed, an application had been made for a preliminary injunction in the state court. The defendant, upon removing the case, would have been at liberty to go on with his alleged wrongful conduct, and in the exercise of his alleged wrongful ownership of the mine in question; and what Judge Sawyer decided was that, between the filing of the petition for removal and the coming around of the first day of the next term of court, the case was not outlawed or so situated that neither court could have any power or authority over it to grant this relief, and he held that the authority to go on for that particular purpose was in the federal court, and that in that case he could hear the application for the injunction. He especially says, after deciding that the record may be filed before the return day for such purposes, that, "after the record has been filed in pursuance of such leave, the court has jurisdiction, in its discretion, to proceed and administer all provisional remedies applicable to the case. Any other construction would work intolerable inconvenience and remediless injury to the parties, and could not have been contemplated by congress." It is to be observed that he especially limits this judgment to "provisional" remedies to save otherwise remediless injuries, and the case, in my judgment, is not an authority for the doctrine that the court may go on and hear anything at will, and make any disposition of the case which it may choose, before the return day.

Other cases may be cited, along with those already mentioned, to show that this requirement of the statute for a fixed return day is not jurisdictional, but a matter of procedure, and that the procedure

is within the sound discretion of the court. But, of course, this sound discretion of the court means that it is to be governed by the positive requirements of acts of congress, the rules of court, and the practice precedents, as all discretion is, and it does not mean that the court may do anything it chooses, at will. Wilson v. Telegraph Co., 34 Fed. 561, by Mr. Justice Field, in the California district; Burgunder v. Browne, 59 Fed. 497, by Judge Gilbert, in the Washington district; Lucker v. Assurance Co., 66 Fed. 161, by Judge Simonton, in the South Carolina district; Pierce v. Corrigan, 77 Fed. 657, by Judge Acheson, in the Pennsylvania district. The cases of Perry v. Sharpe, 8 Fed. 24; Sharp v. Whiteside, 19 Fed. 151; Manufacturing Co. v. Smith, 1 Dill. 307, Fed. Cas. No. 5,217; Coburn v. Cattle Co., 25 Fed. 793; Bryant v. Thompson, 27 Fed. 882,—cited by counsel for the defendants, are, in my judgment, without any bearing on this question of practice.

It is a result of all the authorities—First. That the federal court, during the intermediate time between the filing of the petition for removal and the coming of the first day of the next session of the court, has the most plenary jurisdiction over the case, and may do with it anything that it could do with a case originally brought in the court, or that any court may do with any case of which it has acquired rightful jurisdiction; but, in the doing of those things, it must be governed, as in all cases, by the rules of practice and procedure applicable to that particular class of cases to which the one in hand belongs. Second. That, in the class of cases comprehending those removed from a state court, the acts of congress regulating the removal and the practice therein have prescribed the next term of the federal court as the earliest day when the parties to the suit are required to appear in the federal court, so that the case may proceed in the ordinary way to a final hearing in due course of proper practice and procedure, and until that time they are not required to appear and proceed; but, upon due notice for that purpose, if any extraordinary procedure be necessary to preserve the property in litigation or the rights of the litigants, either party may be required to appear for such extraordinary purpose, and either may bring along the record, and file it for a proper hearing of the application, whatever it be; and while the court has the jurisdiction, as it always has, to proceed even erroneously, it has no rightful authority to proceed erroneously, and it would be error, before the return day, to hear any application not falling within the limits above indicated.

The application made to the court in this case falls within the category of those which should not be granted until after the return day of the removal proceedings. It finds a complete precedent in the case from Louisiana by Judge Billings,—New Orleans City R. Co. v. Crescent City R. Co., 5 Fed. 160. In this case, as in that, the result of the application would be to finally determine the whole merits of the controversy. There would be nothing left but to dismiss the bill before the time when such dismissal would be proper. If the injunction resting upon the defendants should be dissolved, they or their trustee could proceed with the sale of the property, pocket the money, and any claim against it set up by this bill would not be at

all available by any final decree that the court could make. It is true that in the case of Cæsar v. Capell, 83 Fed. 403, involving one of these Jarvis-Conklin mortgages, we have just decided that the claim of invalidity, under the Tennessee statutes, involved, is not a sound one, and that a contract similar to the one pleaded in this case is not invalid, and may be enforced by the courts in Tennessee; and on that judgment, and so far as relates to that issue in this bill, we might not and would not, upon an application for an injunction, grant one; but the plaintiffs in this case, having obtained the injunction of the state court, are entitled to hold on to it for a final trial of that issue, as they make it in their own bill, until the motion to dissolve can be properly made, under the rules and practice of the court. Whatever delay is incident to this is the consequence of the defendants' own act in removing the case, and it does not lie in their mouths to complain about it.

In reaching this conclusion, I have paid no attention whatever to the answers of the defendants which have been filed before the return day of the removal case. Whether they have been properly filed under the rulings that have just been made, I am not now called upon to decide. If the application were a proper one to be made at this time, I do not doubt that defendants might have leave to file an answer, and that it would have all the force and effect of an answer on the hearing of such an application, just as they would have a right to use affidavits according to the practice of the court on such a preliminary and interlocutory hearing. But it occurs to me to say here, by way of illustration, that if the plaintiffs, being satisfied with these answers, should set this case for final hearing upon bill and answer, it could not now be heard under the rulings that have just been made, for the reason that the removing defendants would have a right, under the act of congress, to postpone the hearing of the case until after the first day of the next term of the court, to prepare for such a trial, just as the plaintiffs have the same time to prepare for such an application as that now made. This disposes of the first and second grounds stated in the motion to dissolve the injunction.

As to the third ground, that the plaintiffs have shown a want of diligence in the prosecution of their suit for an injunction, and that they have abandoned their application for an injunction, something further should be said. In the case of Plowman v. Saterwhite, 3 Tenn. Ch. 2, Chancellor Cooper has explained the reason and policy of the Tennessee statute (Mill. & V. Code Tenn. §§ 5181, 5182) under which this bill was filed, and the statutes upon their face show quite clearly what they mean. It is claimed by the defendants here that this is not, strictly speaking, an injunction, but only a statutory "stay order," and therefore does not fall within the rule of New Orleans City R. Co. v. Crescent City R. Co., 5 Fed. 160. The argument is that, under the statute, it was the duty of the plaintiffs to appear on the 19th of July, 1897, named in the order, and apply for their injunction in the state court; and, not having appeared there, it was their duty to come with the record here, and make that application to us; and, not having done so, that they have abandoned this claim for relief; and that either there is no longer any injunction, and

the stay order is not now operative, or else that it ought to be immediately discharged. It is also argued that the chancellor's stay order goes beyond the statute in allowing the stay to continue until the further order of the court to the contrary. The conclusive answer to this position is that on the 14th day of July, 1897, and before the time appointed by the chancellor's order for making the application for an injunction, the defendants, of their own accord, appeared in the state court, and arrested all further proceedings until the fourth Monday of next November, by filing their petition and bond for removal, thereby ousting the state court of all jurisdiction in the premises, and under a statute which on the face of it directed that the removing party should file the record at the next term of the federal court, then more than four months off, and that the case should only then proceed; and that, in the face of that statute, they have chosen to file their record before that time, upon the assumption that the case may proceed contrary to the plain words of the statute, for the purposes of dissolving the stay order, and of correcting whatever excess there may be in that process itself.

The jurisdiction of the federal court over the case before the return day cannot be denied, but it does not follow from this, and the undeniable fact that the federal court takes the case at the exact point where the state court left it, that the plaintiffs are compelled to appear to make in their own behalf such an application as the state statute contemplates, at any time before the time appointed by the act of congress, for hearing it when the case has been removed. It is then only that the federal court commences where the state court left off, except in those cases where provisional procedure is required. So far as relates to the point that the stay order no longer exists, by reason of the neglect of the plaintiffs to appear in this court, and ask for the injunction, which the state statute contemplates shall be asked for at the time of the expiration of the statutory stay order, it need only be said that, if that be true, there is no obstacle in the way of the trustee proceeding to sell the property; but he must take the responsibility of doing that thing in the present attitude of the case. He cannot call upon this court before the return day of the removal petition to relieve him of that responsibility, by formally discharging a stay order which already has no force and effect. If it has any binding force, the defendants must wait, under the ruling we have made, until the return day of the case, before it can be discharged. If it has no force and effect, the defendants must proceed at their own peril.

I am not prepared to say that the order of the chancellor is beyond the authority conferred upon him by the statute. In its very terms, the statute provides that "the sale shall be postponed until the judge or chancellor acts upon the application for injunction," and makes his orders in the matter. Mill. & V. Code Tenn. § 5182. The party applying for an injunction is required to give 20 days' notice of the time and place where the application will be made, and in the meantime the statute stays the sale; but surely there is no hard and fast rule that the application for injunction shall be absolutely made at the expiration of the 20 days, and that, if it be not then made, it shall

be treated as abandoned. Like all other statutes of that kind and all practice of that kind, it is subject to any contingencies that may arise; and, if it cannot be heard on the very day when the 20 days expire, it may be heard at such other day as the chancellor may appoint, according to the rules and practice of the court. And if any event happen to postpone the day, such as the death of the parties or the like, or the removal of the case to the federal court, let us say that postponement would not affect the force of the stay order; and the necessary result of the filing of this petition for removal simply is that the defendants, by their own application to remove the case, have called into effect an act of congress which postpones the requirement upon the plaintiffs that they shall apply for an injunction, until the first day of the next session of the court succeeding the filing of the application for removal, and until that time the parties must be content with the postponement granted by the act of congress. The application to vacate the stay order must be denied. Ordered accordingly.

FARMERS' LOAN & TRUST CO. v. LONGWORTH et al.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 288.

1. APPEAL—PARTIES—VOLUNTARY APPEARANCE.
A party entitled to join in an appeal may do so by entering a voluntary appearance in the appellate court after the appeal has been perfected therein, without giving notice to the opposite party or the circuit court.

2. RAILROADS—PRIORITY OF LIENS—JUDGMENT FOR DAMAGES.
A judgment creditor whose claim originated in the negligent act of the railroad company's servant is not entitled to a preference over the holders of pre-existing liens.

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

Struve, Allen, Hughes & McMicken, for appellant.

Stratton, Lewis & Gilman, Frederick Bausman, and George M. Emory, for appellees.

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

HAWLEY, District Judge. The appeal taken in this case was dismissed on the ground that the Northern Pacific Railroad Company was a necessary party to the appeal. Trust Co. v. Longworth, 22 C. C. A. 420, 76 Fed. 609. The facts of the case are there stated, and need not be here repeated.

After the dismissal the attention of the court was called to the fact, which had been overlooked, that after the appeal had been perfected in this court, and after the motion had been filed by the appellees to dismiss the same, and within six months from the entry of the judgment herein, the Northern Pacific Railroad Company, by its attorneys, entered in this court its appearance and consent to the appeal. Upon this ground a rehearing was granted. The argument in behalf

of appellees upon rehearing again called in question the right of the Northern Pacific Railroad Company to join in the appeal, and questioned its right to do so by a voluntary appearance in this court without notice to the appellees or to the circuit court. The granting of the rehearing necessarily disposed of that question adversely to the views contended for by appellees; and, inasmuch as no additional authorities have been cited, we deem it unnecessary to again consider that question. Morrison v. Kuhn, 26 C. C. A. 130, 80 Fed. 740.

The case, upon its merits, is disposed of by the principles announced by this court in Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 24 C. C. A. 511, 79 Fed. 227, and Trust Co. v. Nestelle, 25 C. C. A. 194, 79 Fed. 748, to the effect that a judgment creditor of a railroad corporation, whose claim originated in the negligent act of the corporation's servant, is not entitled to be paid in preference to the holders of pre-existing liens upon the corporation's property. This is the only question presented by the appeal upon the merits. Upon the authority of the previous decisions of this court, and authorities there cited, the order of the circuit court is reversed, with costs in favor of appellant.

UNITED STATES v. COFFIN et al.

(Circuit Court, D. Nevada. September 6, 1897.)

No. 625.

1. FRAUDULENT ASSIGNMENT—PRISONER AND HIS ATTORNEYS—SUFFICIENCY OF EVIDENCE.

On the day of his conviction of the larceny of a large amount from the government, a prisoner withdrew money and mortgages from a bank, where they had been deposited to indemnify the sureties on his bail bond, and, between the time of his conviction and sentence, assigned the mortgages to his attorneys and his wife, and paid the money to his wife. The evidence as to the value of the mortgaged property, the amount of fees due his attorneys, and whether the assignment to them was to secure, or in payment of, their fees, was very conflicting, and the entire transaction was surrounded with mystery. *Held* not sufficient to warrant a decree setting aside the assignments as having been fraudulently made to prevent recovery of the fine imposed as part of the sentence.

2. DEALINGS BETWEEN ATTORNEY AND CLIENT—BURDEN OF SHOWING FAIRNESS.

In any transaction between an attorney and client which is advantageous to the attorney, he is bound to show that it is fair, just, and equitable, and that the client was in a position to deal with him at arm's length.

Charles A. Jones, U. S. Atty.

Torreyson & Summerfield, for respondents Coffin and Woodburn.

Robert M. Clarke, for respondent Heney.

HAWLEY, District Judge (orally). This is a suit in equity to cancel and annul certain assignments of mortgages executed by respondent James Heney in favor of respondents Trenmor Coffin and William Woodburn, upon the ground that the assignments were made in fraud of the rights of the United States. A suit between the same parties, arising out of the same transaction, had been previously brought in the United States circuit court for the Northern district of California;

and an injunction was there issued against the respondents and others, enjoining them from proceeding with the foreclosure suits which Coffin and Woodburn had respectively commenced. When that cause came on to be heard before Judge McKenna upon the motion to dissolve the injunction, proceedings were had which resulted in the court making the following order:

"After argument, and upon the consent of the parties this day appearing in open court, the restraining order heretofore issued herein is so modified as to permit the parties to the foreclosure suit mentioned in the bill herein to proceed therein as they may be advised: provided, that any and all moneys received from the sale of the mortgaged premises shall be deposited at once with T. J. Edwards, Esq., clerk of the United States circuit court for the district of Nevada, at Carson City, Nevada, to abide the result of any action or proceeding that may be instituted by the United States to determine the bona fides of the assignment of the mortgages mentioned in the bill herein to the defendants Trenmor Coffin and William Woodburn: provided, such action or proceeding is instituted in the district of Nevada within thirty days from the date hereof. Further ordered, that this action shall be and stand dismissed at and upon the expiration of thirty days from this date, without prejudice to the right of complainant to commence another action against the same parties for the same cause of action."

This suit was commenced within the 30 days therein specified.

From the testimony in this case it appears that on December 21, 1895, James Heney was convicted in the United States district court for the district of Nevada of a felony, to wit, of the crime of unlawfully and feloniously taking and carrying away and converting to his own use gold metal from the United States mint at Carson, the property of the United States, of the value of $23,000. He was ordered into the custody of the marshal, and the court announced that sentence would be imposed on December 24, 1895. The marshal placed the prisoner in the county jail. Within a few hours after his conviction it was suggested that some steps be taken to secure the counsel, Trenmor Coffin and William Woodburn, who had defended him, their fees. There assembled in the private room of the county jail, in addition to the jailer, prisoner, and his counsel, Mrs. James Heney, her brother, Robert Barnes, and Sheriff Kinney; the latter being called in as a witness. There is more or less conflict as to the conversations, and some controversy as to the actual transactions, which there took place. The prisoner was possessed of money, and was the owner of several mortgages, which he had transferred to Jacob Klein, president of the Bullion & Exchange Bank, as security to indemnify him on account of any damages he might sustain by reason of his being a surety, with others, upon a bond conditioned for his appearance in court to abide any judgment that might be rendered against him under the indictment. The property thus assigned consisted of $4,000 in money, a mortgage executed by Margaret Warde, for the sum of $6,200, upon property situate in San Francisco, Cal.; a mortgage executed by H. S. Dawson and wife, for the sum of $3,000, upon property situate in San Francisco, Cal.; a mortgage executed by M. Callahan, for the sum of $2,500, upon property situate in Washoe county, Nev. The money was deposited in the bank, and of the amount there had been drawn out, during the two trials of the criminal case, by Heney, or upon his order, for purposes not disclosed in the evidence, the sum

of $2,400, leaving at the time of Heney's conviction the sum of $1,600. This amount had been, before the hour of closing the bank, withdrawn by Coffin, and placed in his own safe. This was done before Heney's conviction. On the night in question, at the jail, the $6,200 mortgage was assigned by Heney to Woodburn, the $3,000 mortgage was assigned by Heney to Coffin, and the $2,500 mortgage was assigned by Heney to his wife, Mary Heney. The money ($1,600) was brought to the jail by Coffin, remained there during the transaction, and was afterwards—less the sum of $120, retained by Coffin for certain expenses—delivered over by him to Mrs. Heney. On December 24, 1895, Heney was sentenced to a term of years in the penitentiary, and to pay a fine of $5,000. Briefly stated, the contention of the government is that the assignments were made and delivered for the purpose of defrauding it of its chance to collect any fine which might be imposed by the court upon Heney. The contention of respondents Coffin and Woodburn is that the assignments to them were made in good faith, for value, for the purpose of paying to them the amount due on their fee, and that the assignments were absolute,—without any conditions whatever. The contention of respondent Heney is that the assignments were made in good faith to secure counsel their fees, and that, when the amount of the fees were deducted from the proceeds of the sale, the balance was to be paid over to his wife. Coffin claims that there was and is due to him the sum of $2,000 as a fee. Woodburn claims that his fee is $3,500. Heney claims that he made a special agreement with each of his counsel,—that Woodburn was to receive $2,000 in case of acquittal, and only $500 in case of conviction; that Coffin was to receive $600 in case of acquittal, and $500 in case of conviction; that Woodburn received $70, and Coffin $400, leaving a balance due to Woodburn of $430, and a balance due to Coffin of $100.

The case, as presented, is in many respects unsatisfactory. It is by no means clear. Any attempt to unravel it and get at the bottom facts is met by difficulties of all kinds, which are not easy to overcome. This court is unwilling to say that any testimony that would tend to elicit the truth has been suppressed, yet the impression remains that the whole truth of the transaction has not been fully disclosed. There are many admitted facts in the testimony that tend to establish the broad proposition for which the government contends. The inferences to be drawn from the time, manner, and circumstances of the transaction point very strongly that way. Heney was convicted Saturday night. In anticipation of his conviction, the money and securities in the bank had been withdrawn, and placed in the possession of Mr. Coffin. Tuesday was the day set for sentence. It was known that Heney would not only be imprisoned, but that a fine would also be imposed. The law so provided. Although possessed of ample means, sufficient to discharge his indebtedness to counsel and to pay his fine, his property had been put out of his hands. When placed in custody of the officer, his bondsmen were released, and were ready to surrender the property to whom it might belong. If turned over to Heney, it might be reached upon execution. Having been successful in unlawfully obtaining from the government a large sum of money, he evidently desired to save as much of his ill-gotten

gains as he possibly could, either by fair or unfair means. He proposed to his counsel that they should take the mortgages, ostensibly for their fee, but with the private understanding that it was only as collateral security. With all due formality, after signing and acknowledging the assignment which admitted the receipt of $6,200 as the consideration, he handed the mortgage over to Mr. Woodburn, and said, "This is yours," and the same public formality and declaration accompanied the transfer of the other mortgage to Mr. Coffin. In the next breath, and in a different part of the room, and in a lower tone of voice, was told the story that the assignments were only intended as collateral security. The witness Kinney and others heard both statements. But the question arises whether these suspicions, strong as they are, of an intended fraud by Heney upon the government, are sufficient to justify a decree of this court to cancel and set aside the assignments of the mortgages to his counsel upon the ground of actual fraud. Fraud is never to be presumed, but, like every other fact, it may be proved by circumstances. Courts, while not indulging in presumptions of a questionable nature, should never refuse to draw from uncontroverted facts the legal inferences which naturally and logically flow from them.

The respondents, when served with process herein, filed their joint and several answer, denying that they, or either of them, entered into or knew of any scheme or combination to defraud the United States or any other person in any manner whatever, or to elude, hinder, or delay the payment of any fine imposed against Heney; that the mortgaged property had greatly depreciated in value, and would not sell for more than enough to pay the fees of counsel; that the assignments were made bona fide in payment of fees due from Heney. Other averments were made, as to the relation of the counsel towards Heney, and as to the purpose for which the assignments were made, which need not be mentioned. Before the trial, Heney appeared in court, and asked leave to file a separate answer, stating that he had never been consulted as to the defense that should be interposed, and that he was unaware of what action had been taken in the premises, and that he had never authorized Woodburn and Coffin, or either of them, to interpose an answer on his behalf. Leave was granted. He then filed a separate answer, alleging "that said assignments were made, bona fide and in good faith, for the purpose of securing" his counsel for the amount due them for professional services, and then alleged the specific agreements he made with them concerning their fees, and asked for a decree that the balance remaining after foreclosure and payment of counsel "be adjudged and decreed to belong to this respondent's wife, Mary Heney." After the case was tried and submitted, the court ordered that the money realized from the sale of the Dawson mortgage be forthwith deposited with the clerk of this court, in pursuance of the order and stipulation as made in the circuit court in San Francisco, and reserved the right to have further testimony taken; and subsequently, upon motion of complainant's counsel, the case was reopened, and a commission was issued to take testimony in San Francisco; and much additional information was there obtained as to the value of the mortgaged prop-

erty, and the manner in which the sale of the property under the Dawson mortgage was conducted, and also as to certain declarations of Trenmor Coffin as to other parties having an interest in the proceeds of the sale of the mortgaged property. The property under the Dawson mortgage was assessed at $2,800. It was sold under foreclosure sale to Mr. Coffin, August 18, 1896, for $1,750. The certificate of sale was assigned to Jane Coop in December, 1896, and shortly thereafter the property was sold for $2,466.40, and again sold in May, 1897, for $3,000. On May 8, 1897, Mr. Coffin's attorney forwarded to the clerk of this court the sum of $1,478.35, being the amount for which it was sold, less attorney's fees and expenses of foreclosure. It appears that prior to the foreclosure there had been much talk about the sale between Mr. Coffin and his attorneys, and also with other parties who had a subsequent mortgage on the property, and with Mr. Temple, attorney for Mr. Dawson, the mortgagor. There appears to have been an understanding that only $1,750 should be bid, and Mr. Coffin instructed his attorneys to only bid that amount. There had also been more or less conversation between the parties with reference to disposing of the property at private sale. Mr. Temple testified as follows:

"I proposed to him [Coffin] what I had already written,—that he should take $1,750, and release the mortgage, or not release it, assign the mortgage to a nominee, and that I wished to keep the mortgage alive for the protection of my client, Dawson. Mr. Coffin replied, in effect, * * * that he could not do as I asked, because he had to account for the proceeds of the mortgage to his client and his wife."

Touching this last proposition, Mr. Coffin, on May 7, 1896, addressed a letter to his counsel, in which he said:

"J. W. Dorsey, Esq., San Francisco—Dear Sir: Replying to yours of April 28, in regard to the settlement of mortgage in Coffin v. Dawson, I will say that I am not now in a position to make any settlement whatever for less than the amount due upon the mortgage, for the reason that other parties have an expectancy in the mortgage in case the full amount is collected, and I would be censured if I would take less than the full amount. * * * Press the foreclosure sale as soon as possible, and I will probably have the property bid up to near its cash value at the sale.

"Yours, Trenmor Coffin."

The property under the Warde mortgage, held by Woodburn, has not yet been sold. Mr. Woodburn, in giving his testimony as to what occurred when the mortgages were assigned, said:

"Mr. Heney did say to me after the mortgage was given to me— He gave it to me himself— He said: 'You take the larger mortgage; and, Coffin, you take the smaller one.' The only conflict that occurred was between me and Mr. Heney, as to the value of the property. My information led me to believe it had dropped 40 or 60 per cent., and Mr. Heney claiming it was worth the face value. Mr. Heney said to me, in giving the mortgage: 'Woodburn, if you realize the face value of that mortgage, will you ever see Mary want for anything?' I said: 'No, sir; I will not.' I never expected $6,200 for my fee, and it was all open and aboveboard, before everybody there. I never expected $6,200. I never expected to realize half of it."

The whole case, in all of its features, presents very remarkable characteristics. There is something radically wrong about the transactions, requiring close scrutiny and searching investigation. The inferences to be drawn from all the testimony are such as to excite

the vigilance of any tribunal compelled to pass upon the fairness of the transactions. It looks unreasonable, to say the least, that a man of Heney's financial shrewdness, whose desire seems to have been to obtain money by any means, and to keep all he gets, would, after his conviction of a crime, where the facts, as here, left no hope for any legal escape from his punishment, voluntarily have turned over property which, upon its face value, and the weight of testimony, is worth over $9,000, in payment of an indebtedness of only $530, as claimed by Heney, or even for $5,500, as claimed by the other respondents, unless there existed some other motive or understanding. The testimony of respondent Heney, under all the circumstances and surroundings in which he is placed, is to be weighed with suspicion; yet in some respects it evidently bears the earmarks of truth, and is supported by the testimony of others, free from all taint of doubt or interest in the result of the suit, and ought not to be, and cannot be, entirely discredited. Respondents Woodburn and Coffin earnestly claim that all their acts in the premises were in the utmost good faith, and vigorously disclaim any intention or purpose to defraud or take undue advantage of anybody. As to them, the strongest inferences of fraud arise from their contention that the assignments of the mortgages were absolute, in payment of their fees, and from the manner in which the sale of the property under the Coffin assignment was conducted. That they had the right to secure the payment of their fees is unquestioned, if in so doing they acted openly and honestly, without any design to defraud others having an interest in the bona fides of the transaction. Having carefully weighed all the testimony in the case, my conclusion is that it is insufficient to justify a decree setting aside the assignments on the ground that they were executed for the purpose of defrauding the United States.

The United States pray for such other and further relief as in equity and justice they may be entitled to, and this calls for the judgment of the court as to what the real consideration and purpose for which the assignments were made were. The weight of the testimony —which need not be further commented on—clearly shows that the assignments were made to secure counsel their fees, and that the understanding between counsel and Heney was that the balance of the money realized from the foreclosure sale, after payment of the costs and expenses of sale, and deducting the fees of counsel, should be paid over to Mr. Heney, or to his wife. What fees were due from Heney to Woodburn and Coffin at the time the assignments were made? As to the amount due Woodburn, it is admitted by counsel for the government and for Heney that the weight of the testimony shows that it was originally fixed and agreed upon at $2,000, without any contingency as to acquittal or conviction; and the court, from all the testimony, so finds. Woodburn's claim for $3,500 arises out of the fact that during his employment, under this understanding, he was discharged by Heney, and that a new agreement was made, whereby Heney promised to pay whatever his services were reasonably worth, and that upon those terms he came back into the case. Heney admits that there was a misunderstanding, and talk of Woodburn withdrawing, but denies that he was discharged, or that any new agreement

was made. The terms as to Woodburn's discharge, as testified to by him, were never complied with. The differences between them were amicably adjusted within two days, without detriment, loss, or damage to either. There is a decided conflict as to the amount agreed to be paid Coffin. The question is not free from doubt. Coffin came into the case at the "eleventh hour." Neither he nor Heney wanted anybody else to know what the fee should be, and this is the only fact concerning this transaction upon which there is no disagreement. Coffin's statement as to the fee is as follows:

"Mr. Heney asked me * * * before the trial what I would charge. I told him, 'One thousand dollars.' He did not want to pay so much, and I always declined to mix up with the case in any way for less than $1,000; and on Saturday evening before the trial, which was coming on Monday, he asked me again if I would not take his case for less than $1,000, and I told him, 'No.' I said: 'Mr. Heney, I don't think you want me in the case, and I do not think you need me. Mr. Woodburn can try your case, and I do not think you need me;' and I got up and started out. I felt a little disgusted about it, and, when I was at the door,—just opened the door,—Heney, from behind the counter, called me to come back, and said he wanted me in the case, and repeated again that it would not take to exceed a week, and asked me if I would not take $500; and I said: 'If it can be tried in a week, I will take it for $500; and if, on Saturday night, you pay me $500, that will be in full for my services up to Saturday night.' But I said again it would be impossible to try that case in a week, and my fee would be $1,000 for trying the case. And that was the last that was said about the fee until after the trial, when I asked him for it, and he explained why he could not pay. * * * I declined to go into the second trial until I was paid for the first. He said he could not pay, and I insisted, and he got me $300; and I said the fee for the second would be the same, making $2,000."

The first trial of Heney occupied two weeks.

Heney's version is that:

"Mr. Coffin was to get $600 if I was acquitted; he was to get $500 if I was convicted,—if the case was to be tried once or a dozen times."

In reply to the question, "Was that agreement reduced to writing?" he answered:

"No; I wanted Mr. Coffin to give me a writing for it, and he said he would not do it. He wanted no one to know. He said his fee was so cheap that he was ashamed of it; he was engaged by Mr. Jones, and wanted to be in court anyhow; and he wanted to follow the case."

Mr. Heney was called in rebuttal, and upon his cross-examination, in reply to questions, answered as follows:

"Q. Did you ever have more than one contract with Mr. Coffin? A. I never did, sir. Q. Was that made before or after the trial commenced? A. It was made on Saturday night previous to the trial,—pretty late. Q. Was there any agreement between yourself and Coffin that the fee agreed ($500) * * * should be for one week's work? A. Nothing of that kind stipulated in the agreement at all. The case was to be tried for $500 if it was to be tried once or a dozen times, and $500 if I was convicted; and, if I was to be acquitted, he was to have $600, if I was to be tried once or a dozen times. Q. After that first trial, did you ever have any other agreement? A. No. * * * Q. When did you first know he charged $2,000 for his services? A. When I heard his answer read; * * * the day I came up the first time; the day it was postponed. That was the first I knew of it,—the first time I came up here, and concluded to file a separate answer."

Accepting Mr. Woodburn's and Mr. Coffin's versions of the main agreements, as to the fee for Mr. Woodburn of $2,000, and of Mr.

Coffin of $1,000, without any contingencies of acquittal or conviction, I do not feel authorized, from all the surrounding circumstances in this case, to allow them the full amounts respectively claimed, or any sum greater than just stated, from which will be deducted the amounts heretofore paid. Heney was under indictment for a serious offense. He was anxious to have a definite understanding as to the amount of the fees he would be called upon to pay. When once fixed and agreed upon, the amounts should not be raised, during the progress of the trial, to the seeming disadvantage of the client. The law is well settled that, in all transactions between an attorney and his client, the attorney, in a matter of advantage to himself, is bound to show that the transaction is fair, just, and equitable; that his client was fully informed of his rights in the subject-matter of the transaction, its nature and effect; and that he was placed in such a position as to be able to deal with the attorney at arm's length. The general rule is clearly and correctly stated in 3 Am. & Eng. Enc. Law, 332, as follows:

"In all dealings with his client, the highest degree of fairness and good faith is required of the attorney. The courts view all such transactions with suspicion, and examine them with the utmost scrutiny; and, if they present even a suggestion of unfair dealing, the burden of proof lies on the attorney to show the honesty and good faith of the transaction, and that it was entered into by his client freely and understandingly."

See authorities there cited; 1 Lawson, Rights, Rem. & Prac. § 176, and authorities there cited; Kisling v. Shaw, 33 Cal. 425, 440; Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490; Ross v. Payson, 160 Ill. 349, 43 N. E. 399; Burnham v. Heselton, 82 Me. 495, 20 Atl. 80; Cooper v. Lee, 75 Tex. 114, 12 S. W. 483.

The burden of proof is always upon the attorney to show the absolute fairness of the transaction. In Elmore v. Johnson, 143 Ill. 513, 525, 32 N. E. 413, the court, in discussing this question, said:

"Before the attorney undertakes the business of the client, he may contract with reference to his services, because no confidential relation then exists, and the parties deal with each other at arm's length. The same is true in regard to dealings which take place after the relation has been dissolved. 1 Story, Eq. Jur. (13th Ed.) 310–313. But the law watches with unusual jealousy over all transactions between the parties which occur while the relation exists." Morange v. Kling, 93 N. Y. 381; Tenney v. Berger, Id. 524; Cotzhausen v. Trust Co., 79 Wis. 613, 49 N. W. 158; Weeks, Attys. at Law, §§ 250, 255, 268.

The views already expressed dispose of all the questions in this case, except as to the disposition to be made of the money that has been and is to be paid to the clerk of this court from the proceeds of the foreclosure sales. No order in that regard will be made until after the sale of the property under the Warde mortgage, and after the proceeds are deposited in this court as heretofore agreed by counsel and ordered by the court.

DUDLEY v. JAMES.

(Circuit Court, D. Kentucky. July 27, 1897.)

No. 6,606.

1. TENURE OF OFFICE—DEPUTY MARSHALS—CIVIL SERVICE RULES.
Since the act of May 28, 1896, as well as previously, the tenure of a deputy marshal expires, except as otherwise specially provided by law, with the term of the principal marshal; and thereafter he is not in the executive civil service of the United States, within the meaning of the civil service rules promulgated November 2, 1896.

2. JUDICIAL CONTROL OF EXECUTIVE OFFICERS—INJUNCTION—MANDAMUS.
The courts cannot properly interfere with executive action, either by mandamus or injunction, in a matter in which the executive officer is authorized to exercise his judgment or discretion.

This was a suit in equity by Lee J. Dudley against A. D. James, United States marshal for the district of Kentucky, to enjoin him from removing complainant from his office as a deputy marshal. The cause was heard on motion for a temporary injunction.

E. E. McKay, for complainant.
Walter Evans, for defendant.

BARR, District Judge. The complainant in this case alleges that he was duly appointed and qualified as office deputy United States marshal under James Blackburn, then United States marshal for the district of Kentucky, on the 2d of July, 1896, under and pursuant to the act approved May 28, 1896, at a salary which was fixed by the attorney general at $1,500 per annum; that he took the oath required as said United States deputy marshal, and has performed the duties of an office deputy and clerical assistant to the United States marshal for the district of Kentucky from that time until the filing of this bill; that under an act approved the 16th of January, 1883, commonly styled the "Civil Service Act," and under the rules adopted and promulgated thereunder by the president of the United States November 2, 1896, the position of office deputy marshal and clerical assistant was placed within the bounds and purview of said law and rules, and the classified service, and by reason thereof the complainant cannot be thereafter removed without just cause, and cannot be dismissed from the service because of his political or religious opinions or affiliations. Plaintiff further alleges that on the ——— day of July, 1897, the defendant, A. D. James, qualified, and became the United States marshal for the district of Kentucky, and since then has declared his intention to remove the complainant from his office, and appoint, or cause to be appointed, another in his stead. By an amended bill he alleges that his duties are mostly clerical, and consist of office work in verifying vouchers and pay rolls, and in keeping the office, and preparing the accounts for the amounts paid out and received by the marshal as a disbursing officer, and in keeping the cash and other books of said office, making weekly reports, etc. He further alleges that on July 6, 1897, the defendant, in a communication to complainant, stated "your orator had been highly recommended to him as a book and account keeper, and as a man,

but that his (defendant's) party friends were insisting upon the immediate appointment of a Mr. Blackburn to take your orator's position, and that he would have to and intended to appoint said Blackburn in your orator's place, but for no other reason than that the complainant was a Democrat." The prayer of the bill is for a temporary injunction enjoining the defendant from removing your orator from his office aforesaid, or from taking any steps towards accomplishing same, or from doing any act whereby complainant would be disturbed in discharging his duties or receiving the emoluments of said office, and upon final hearing he prays that said injunction be perpetuated.

The answer filed denies that the complainant is entitled to hold the position of office deputy marshal of the United States for the district of Kentucky at the salary of $1,500, or any other sum, and denies that the complainant is within the bounds or the purview of the civil service act, and the rules, and classified service, and that plaintiff cannot be removed without just cause, or cannot be dismissed from the service; and denies that he desires to remove the complainant solely because he is a Democrat; and denies that on the 6th of July, or at any other time, in a conversation with the complainant, he stated he intended to employ one Blackburn in place of complainant for no other reason than that the complainant was a Democrat. And defendant alleges that the complainant was appointed a deputy marshal of the Hon. James Blackburn, late marshal for the district of Kentucky; that he took the oath as said deputy marshal on the 4th of January, 1894; and that after the passage of the act approved May 28, 1896, he was appointed office deputy, and took the oath as such on the ——— day of ———, 1896. And further alleges that on the ——— day of June, 1897, he, the defendant, was appointed United States marshal for the district of Kentucky, and thereafter he executed bond, and took the oath of office, and is now the legally appointed and qualified marshal for the district of Kentucky, and that the term of office of said Dudley expired with the term of office of said James Blackburn, late marshal of the district, and thereafter he ceased to be a deputy marshal. Defendant admits that he intends to appoint some other person than the complainant to the office and position of deputy marshal of the district of Kentucky, and insists that he has full right and power to do so. There was no testimony presented, and the case was heard and submitted on the pleadings.

These pleadings present two questions for consideration: First, whether or not the complainant was, at the filing of his bill, an officer or in the executive civil service of the United States; and, second, if he was and is an officer in the executive civil service of the United States under and within the civil service act, and the rules promulgated thereunder, whether a bill of injunction would lie in this court to restrain the defendant from removing him. We think it quite clear that prior to the act of May 28, 1896, the tenure of the deputy marshal continued only so long as the term of the principal marshal whose deputy he was, except where it by law specially continued. The marshal was authorized to appoint one or more deputies, and their compensation was a matter of contract (within certain limits) between the marshal and the deputy. There were no duties pre-

scribed by law for the deputy marshal to perform other than those of the marshal, and the authority and power of the deputy was limited by that of the marshal. It is true that the deputy was paid out of the fees which he earned, but these fees were fees due to the marshal, collectible by him alone; and every service and duty performed was in the name of the marshal. The obligation of the bond of the marshal covered the acts of the deputy as well as those of himself. This was the recognized position of the deputy marshal from the establishment of the government, and congress, as early as 1789, provided: "In case of the death of any marshal his deputy or deputies shall continue in office, unless otherwise specially removed, and shall execute the same in the name of the deceased until another marshal is appointed as provided by law. The defaults and misfeasances in office of such deputies in the meantime shall be adjudged a breach of the condition of the bond given by the marshal who appointed them." And also provided that every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed expires, "shall have power notwithstanding to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office." Rev. St. §§ 789, 790.

It is held in Powell v. U. S., 60 Fed. 687, that a deputy marshal is not such an officer of the United States as can maintain a suit against the United States for service rendered, and for services rendered he must look to the marshal who appointed him, or under whom he acts. And in Douglas v. Wallace, it is held by the supreme court of the United States: "The claims of deputy marshals against the marshal for services stand upon the same footing as those of an ordinary employé against his employer." 161 U. S. 346, 16 Sup. Ct. 485. This being the position which deputy marshals bore prior to the act of May 28, 1896, the inquiry arises whether that act has changed their relations, so as to make either an office deputy or a field deputy an independent officer of the United States, with a tenure continuing after the term of the office of the principal. The tenth section of this act provides:

"That when in the opinion of the attorney general the public interest requires it, he may on the recommendation of the marshal, which recommendation shall state the facts as distinguished from conclusions, showing necessity for the same, allow the marshals to employ necessary office deputies and clerical assistance, upon salaries to be fixed by the attorney general from time to time and paid as hereinafter provided. When any of such office deputies is engaged in the service or attempted service of any writ, process, subpœna, or other order of the court, or when necessarily absent from the place of his regular employment on official business he shall be allowed his travelling expenses only and his necessary and actual expenses for lodging and subsistence, not to exceed two dollars per day, and the necessary actual expenses in transporting prisoners including necessary guard hire, and he shall make and render accounts thereof as hereinafter provided."

Section 11 provides:

"That at any time when in the opinion of the marshal of any district the public interest will thereby be promoted, he may appoint one or more deputy marshals for such district, who shall be known as field deputies, and who unless sooner removed by the district court as now provided by law shall hold office during the pleasure of the marshal, except as hereinafter provided, and who shall each, as his compensation receive ¾ of the gross fees, including mileage,

as provided by law, earned by him, not to exceed $1,500 for the fiscal year, or at that rate for any part of a fiscal year, and shall in addition be allowed his actual and necessary expenses, not exceeding $2 per day while endeavoring to arrest under process a person charged with or convicted of a crime. * * * The marshal immediately after making any appointment or appointments under this section shall report the same to the attorney general, stating the facts as distinguished from conclusions constituting the reason for such appointment, and the attorney general may at any time cancel any such appointment as the public interest may require."

And by section 24 "all acts and portions of acts inconsistent with this act are hereby repealed."

It will be observed that the United States, both in office and field deputies, pay their compensation. As to office deputies, the compensation is by salary; as to field deputies, by three-fourths of the gross fees which they may have earned. These fees are not in the name of the deputy, but go to the marshal, who, we assume, collects them, and pays them into the treasury; and the field deputies are paid out of the treasury three-fourths of their gross fees. But, whether this be the actual method of payment or not, it is not material in the present inquiry. It will also be observed that office deputies have exactly the same power and authority to serve process and perform other duties as the field deputies have, and the power of the office deputy as well as that of the field deputy is limited in this regard by the power and authority of the marshal. Each class of deputies performs such duties as may be prescribed by the marshal, and, though it may be contemplated that the office deputy will render the marshal clerical assistance, this must depend upon the marshal's convenience or will. It is true that section 11 in terms provides that the field marshal shall hold his office during the pleasure of the marshal, and nothing is stated in regard to the office deputy; but this should not, and cannot, of itself, be construed to make an office deputy a separate and distinct officer of the United States with an indefinite term. If there is any distinction to be drawn from the language of the two sections as to the tenure or term, it will be rather against the office deputy, since the language is to allow the marshals "to employ" necessary office deputies, and section 11 authorizes the "appointment" of one or more deputy marshals. We see nothing in the provisions of this act which is inconsistent with the previous recognized position of the deputy marshal in regard to his tenure or service, and conclude that the former statutes, read with this act, cannot be construed other than that the term of both office and field deputy marshals must cease with that of the marshal who appointed them. We conclude, therefore, that the complainant was, at the time of the filing of his bill, not in the executive civil service of the United States, within the meaning of the civil service rules promulgated November 2, 1896, and therefore he is not entitled to maintain this action.

This is the construction given to the act of May 28, 1896, by the first comptroller of the treasury, the Honorable Robert B. Bowler, in a decision of June 7, 1897. Although this view is conclusive of the present motion, it is proper, as there seems to be some misapprehension of the power of a court of chancery to grant injunctions, and thus control executive action, that the court should briefly state its

views upon that question. It has been settled from the adoption of the constitution of the United States, dividing the powers of government into three departments, that the judiciary cannot properly interfere with executive action when the executive officer is authorized to exercise his judgment or discretion; that it is only in cases where the executive officer has to perform a purely ministerial act that the courts, either by a proceeding in mandamus or injunction, can direct or control the performance of such (ministerial) act. Whether or not the judiciary can control executive action, and to what extent, is most elaborately discussed in the case of Marbury v. Madison (1803) 1 Cranch, 137, and there the rule was indicated that the courts cannot, either by mandamus or otherwise, control executive action, where that action depended upon either the discretion or judgment of the executive officer; and it was only where the performance of the executive act was purely ministerial that the court could intervene, either by mandamus or otherwise. This question has been again and again presented and considered by the court, and the rule first adopted never departed from. In Gaines v. Thompson, 7 Wall. 347, the supreme court, by Justice Miller, after deciding that the courts would not interfere by injunction any more than by mandamus to control the action of the secretary of the interior and the commissioner of the land office, and require them to cancel an entry for land, because their action was not ministerial, but a matter resting solely upon the judgment or discretion of those executive officers, quoting from the opinion of Chief Justice Taney in Commissioner of Patents v. Whiteley, 4 Wall. 522, said:

"The court cannot entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorizes him to exercise judgment or discretion, nor can it, by mandamus, act directly upon an officer, or guide or control his judgment or discretion in a matter committed to his care in the ordinary exercise of his official duties. The interference of the court with the performance of the ordinary duties of the executive department would be productive of nothing but mischief. We are quite satisfied that no such power was ever intended to be given to them."

The court in this case reviewed the previous cases, and showed that the distinction which had been previously laid down had never been departed from, and said, among other things:

"Certain powers and duties are confided to these executive officers, and to them alone; and, however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts after the matter has once passed beyond their control, there exists no power in the courts by any of its process to act upon the officer so as to interfere with the exercise of his judgment while the matter is properly before him for action. The reason for this is that the law imposes this discretion in him for that action, and not in the courts. The doctrine, therefore, is as applicable to writs of injunction as to writs of mandamus."

See, also, Kendall v. U. S., 12 Pet. 524; Decatur v. Paulding, 14 Pet. 497; U. S. v. Black, 128 U. S. 40, 9 Sup. Ct. 12; U. S. v. Windom, 137 U. S. 636, 11 Sup. Ct. 197; High, Extr. Rem. § 42; Black, Const. Law, p. 81.

The question before the court does not require the consideration of the civil service law of 1883, or of the rules and regulations made thereunder in November, 1896. No opinion is now indicated as to

whether or not that law, and the regulations made thereunder, apply in the appointment of office deputy marshals. That matter is not before the court. For the reasons given, the motion for the temporary injunction must be overruled.

MINNESOTA TRIBUNE CO. v. ASSOCIATED PRESS.[1]

(Circuit Court of Appeals, Eighth Circuit. November 22, 1897.)

No. 906.

1. CONSTRUCTION OF CONTRACTS—REFERENCE TO BY-LAWS—NEWS-ASSOCIATION SERVICE.

A contract between an association engaged in furnishing news, and a certain newspaper company, provided, in its seventh paragraph, "that the rights, duties, and obligations of the parties hereto, except as hereinbefore specifically provided for, shall be controlled and governed by the by-laws of the said party of the first part," etc. *Held*, that the effect of this was to make the subsequent provisions of the contract subordinate to the by-laws, so that the ninth paragraph, which provided that the news association should not extend its news service to any publications not then entitled to receive the same, without the written consent of the other contracting party, was controlled and modified by a provision of the by-laws which provided that newspapers entitled to receive news service from certain old associations on a given date should be entitled to have service extended to them without the consent of the local members.

2. SAME.

A newspaper company, having an exclusive contract right in its locality to the news service of a press association, agreed to lease to a rival publication, for three years, the right to receive the same service, provided the association would assent thereto. At a conference between the managers of the two newspapers and the manager of the association, the latter verbally agreed to comply with the arrangement, in consideration of an increase in the weekly payments. Thereupon the agreement between the two newspapers was executed in writing by them, and the association's wires and operator were placed in the office of the second newspaper, so that the news reports were delivered direct to it. Pending the existence of this arrangement, a new news association was formed, with a by-law making eligible as members thereof, without the assent of its local board, newspapers which were entitled on a given date to receive service of news from the old association "under existing contracts." *Held*, that the second newspaper was within this description, and was entitled to have the news service of the new association extended to it without the consent of the other newspaper company, which, being at the time the only one receiving news from the new association, had all the powers of a local board. 77 Fed. 354, affirmed.

3. SPECIFIC PERFORMANCE—AMBIGUOUS CONTRACTS.

A suit for specific performance can only be maintained where the terms of the contract are so precise that they cannot be reasonably misunderstood; and specific performance will not be granted to enforce an agreement if any of its provisions are so far indefinite or ambiguous as to render it uncertain what were the intentions of the parties, and what obligations they intended to assume.

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

This was a bill filed by the Minnesota Tribune Company, the appellant, against the Associated Press, the appellee, to specifically enforce the provisions of a contract between said parties, which contract was as follows:

"This agreement, made and entered into this 2nd day of March, 1893, by and between the Associated Press, the party of the first part, and the Minnesota

[1] Rehearing pending.

Tribune Company, the party of the second part, witnesseth: That, for and in consideration of the covenants herein contained, the parties hereto have mutually agreed as follows: 1st. The party of the first part hereby sells and conveys to the party of the second part the right and privilege of publishing in the Minneapolis Tribune, a newspaper printed in the English language at Minneapolis, Minn., the night news report of the Associated Press, for the term of ninety-two years, and to deliver to said party of the second part, in time for publication in said newspaper, the said report, so far as it may be practicable so to do. 2d. Said party of the second part agrees to receive the said news report of said party of the first part for said term of ninety-two years, and to publish the same in said newspaper continuously, and to pay therefor ninety-four and $^{90}/_{100}$ dollars per week, in advance, and also to pay any additional weekly assessments made by the board of directors or executive committee of said first party upon said party of the second part, not exceeding fifty per cent. * * * of the amount agreed to be paid weekly, in like weekly installments, in advance. 3d. Said party of the second part agrees to furnish to the party of the first part the news, local and telegraphic, of the following described territory, viz. within a radius of sixty miles from said city, excepting the city of St. Paul, and such territory adjacent thereto as is covered by the franchise rights of the members of said city, in accordance with the provisions and requirements of section one of article eleven of the by-laws of said party of the first part. 4th. It is mutually understood and agreed that the board of directors of said party of the first part shall have the right and power to change from time to time the weekly assessment to be paid by said party of the second part for the news report hereinbefore mentioned, without limit as to the amount, and that said party of the second part shall pay the amount of said weekly assessment so long as it takes said news report. In the event that said weekly assessment should be increased more than fifty per cent. * * * above the weekly amount specified and agreed to be paid by said second party at the date of this contract, then and in such case said second party shall have the right to terminate this contract, and all liabilities thereunder, upon the transfer and surrender to said first party of all his stock in said Associated Press, for which he shall be entitled to receive from said first party the par value thereof. 5th. It is further mutually agreed between the parties hereto that the franchise or privilege granted by this contract to said party of the second part may be transferred with the said Minneapolis Tribune newspaper, provided the new proprietor shall enter into a new contract with said party of the first part similar hereto. 6th. Said party of the second part covenants and agrees that it will not furnish, before publication, any news, to any person or corporation engaged in the business of collecting or transmitting news, except upon the written consent of the board of directors of the party of the first part, first had and obtained, and that it will not furnish to any person any of the news received by it under this contract before publication by it, and that it will not furnish its special or other news to, or receive news from, any person or corporation which shall have been declared by the board of directors of said party of the first part antagonistic to said party of the first part, after having received notice of such declaration. 7th. It is further mutually agreed between the parties hereto that the rights, duties, and obligations of the respective parties hereto, except as hereinbefore specifically provided for, shall be controlled and governed by the by-laws of said party of the first part now or hereafter in force during the life of this contract, and that the right to receive news under this contract may be suspended or terminated in the manner and for the causes specified in said by-laws. 8th. It is further stipulated and agreed that said party of the first part shall in no event be liable for any loss or damage arising to said party of the second part by reason of the publication of any of the news received by it from said party of the first part under this contract. It is agreed that the word 'person,' in this contract, includes any partnership, corporation, association, newspaper, or agency. 9th. Said party of the first part promises and agrees not to furnish any news report to any newspaper, published in the said territory described in this contract, not now entitled to receive the same under the by-laws of said party of the first part, without the written consent of the said party of the second part or its assigns. 10th. Said party of the second part has assigned and transferred its stock in the said party of the first part to the said party of the first part, which

stock is to be held by said party of the first part as security for the performance by said party of the second part of this contract on its part. Said party of the second part, in consideration of the making of this contract by said party of the first part, hereby covenants and agrees that it will not sell or part with any interest in said stock to any party who shall not be the proprietor of a newspaper which shall at the time be on the membership roll of said party of the first part, and that it will keep and observe and perform all the requirements of the by-laws of said party of the first part now or hereafter in force during the life of this contract."

The material portions of the by-laws of the Associated Press to which reference is made in the aforesaid contract were as follows:

"VI. Membership.

"(1) Who are Members. The proprietors of the newspapers receiving the news report of the Associated Press shall constitute its membership, and be designated as 'Members of the Associated Press.'

"(2) Membership Roll. The secretary of the company shall keep a record of all newspapers entitled to a news report from the association, to be known as the 'Membership Roll,' and no service of news shall be rendered to any newspaper until it shall have been properly enrolled.

"(3) Who are Eligible. Memberships shall not be confined to newspaper proprietors who are the owners of stock, but may be issued, without regard thereto, to any newspaper proprietor, in accordance with the terms and conditions provided in these by-laws.

"VII. Admission of Members.

"(1) How Admitted. Application for admission to be a member of this association shall be made by a communication in writing addressed to the board of directors, and signed by the proprietor of the newspaper for which the news report is desired. The application shall be accompanied by the consent in writing of all persons whose consent is necessary, under the by-laws, to authorize the board to grant the application. Applications may be acted upon at any meeting of the board of directors or the executive committee, the affirmative vote of a majority [of] those present being necessary to elect.

"(2) Consent of Local Board. No new member shall be admitted, except in accordance with the provisions of the by-laws relating to local boards, where publication is proposed in a city or town having at the time one or more members holding certificates of series A. Newspapers which were entitled to a service of news under existing contracts with the Western Associated Press or the United Press on the 15th day of October, 1892, shall not be considered new members, within the meaning of this article.

"(3) Membership Contract. Every member shall be required to execute a contract with the association before the name of the newspaper of which the member is proprietor shall be entered upon the membership roll. The form of this contract shall be prescribed by the board of directors, and it shall conform to the requirements of the by-laws, embodying the substance of their provisions respecting the rights and duties of members.

"VIII. Certificate of Membership.

"(1) Form of Certificate. The evidence of membership shall be a certificate signed by the president and secretary of the Associated Press, and bearing its seal. It shall set forth the language in which the newspaper admitted as a member shall be printed. It shall state whether the newspaper is a morning or afternoon paper, and the place of its publication. It shall entitle the holder to receive for publication in the newspaper named a day or night report, as may be specified, upon payment of a weekly toll, to be fixed from time to time by the Associated Press, acting through its board of directors. Certificates shall be issued in two classes, to be designated 'Series A' and 'Series B,' and shall state the substance of the franchise obligations included in the contract of the member as provided in these by-laws.

"Series A.

"(2) The holder of a certificate of membership of series A shall be entitled to receive the news report provided for in his contract, and no new membership

shall be created in his city, or such additional territory contiguous thereto as may be specified in his contract, without the consent in writing of all the holders of certificates of series A in such city and additional territory, except as may be otherwise provided in these by-laws. * * *

"X. Local Boards.

"(1) Charter. In every city where there shall be more than one member holding a membership certificate of series A, as heretofore provided for, * * * there shall be a local board, acting under a charter issued by the board of directors of the association, which shall be signed by the president and secretary, and bear the seal, of the company.

"(2) Composition and Power. Every member in such city holding a certificate of series A shall be entitled to a representation and one vote at all meetings of the local board, and no new membership shall be issued, authorizing the publication of the news of the association, in any city, without the unanimous consent in writing of the members of the local board in that city."

"(5) Where Only One Member. In any city where there shall be only one member holding a certificate of series A, such member shall have and exercise all the powers and privileges of a local board under any of the by-laws."

For some years prior to the date of the aforesaid contract, to wit, March 2, 1893, the Minnesota Tribune Company was the owner of, and had been engaged in publishing, a newspaper in the city of Minneapolis which was known as the "Minneapolis Tribune"; and during such time it had received its news reports from two news-gathering associations, known, respectively, as the "United Press" and the "Western Associated Press," under contracts with said associations. On June 29, 1891, the Minneapolis Times Company, which was a corporation under the laws of the state of Minnesota, was engaged in publishing a morning newspaper in the city of Minneapolis known as the "Minneapolis Times." On the day last mentioned the Minneapolis Times Company entered into a contract with the Minnesota Tribune Company whereby the former company agreed to purchase from the latter company copies of the news reports of said United Press and said Western Associated Press for a period of three years, and to pay therefor about $8,280 per year, which said contract was in force on the 15th day of October, 1892. On or about July 1, 1894, the Minneapolis Times Company sold its newspaper and subscription list, and all of its rights, franchises, and good will, to the Journal Printing Company, a Minnesota corporation, which thereby became the successor of the Minneapolis Times Company, and the publisher of the Minneapolis Times. The bill of complaint which was filed herein charged, in substance, that the paper known as the "Minneapolis Times" was a morning newspaper, and a rival in business of the Minneapolis Tribune; that since September 27, 1894, the defendant below, the Associated Press, in utter disregard of its aforesaid contract with the Minnesota Tribune Company, had sold and furnished to said Journal Printing Company, for publication in the Minneapolis Times, all of its night news reports and information, which it had contracted and agreed to furnish exclusively to the Minnesota Tribune Company; and that such news reports had been so furnished to the Journal Printing Company notwithstanding the appellant's earnest protests and requests to the contrary. In view of the premises the bill prayed that the Associated Press, the appellee herein, might be enjoined and restrained, during the existence of the aforesaid contract, from furnishing said night news reports to said Journal Printing Company for publication in the Minneapolis Times, or to any other morning newspaper published within the territory described in said contract. The circuit court, on final hearing, refused said injunction, and dismissed the bill of complaint (77 Fed. 354), from which decree the complainant below has appealed.

M. D. Munn (N. M. Thygeson, on the brief), for appellant.

Emanuel Cohen (William D. Cornish and John P. Wilson, on the brief), for appellee.

Before BREWER, Circuit Justice, THAYER, Circuit Judge, and RINER, District Judge.

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

The briefs and arguments of counsel which have been filed in this case are principally devoted to a discussion of the proper interpretation of the contract between the Associated Press and the Minnesota Tribune Company (hereafter termed the "Tribune Company"). On the part of the appellant, it is claimed that the ninth clause of the contract in express terms precludes the Associated Press from furnishing its news reports to the Journal Printing Company, its rival in business, because the latter company was not on March 2, 1893, entitled to receive such news reports without the written consent of the Tribune Company. On the other hand, the appellee contends, and this view prevailed in the trial court (77 Fed. 354), that the ninth clause of the contract of March 2, 1893, is controlled by subdivision 2 of article 7 of the by-laws of the Associated Press, relating to the admission of members, which provided, in substance, that newspapers which were entitled to a service of news on October 15, 1892, "under existing contracts with the Western Associated Press or the United Press," should not be considered new members, but might be admitted to membership in the Associated Press without reference to that provision of the by-laws which requires the assent of the respective local boards to the admission of new members in the territory over which such local boards severally exercise jurisdiction. It is claimed by the Associated Press that under the by-law it could lawfully admit the Journal Printing Company to membership without the consent of the Tribune Company, although the latter company was the only newspaper in the city of Minneapolis holding a press franchise in the Associated Press on September 27, 1894, because the Journal Printing Company on October 15, 1892, was entitled to press dispatches, both from the United Press and from the Western Associated Press, under then existing contracts, to which the Tribune Company was itself a party. For the purpose of reaching a correct conclusion concerning the obligations imposed by the contract in question, it is clear, we think, that the contract should not be considered by itself, but should be construed in connection with the by-laws of the Associated Press. Reference is made to the by-laws in the contract, and the seventh paragraph thereof expressly declares "that the rights, duties, and obligations of the parties hereto, except as hereinbefore specifically provided for, shall be controlled and governed by the by-laws of said party of the first part, now or hereafter in force during the life of this contract." The necessary effect of this provision of the contract was to make the subsequent provisions thereof, including the ninth, subordinate to the by-laws. But, taking a broader view of the case, we think it is obvious that the provisions of the by-laws relating to the admission of new members, and the provisions of the contract bearing on that subject, were intended to be harmonious, since it is hardly reasonable to suppose that the Associated Press intended to place restrictions upon its right to admit new members in a particular locality that were contrary to general rules governing the admission of members which had been prescribed for other localities. It must be held, therefore, that the language em-

ployed in paragraph 9 of the contract, on which the appellant company chiefly relies, cannot be construed literally, but is controlled and modified by subdivision 2 of article 7 of the by-laws.

Assuming the foregoing to be a correct view, the next question for consideration is whether the Minneapolis Times can be regarded as a newspaper which on October 15, 1892, was entitled to a service of news under existing contracts with the Western Associated Press or the United Press, within the fair intent and meaning of the by-law. The facts pertinent to this inquiry, which are disclosed by the evidence, are as follows: When the Tribune Company, on June 29, 1891, entered into an agreement with the proprietor of the Minneapolis Times, whereby the latter paper secured the news reports of the Western Associated Press and the United Press for a period of three years, the Tribune Company was the owner of an exclusive news franchise for the city of Minneapolis in each of said news-gathering organizations. The franchise theretofore granted to it by the United Press did not authorize the Tribune Company to sell the news reports which it received to any other newspaper, but provided that it should be entitled to receive the night report of the United Press for publication in the Minneapolis Tribune, "and for no other purpose whatever." Before the contract last referred to was executed, a conference was had between the Western manager of the United Press and a representative of the Tribune Company and a representative of the Minneapolis Times, at which conference the nature of the proposed contract between the two newspapers was made known to the United Press, and its consent to the execution of the proposed agreement was obtained. Such consent was given, however, on condition that the Tribune Company should thereafter pay $90 per week to cover the extra expense of furnishing dispatches for both papers, in lieu of $75 per week, which it had theretofore paid. Immediately after this agreement was made and assented to, the United Press moved its telegraph instruments and operators from the office of the Tribune Company to the office of the Minneapolis Times, where the news dispatches of the United Press were thereafter delivered and received under the aforesaid arrangement until about July, 1893. The evidence does not show conclusively whether the Tribune Company had the right to sell the news reports of the Western Associated Press without the latter's consent, but the fact is disclosed by the evidence that, before undertaking to furnish such reports to the Minneapolis Times, it applied to the Western Associated Press for permission to do so, and obtained its consent. It further appears that on October 15, 1892, and for some months thereafter, negotiations were pending between the promoters of the present Associated Press, which had not then been incorporated, and the United Press, with a view of dividing the United States between the two news-gathering associations, and enabling them to act in harmony with each other. It was at first proposed, and an agreement to that effect was formulated, that the United Press should abandon the Western territory which it then occupied, and confine its operations to the country east of the Allegheny Mountains, while the new Associated Press should collect news in the Middle and Western states, and in most of the

Southern states. This scheme, which contemplated an end of rivalry between the two great news-gathering associations, and the withdrawal of the United Press from much territory which it then occupied, had not been abandoned, but was still under consideration, on December 21, 1892, when the by-laws of the Associated Press were adopted; and it serves to explain, in a great measure, the provision found in subdivision 2 of article 7 of its by-laws, heretofore quoted. It was doubtless supposed that in due course of time the United Press would vacate its Western territory, and that its old patrons in the West would desire to become customers of the Associated Press, and a provision was accordingly inserted in the by-laws by which they might be admitted to membership without the consent of the local boards. In view of these facts, we are strongly inclined to the view that the Associated Press was at liberty to furnish its news reports to the Minneapolis Times without the consent of the Tribune Company. The by-law to which reference has already been made is very broad, and does not, in terms, require that a newspaper should itself have entered into a contract with one of the news-gathering associations therein mentioned, to render it eligible to membership in the Associated Press without the consent of a local board. It might with much reason be claimed that the peculiar language employed in the by-law was intentionally chosen so as to bring within its provisions newspapers that were receiving news reports from the Western Associated Press or the United Press on October 15, 1892, whether such service was being supplied under a contract with one of the associations, or under an arrangement with some third party who was entitled by contract to the news reports of either of said associations. It is not necessary, however, on the present occasion, to adopt such an extreme view, since the evidence, as we think, fairly shows the existence of a tripartite agreement between the United Press, the Tribune Company, and the Minneapolis Times, under and by virtue of which the last-named paper on October 15, 1892, was directly supplied with news by the United Press. It was essential that the United Press should have given its consent to the proposed contract between the Tribune Company and the Minneapolis Times, because the Tribune Company had no right, without such consent, to furnish the news reports of the United Press to any other newspaper. The United Press did give its consent to that agreement, and received a consideration for so doing; and thereby direct contractual relations were established between the Minneapolis Times and the United Press, which were thereafter recognized and observed.

But another reason exists which is in itself sufficient to sustain the decree of the circuit court dismissing the bill of complaint. As has been heretofore stated, this is a suit to specifically enforce a contract of the Associated Press, by restraining it from violating one of the provisions of the contract. It is questionable, to say the least, whether a court of equity could, in any event, grant the relief prayed for, because it is not clear that the damages which the Tribune Company will sustain by reason of the alleged breach are so far irreparable or difficult of ascertainment as to make the remedy at law inadequate. But, waiving that question, it must be borne in mind

that it is a well-established rule that courts of equity will not undertake to enforce an agreement if any of its provisions are so far indefinite or ambiguous as to render it uncertain what were the intentions of the parties, and what obligations they intended to assume. A suit for specific performance can only be maintained where the terms of the agreement are so precise that they cannot be reasonably misunderstood. If the contract which a complainant seeks to enforce is vague or uncertain, a court of equity will not interfere, but will leave him to his legal remedy. Colson v. Thompson, 2 Wheat. 336, 341. And, where a contract is clearly susceptible of different reasonable interpretations, a court of equity ought not to take the chances of decreeing its specific execution in a way which will possibly do violence to the intentions of the parties thereto. In all such cases, as well as where a contract is not fair and just in all its parts, or is tainted with illegality, the party seeking to enforce it should be remitted to his action for damages. Fry, Spec. Perf. §§ 317, 361, and cases there cited. In view of what has already been said relative to the contract involved in the present suit, and the circumstances which attended its execution, and the by-laws under and subject to which it must be construed, we think that it must at least be conceded that the meaning of the contract, in the respect wherein a controversy as to its meaning has arisen, is beclouded with doubt and uncertainty. It cannot be said that the complainant has shown with the requisite certainty that the Associated Press is not entitled, under its contract with the Tribune Company, and under its by-laws, to furnish news reports to the Minneapolis Times, and that its action in that regard amounts to a breach of the agreement, because as good if not better reasons can be advanced in support of the contrary view, that the Associated Press reserved to itself, under its by-laws, the right to do precisely what it has undertaken to do, and is now doing. Our conclusion is, therefore, that by reason of the difficulties encountered in construing the contract, and the doubtful and uncertain character of the right which the bill seeks to enforce, a court of equity is not the proper forum, and that such relief as the Tribune Company may consider itself entitled to can only be obtained at law.

If we had not reached the conclusion heretofore announced, that the bill of complaint was properly dismissed, we should then feel compelled to consider a further question, which is not touched by the briefs or by the oral arguments; and that is whether a court of equity should in any event undertake to specifically enforce an agreement like the one at bar, which would seem to have an obvious tendency to create and perpetuate a monopoly of the news, by limiting the service of news reports to a single newspaper in a large city, and placing it within the power of the proprietor of such newspaper to prevent other newspapers from having access to the same sources of information. The fact that counsel have not seen fit to raise or discuss this question, and the fact that the bill must be dismissed on other grounds, render it unnecessary to consider it, or to express any opinion thereon. The decree of the circuit court is affirmed.

MYERS, County Treasurer, v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 352.

1. STATE TAXATION OF RAILWAY LAND GRANTS—MINERAL LANDS.

Lands lying within the placed limits of the Northern Pacific Railroad grant, to which the company is seeking to perfect its title, and which are included in lists which have been approved and certified to by the register and receiver of the local land office, but to which the government refuses to issue patents pending an investigation as to whether the lands are mineral lands such as are reserved from the grant, are subject to taxation by the state.

2. SAME—MONTANA LAWS—ASSESSMENT.

There is nothing in the provisions of the Political Code of Montana relating to the assessment of property for taxation which can fairly be construed as depriving the state of authority to tax lands claimed by a railroad company under a congressional grant, though the issuance of patents thereto is suspended pending an investigation as to whether or not they are mineral lands so as to be excepted from the grant.

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

C. B. Nolan, Atty. Gen., for appellant.

C. W. Bunn, for appellee.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity to enjoin appellant, the treasurer of Jefferson county, Mont., from selling the lands described in the bill of complaint for the nonpayment of state and county taxes, levied in the year 1894. The circuit court granted an injunction as prayed for in the complaint. The record contains a lengthy stipulation of facts, upon which the case was tried, which may be briefly summarized. The lands in question are surveyed odd sections within the place limits of the grant to the Northern Pacific Railway Company by act of congress approved July 2, 1864 (13 Stat. 365). The railroad company accepted the terms, conditions, and impositions of this act in due and regular form. It definitely fixed the line of, and built, its road, and earned the grant. Long prior to the assessment and tax levies herein complained of, it prepared, in the form prescribed by the secretary of the interior, and filed with the register and receiver of the United States district land office for the district in which said lands were situate, lists of lands claimed by the company as inuring to it under its grant, including, among others, the land described in the complaint, and at said time paid the register and receiver of the United States land office the fees to which they were, by reason of such listing and filing, entitled. The lists were certified to, allowed and approved by, the register and receiver of the local land office. These lists, including the lands described in the complaint, had not, at the time of the assessments and tax levies complained of, and have not yet, been adjusted in the office of the commissioner of the general land office. The various di-

visions in the commissioner's office have not yet examined or passed upon said lists, and it has not yet been determined in said office what lands are within the terms of the grant to said company, and none of said described lands have been certified by the commissioner to the secretary of the interior, or have been patented by the United States to the railroad company, and the question whether said lands are mineral or nonmineral in character has not yet been determined, and is now under investigation under the terms and provisions of the act of congress approved February 26, 1895, entitled "An act to provide for the examination and classification of certain mineral lands in the states of Montana and Idaho" (28 Stat. 683). The railroad company has such right, title, interest, and property in and to said lands as is conferred upon it by the act of congress approved July 2, 1864, and acts and joint resolutions of congress supplementary thereto and amendatory thereof, and no other. The delay, if any, in the identification of the lands, is not the result of any action, failure, or default on the part of the railroad company. On November 4, 1895, the secretary of the interior suspended the patenting of the lands until the mineral or nonmineral character of the lands selected by the company shall have been investigated, and definitely ascertained and adjudicated by proper proceedings, and until mineral claimants and the state of Montana shall have opportunity to be heard before the department on questions of law and fact. Under the act of February 26, 1895, three commissioners have been appointed to examine and classify the mineral lands in the Helena land district, including the lands described in the complaint. The commissioners commenced the examination and classification of lands in said district during the year 1895, and have since continued such examination and classification, and have examined and classified only a small portion of the lands described in the complaint.

In Barden v. Railroad Co., 154 U. S. 288, 14 Sup. Ct. 1030, the court held that, by the grant of public lands made to the Northern Pacific Railroad Company by the act of July 2, 1864 (13 Stat. 365, c. 217), all mineral lands other than iron or coal are excluded from its operation, whether known or unknown; and all such mineral lands, not otherwise specially provided in the act making the grant, are reserved exclusively to the United States, the company having the right to select unoccupied and unappropriated agricultural lands in odd sections, nearest to the line of the road in lieu thereof. The contention of the appellee is that under the general principles announced in that decision the railroad company is excluded by law from the possession of or dominion over the lands specified in the grant until it is finally determined by the government that it is not mineral land. It is true that the grant is only of nonmineral lands. All mineral lands are, by express language, "excluded from the operation of this act." Grants of like character have, however, always been construed as being in præsenti. In none of them were the mineral lands granted. Mineral lands were always reserved and excepted from the provisions of the grants. Prior to the decision in the Barden Case, there had been more or less discussion as to whether or not the railroad grants excluded mineral lands which, at the time of the passage of

the act, were not known to be mineral. This question was set at rest by the decision of the court in the Barden Case. Mr. Justice Field, speaking for the court, said:

"It seems to us as plain as language can make it that the intention of congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and, among other things, that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold, granted, or otherwise appropriated, and were free from pre-emption and other claims or rights at the time the line of the road was definitely fixed; and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof, a like quantity of unoccupied and unappropriated agricultural lands, in odd sections, nearest to the line of the road, might be selected. There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of the grant. Mineral lands were not conveyed, but by the grant itself, and the subsequent resolution of congress cited, were specifically reserved to the United States, and excepted from the operations of the grant. Therefore they were not to be located at all, and if, in fact, located, they could not pass under the grant. Mineral lands being absolutely reserved from the inception of the grant, congress further provided that at the time of the location of the road other lands should be excepted, viz. those previously sold, reserved, or to which a homestead or pre-emption right had attached."

In that case it was contended that the construction which was finally given to the act by the court would prevent the states and territories from taxing the property of the company unless they could tax the whole property, mineral as well as agricultural lands. In reply to this contention the court said:

"We do not see why not. The authority to tax the property granted to the company did not give authority to tax the minerals, which were not granted. The property could be appraised without including any consideration of the minerals. The value of the property excluding the minerals could be as well estimated as its value including them. The property could be taxed for its value to the extent of the title which is of the land."

In Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. 341, upon which appellee principally relies, the court, after declaring that the lands within the original sections named in the grant to the railroad company had become the property of the railroad company, and were, therefore, taxable, held that the portion of the lands taxed which fell within the indemnity lands could not be taxed, because no title passed to the company until after the selections were made, and until the same were approved by the secretary of the interior. Why? Because his action in making the selection was not ministerial, but judicial. "He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indem-

nity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and, if so, what portion had been thus appropriated, and what portion still remained. This action of the secretary was required, not merely as supervisory of the action of the agent of the state, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved, there were no selections in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification." Here the lands taxed are within the place limits of the grant. The route of the road had become definitely fixed. The lands granted were susceptible of identification, and the title attached to them, and took effect as of the date of the grant; the mineral lands being, as in all of the similar grants to railroad companies, excepted from its provisions. There is no averment, however, in the bill that any of such lands are mineral lands. On the contrary, it is alleged:

"That said lands, and each and every part thereof, were, prior to the attempted assessment and tax levies hereinafter referred to, surveyed by the United States, or under its authority, and were reported by the surveyors making such surveys to be agricultural lands and nonmineral in character, and as yet, so far as your orators have information, no minerals in quantities sufficient to add to the richness of said lands, or to justify expenditure for their extraction by any methods of mining now in use or invented, or known to exist, have been discovered in said lands."

This state of the facts brings the case within the rule announced in Wisconsin Cent. R. Co. v. Price Co., supra, as to the lands included in the grant, which were held to be taxable.

We had occasion in Railroad Co. v. Wright, 4 C. C. A. 193, 54 Fed. 67, to pass upon a similar question; the only substantial difference in the facts, so far as the present discussion is involved, being that in that case the bill alleged that the commissioner of the general land office had refused to issue patents to the railroad company for the lands granted, because the railroad company had failed and refused to file with the commissioner affidavits showing the nonmineral character of the land, while in the present case it is admitted that the railroad company and the receivers thereof have been at all times diligent and active in obtaining the adjustment of said grant, and in obtaining patents to said company for the granted lands, and have done everything in their means and power to obtain the final adjustment of the grant, and to obtain patents for the land described in the complaint. This difference in the facts makes no real distinction in the principles involved in this discussion. In that case substantially the same argument was made as in this. The court, referring to the argument then made, said:

"Counsel for appellant assails the decision rendered by the circuit court, and argues at great length, from several different standpoints, to the effect that the averments of the bill clearly show that all the facts necessary to determine whether the lands in question are within the description contained in the act of congress have never been ascertained; that they cannot be identified as lands coming within the provisions of the act, and have not been segregated

from the public domain; that until such time as they are fully defined and segregated from the public domain the lands cannot be taxed by the state; that the lands are not taxable until the United States ceases to hold or claim any such interest in them as to justify the withholding of patents therefor; that they are not taxable while there remains any duty unperformed by the United States or its officers of determining the facts upon the existence of which depends appellant's right to have patents issued to it for said lands; that the determination of such facts is necessarily a condition precedent to the issuance of such patents; that the lands are not taxable until appellant has procured and filed affidavits of their nonmineral character in the interior department of the government, if the officers of that department have any authority to demand such affidavits; and, finally, that the lands are subject to exploration and location as mineral lands, and for this reason are not taxable. In support of this argument counsel cites a vast number of authorities, state and national, including numerous rulings made by the interior department. The sum and substance of the entire argument made by counsel is that appellant is the owner of the absolute title to all the lands granted by the act of congress for every purpose except as to the right of taxation by the states."

In Railroad Co. v. Patterson, 154 U. S. 130, 132, 14 Sup. Ct. 977, the court said:

"The ground upon which it was asserted that these lands were not subject to taxation was that they had not been identified as lands passing to the plaintiff under its grant, because the United States had refused to certify them, and held them suspended 'for the reason that it is claimed that such lands are mineral, and are excepted from the grant to the plaintiff.'. It was said in Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 505, 10 Sup. Ct. 344, that 'he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation'; and plaintiff does not state whether all or any part of the lands are mineral or nonmineral. If the legal or equitable title to the lands, or any of them, was in the plaintiff, then it was liable for the taxes on all or some of them; and the mere fact that the title might be in controversy would not appear in itself to furnish sufficient reason why plaintiff should not determine whether the lands or some of them were worth paying taxes on or not."

The court disposed of the case upon other grounds. But the language of the court, as quoted, is indicative of its views upon the question here involved, and is sufficiently expressive to justify a reference thereto in support of the right of the state to tax the lands.

In Central Pac. R. Co. v. Nevada, 162 U. S. 512, 16 Sup. Ct. 885, which is distinguishable from this case only upon the ground that there the state had levied the tax upon the possessory claim of the railroad company, while in this case it is claimed that it is not the interest of the company, but the land itself, that is assessed. But the identical point here raised was there argued and relied upon by the attorney for the railroad company, and was answered by the court as follows:

"It is further claimed that no lands granted to this road can be taxed prior to the issue of the patent, because the grant excludes mineral lands,—not only minerals, but mineral lands; that the right and power to ascertain which of the lands are mineral and which nonmineral is vested exclusively in the officers of the government, and can be proved only by the issue of a patent, as held by this court in Barden v. Railroad Co., 154 U. S. 288, 14 Sup. Ct. 1030. It is argued that, if the railroad company paid taxes upon these lands, it might never own or require them, and the tax would consequently be paid on property it never owned or could own; and that, upon the other hand, if the company should not pay the taxes, and the lands be sold under the judgment appealed from, the title to the lands, if the assessments were valid, would pass to the purchaser, whether they were mineral or not. * * * It is true that in the

Barden Case we held that mineral lands were excluded from the operation of the Pacific Railroad land grants whether such minerals were known or unknown at the date of the grant, because the statutes had excepted them in the most unequivocal terms; but nothing was said in that case to impugn the authority of the previous cases which had held that these grants were in præsenti of lands to be afterwards located. They became so located when they were surveyed. Then the grants attached to them subject to certain specified exceptions, one of which was that minerals should be discovered upon them before the issue of a patent, when, as to such lands, the title of the company failed. The possibility, however, that minerals might be discovered upon certain sections of these lands, as to which the title of the railroad company might be defeasible, would not impair their title to the great bulk of the grant, or enable the company, with respect thereto, to evade its just obligations to the state. Should the company disclaim a right to the possession of any portion of these lands by reason of the discovery of minerals thereon, there would remain no right to tax them under the statutes of Nevada; but, so long as the company asserts a possessory claim to them, it implies a corresponding obligation to pay the taxes upon them. State v. Central Pac. R. Co., 20 Nev. 372, 22 Pac. 237."

We have quoted thus extensively from the decisions of the United States courts for the purpose of showing that the questions raised and discussed in this case are neither new nor novel. The points raised are precisely the same as were raised in the cases before the decision in the Barden Case, and the decision in that case in no manner changes the rulings that had been previously made upon the same identical question. In fact, this is apparent from the language of the court itself in that case, heretofore quoted, in which it is expressly affirmed that, notwithstanding the views expressed as to the character of the grant, it would not in any manner interfere with the right of the state to tax the lands granted to the railroad company.

Appellee cites section 3697 of the Political Code of Montana, which provides for the assessment of land in subdivisions and by sections, and argues that such an assessment cannot be construed as an assessment of the interest of the railroad company therein. Section 3700 of the same Code provides that the assessor shall ascertain "all property in his county subject to taxation, * * * and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was at 12 o'clock m. of the first Monday of March next preceding." Section 3670 provides that "all property in this state is subject to taxation," except as provided in section 3671. The lands in question do not come within any of the exceptions mentioned in section 3671, unless it is shown that they are the property of the United States. It is not so shown, unless we indulge in the presumption that they are mineral lands. This we are not authorized to do. All presumptions are directly to the contrary. In favor of taxation is the rule; exemption from taxation the exception. Mining Co. v. Kennon, 3 Mont. 35, 37. The term "property," in the Code, includes real estate; the term "real estate" includes "the possession of, claim to, ownership of, or right to the possession of, land." Section 3680. Possession with a claim of ownership is a subject of taxation, and imposes on the occupant the duty of paying the tax levied upon the property. Reily v. Lancaster, 39 Cal. 354, 356, and authorities there cited. The assessment was made in the manner required by law. The regularity of all the acts of the assess-

ing and collecting officers is conceded. There is nothing in any of the statutory provisions of Montana which can fairly be construed as depriving the state of its authority to tax the property as the lands of the railroad company. In Railroad Co. v. McGinnis (N. D.) 61 N. W. 1032, 1034, the court, in passing upon a similar question, held that, if the railroad company was not the owner of the lands, and had not sufficient title to support the levy of the assessment, it could not and should not be allowed to question "the legality of the tax." The railroad company cannot complain of any injustice or hardship in being compelled to pay taxes on this land. It has as perfect and complete title thereto, subject only to the exceptions stated in the act, as if it had a patent thereto (as is clearly shown in Wisconsin Cent. R. Co. v. Price Co., supra); and, if any part or portion of the land is to be excluded from the grant because coming within any of the exceptions mentioned in the grant, then, by the express terms of the grant, the railroad company is entitled to select, with the approval of the secretary of the interior, an equal quantity of other land in lieu thereof. The act of February 26, 1895, does not contain any provisions which indicate any intention on the part of congress to relieve the lands granted from state taxation until such time as it may be finally settled what portions thereof, if any, are mineral lands.

It appears from the pleadings that appellee has executed mortgages upon this land, thereby asserting its ownership therein. It is admitted that it has all the right, title, and interest in the land as conferred upon it by the act of congress.

We are of opinion that the land is taxable. The railroad company, by virtue of its grant, has an indefeasible right or title thereto. The land has become the property of the railroad company in the sense that there is nothing to prevent its use and enjoyment by the company. It being the beneficial owner of the land, and being protected in its use and enjoyment, there is no substantial reason why it should not be compelled to pay taxes thereon. The argument that it may some time in the future be shown that some part thereof is mineral land is too remote, indefinite, and uncertain to be seriously considered by the court as a valid reason for refusing to enforce the right of taxation. Courts should deal with things as they are, without attempting to determine rights upon mere possibilities and speculations. The duty devolved upon the railroad company to affirmatively show that the lands taxed belong to the class which was excluded from its grant. In other words, the burden was upon the railroad company to show that the lands taxed were mineral lands. State v. Central Pac. R. Co., 20 Nev. 372, 383, 22 Pac. 237; Railroad Co. v. McGinnis (N. D.) 61 N. W. 1032, 1035. It should not be allowed to blow hot and cold; to say in one breath the lands are not mineral for the purpose of establishing its rights therein, and in the next breath to say that the lands may be mineral for the purpose of avoiding the payment of taxes thereon. The judgment and decree of the circuit court is reversed, and cause remanded, with instructions to dismiss the bill, and enter judgment in favor of appellant for his costs.

NEW YORK GUARANTY & INDEMNITY CO. et al. v. TACOMA RAILWAY & MOTOR CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 11, 1897.)

No. 370.

1. STREET RAILROADS—INSOLVENCY AND RECEIVERS—PRIORITY OF CLAIMS.
A cable sold to a cable railway being necessary to keep the road a going concern, the claim for its price is entitled, on the insolvency of the company and the appointment of a receiver, to priority over the mortgage bonds, without showing any diversion of income. And such priority may be allowed though more than two years elapsed between the time the cable was furnished and the appointment of the receiver.

2. EQUITY PROCEDURE—FINAL DECREES—INTERVENTION.
Where the court at one term files an opinion announcing its decision directing a foreclosure and sale, but the final decree in pursuance thereof is not entered until the ensuing term, the court retains jurisdiction during the latter term to permit interventions for the purpose of asserting claims against the proceeds of sale. Its power does not cease on the expiration of the term at which its opinion is announced.

3. LACHES.
Plaintiff sold a cable to a cable-railway company, and delivered it September 17, 1892. On October 5, 1893, he brought an action for the price, and recovered judgment April 3, 1896. A receiver having in the meantime been appointed for the railway company, plaintiff filed his judgment claim in the receivership suit on March 26, 1897. *Held*, that the claim was not barred by laches.

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

Thomas Burke and D. J. Crowley (Burke, Shepard & McGilvra and Crowley & Grosscup, of counsel), for appellants.

Charles A. Murray and Walter Christian, for appellee Broderick & Bascom Rope Co.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an appeal by the New York Guaranty & Indemnity Company, trustee, complainant, and George W. Bird and S. Z. Mitchell as receivers of the property of the Tacoma Railway & Motor Company, from an order of the court below making the claim, in the sum of $620.45, of the Broderick & Bascom Rope Company, an intervener in said case, a preferred debt over the mortgage held by the complainant. The suit was brought by the complainant on February 14, 1895, to foreclose a mortgage or deed of trust held by it upon the properties of the Tacoma Railway & Motor Company. The court below on December 23, 1896, rendered its decision, foreclosing the mortgage held by the complainant, and ordering the sale of the road; but the record shows that the final decree was not signed and entered of record until the 19th of February, 1897, in the ensuing term. Under this final decree the mortgaged property was sold on March 26, 1897, for $100,000, and this sale was confirmed by an order of the court below on March 31, 1897. The record further shows that only one defendant besides the motor company was joined in the foreclosure suit, and that, down to the time of the final decree and sale, no creditor had intervened in the cause. On the same day

upon which the order of confirmation of the sale was made, but subsequent to the entry thereof, the Broderick & Bascom Rope Company presented, for the first time, its motion for leave to intervene. This was granted, and thereupon it filed its petition in intervention, setting up a claim of preference over the mortgage indebtedness. The claim consists of a judgment recovered by the intervener, the principal appellee here, in the state court of Washington, against the defendant motor company, on April 30, 1896, for the sum of $562, and $58.45 costs, aggregating $620.45, and was founded on an indebtedness for a wire cable sold by the intervener to the motor company on October 24, 1892. A stipulation of facts was entered into between counsel for the respective parties, which is as follows:

"(1) The insolvency of the Tacoma Railway & Motor Company, principal defendant in this action, dates from the 20th day of December, 1894, and that prior to said date said corporation was solvent. (2) The action in which judgment was rendered, which is the basis of this intervention, was commenced in the superior court of Pierce county on the 5th day of October, 1893, and said cause was pending until final judgment rendered on or about April 30, 1896, and that said cause was based upon a claim amounting to $2,800, and the whole thereof was contested by the Tacoma Railway & Motor Company, and a cross claim was alleged by the Tacoma Railway & Motor Company in its answer. As a result of the trial of said issues a verdict and judgment was entered for the sum of $562, and $58.45 costs. (3) The claim sued upon by the said intervener, Broderick & Bascom Rope Company, which resulted in the judgment referred to in the last preceding paragraph, was for the contract price of a certain cable rope ordered by the principal defendant, Tacoma Railway & Motor Company, on July 7, 1892; and the said cable rope was delivered in pursuance to said order on or about October 24, 1892, and was thereafter used in the operation of the cable-railway line of the railway described in this action, being a part of the corpus of the property foreclosed in this action; said cable being used until about the month of May, 1893; being for the period of one hundred and nineteen days said cable was used in the operation of a portion of said railway system. (4) It is agreed that the principal defendant, Tacoma Railway & Motor Company, executed and delivered to the plaintiff in this action, as trustee, on or about July 2, 1892, a mortgage upon the entire plant of the Tacoma Railway & Motor Company, together with extensions thereof and after-acquired property, all of which is the property sold in this action on March 26, 1897, for the sum of $100,000, which sale was on this date, to wit, March 31, 1897, confirmed by the court. There are no other funds or property applicable to the payment of said mortgage debt. That the amount of bonds secured by said mortgage, and sold by virtue of the terms of said mortgage, and falling under its operation, is the sum of $1,240,000, and that the judgment rendered in the principal action herein for foreclosure, for the sum of upwards of $1,400,000, is a valid judgment, in so far as the same fixes the indebtedness secured by said mortgage. And it is further agreed that the claim which is the basis of this intervention of Broderick & Bascom Rope Company was not secured by said mortgage, and has never been paid. It is further agreed that between the 24th day of December, 1894, and the 1st day of April, 1895, the original claim for $2,800 of the Broderick & Bascom Rope Company was presented to receiver, George W. Bird, then being the sole receiver, together with the statement that said Broderick & Bascom Rope Company would claim that said claim should be paid in preference to, and prior to, the mortgage indebtedness; and on said presentation said Bird, as receiver, rejected the entire claim, and denied that said claim, or any part thereof, was valid and was entitled to any preference. Subsequently said Bird became a party to the action then pending thereon, and judgment was rendered as hereinbefore stated. That said judgment did not assume or pretend to fix or adjudicate the subject of preference, but simply determined the validity of the claim as binding obligation of the Tacoma Railway & Motor Company, to the amount thereof as hereinbefore stated, to wit, the sum of $620.45, judgment and costs."

The court below, as stated, allowed the intervener's claim, in the sum of $620.45, as a preferential debt over the mortgage indebtedness, and directed the payment thereof from the funds in the registry of the court. It is from this order and the decree entered in accordance therewith that the complainant, the New York Guaranty & Indemnity Company, and the receivers of the Tacoma Railway & Motor Company have appealed. The assignments of errors are seven in number, but they can be said to raise but three questions, viz.: (1) Is the judgment claim of the intervener, the Broderick & Bascom Rope Company, entitled to preference over the mortgage lien? (2) Had the court below jurisdiction to make the order of preference appealed from? (3) Is the claim stale, and barred by laches?

We think that the first proposition may be briefly disposed of. It is unnecessary to attempt to review the many decisions which lay down the principles upon which claims for services rendered and materials, supplies, etc., furnished to railroads are preferred over the mortgage indebtedness. It is sufficient, for the purposes of this case, to say that such claims are preferred over the mortgage lien when they involve debts incurred which were necessary "to keep the road a going concern, or which are the outcome of indispensable business relations, a continuance of which involves the interests of the public and traffic of the road." Judge Colt, in Wood v. Railroad Co., with respect to the intervention of the Carnegie Steel Company, Limited, for the allowance of a claim for coupling links and pins and tank steel as a preferred debt. 70 Fed. 741–743. For statements of the principles governing the allowance of preferential claims, see the following authorities: Fosdick v. Schall, 99 U. S. 235; Hale v. Frost, Id. 389; 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; St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co., 125 U. S. 658, 8 Sup. Ct. 101; Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. 950; Thomas v. Car Co., 149 U. S. 95, 13 Sup. Ct. 824; Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 182; Bound v. Railway Co., 7 C. C. A. 322, 58 Fed. 473; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co., 52 Fed. 524; same case, on appeal, 10 C. C. A. 323, 62 Fed. 205; Central Trust Co. v. Charlotte, C. & A. R. Co., 65 Fed. 264.

Was the cable in question necessary "to keep the road a going concern"? The stipulation of facts simply states that the cable rope involved in this claim was ordered by the defendant the Tacoma Railway & Motor Company on July 7, 1892, and that it was delivered in pursuance of said order on or about September 17, 1892, and was placed in use on or about October 24, 1892, and was thereafter used in the operation of the cable-railway line of the defendant company until about the month of May, 1893; being for the period of 119 days that the cable was used in the operation of a portion of said railway system. It will be observed that there is no statement in the stipulation of facts that the cable was necessary

to keep the road a going concern. In the petition in intervention, however, will be found the following allegation:

"(11) That the said cable sold by said Broderick & Bascom Rope Company to said Tacoma Railway & Motor Company was actually used by said Tacoma Railway & Motor Company in the operation of its said cable street railroad line in the city of Tacoma, described as aforesaid, for the period of 119 days, and that the said wire cable was actually necessary for the operation of said cable road during said period of time."

There is nothing in the stipulation to negative this allegation in the petition. But, aside from this, it must be obvious that the road could not have been kept in operation without the cable in question. It was one of the very means by which the road was operated and kept a going concern. Without it, this portion of the cable-railway system could not be operated at all. It could not discharge its duties to the public, or derive an income from earnings. It is impossible to imagine a case where anything was more necessary to keep this portion of the street railway a going concern, both in the literal and financial sense of the term, than the cable in question. As well might the road have been without engines, fuel, or cars, as without a cable. In Wood v. Railroad Co., supra, the claim of the Carnegie Steel Company, Limited, intervener, for the price of certain coupling links and pins and tank steel, was preferred over the mortgage lien, on the ground, upon a demurrer to the petition in intervention, that the petition alleged "that said supplies were necessary to the operation, from day to day, of said railroad." Certainly, coupling pins and links could be of no greater necessity to the operation of a railroad than a cable to the operation of a street cable road. In Railroad Co. v. Lamont, 16 C. C. A. 364, 69 Fed. 23, the claim preferred was for providing, furnishing, and maintaining for the railroad company waiting rooms for its passengers, office room for its ticket agents, and a convenient place for its employés to board and lodge at reduced rates. Judge Caldwell, in delivering the opinion of the circuit court of appeals for the Eighth circuit, used the following vigorous language:

"To defeat the preferential character of this claim, the court would have to be satisfied that waiting rooms for passengers and an office for ticket agents are not essential or necessary, at a town of several thousand population, on the Northern Pacific Railroad. We are asked, in effect, to hold that passengers on that road, while waiting to take passage on its trains, must endure the rigors of a North Dakota climate without shelter, and that its ticket agent must be content with an office on the public commons, and carry his tickets in his pocket or his hat. The road is in straits, financially, but we are unwilling to believe that its business is so unremunerative and its patronage so slender as to justify it in dispensing with waiting rooms and a ticket office at one of the most important towns on its line west of the Mississippi river. Decided by the strictest rules applicable to this class of cases, the intervener's claim was clearly a preferential debt."

In the case of Trust Co. v. Morrison, 125 U. S. 591, 8 Sup. Ct. 1004, a liability incurred by an intervener as surety for a railroad company on an injunction bond to stay execution of a judgment at law against the company, executed more than six years before the date of filing the petition in intervention, was held a preferential claim, on the ground that it tended to preserve the property mort-

gaged. It is true that the supreme court has repeatedly declared that preferential claims would be allowed but within very narrow limits, and has time and again admonished the circuit courts that such claims would be limited to wages of employés, supplies necessary for the maintenance of the road, and current operating expenses essential to keep it a going concern. Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. 950; Thomas v. Car Co., 149 U. S. 95, 13 Sup. Ct. 824; Bound v. Railway Co., 7 C. C. A. 322, 58 Fed. 473; Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 79 Fed. 202, and cases there cited. But it is also true that the application of the general rules as to preferential claims enunciated by the supreme court depends to a large degree upon the particular circumstances of each case. Wood v. Railroad Co., supra, and cases there cited. It is upon this ground that we distinguish the many cases cited by counsel for the appellants, which would seem to militate against the allowance of the claim in this case as a preferential one. We think, under the circumstances of this case, that the cable in question, without which, confessedly, this part of the street-railway system could not have been kept in operation and as a going concern, comes within the category of debts which may be preferred over the mortgage indebtedness. We do not think, as contended for by counsel for appellants, that the cable can be regarded in the light of repairs, or for construction or improvements, within the sense of the rules laid down by such decisions as Railway Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546; Thomas v. Car Co., 149 U. S. 110, 13 Sup. Ct. 824; and other cases of a like character. The question here is not so much whether the cable involved in this claim for preference is to be regarded in the light of repairs, or for construction, or as an improvement, or in the nature of materials or supplies furnished; but it depends upon the inquiry whether or not it was necessary to keep the road "a going concern," within the meaning of this expression as it is used by the supreme court in the cases cited above.

It is further contended that the claim in question is in the nature of a claim for repairs and improvements, and that, to make out a case for preference, there must have been some diversion of income, which otherwise would have been applied, or was properly applicable, towards the payment of the claim, to payment of bonded interest, or otherwise to the benefit of the security; citing Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 68 Fed. 36, 37. But, to use the language of Judge Caldwell in Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 182–189—

"It is an error to suppose that such debts can only be given priority where there has been a diversion of the income of the road. Nor is it true that they can only be paid out of the earnings of the road, and cannot be made a charge on the corpus of the property. A diversion of the income is not essential to give them priority, and they may be made a charge on the corpus of the estate if the earnings are not sufficient to pay them."—citing Miltenberger v. Railway Co., 106 U. S. 286–311, 312, 1 Sup. Ct. 140; Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 434–457, 6 Sup. Ct. 809; Thomas v. Railway Co., 36 Fed. 808.

Judge McKenna, in his opinion in Atlantic Trust Co. v. Woodbridge Canal & Irr. Co., 79 Fed. 39–41, himself concedes this; for,

after quoting at length from the opinion of Circuit Judge Sanborn in Trust Co. v. Riley, 16 C. C. A. 610, 70 Fed. 32, he says:

"From this case it is clear that diversion of income is not a universal condition of preference."

See, further, Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co., 10 C. C. A. 323, 62 Fed. 205; Wood v. Railroad Co., supra.

Nor can it be said that there is a fixed, arbitrary rule, barring preferential claims that have been contracted more than six months before the appointment of a receiver. In Railroad Co. v. Lamont, supra, it was said:

"A preferential debt is not barred, though contracted more than six months before the appointment of a receiver. As to such debts, there is no arbitrary six-months rule, as has been often decided."

In the case cited the indebtedness accrued more than six months before the receivership. In Atkins v. Railroad, 3 Hughes, 307, Fed. Cas. No. 604, the claim was 22 months old at the time of the appointment of the receiver. In the case of Hale v. Frost, 99 U. S. 389, the supreme court gave priority to a claim for materials furnished 3 years before the appointment of the receiver, and for which a note had been given 16 months before the receiver was appointed. In Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, priority was given to a claim for coal supplied 11 months before the appointment of a receiver. In Trust Co. v. Morrison, supra, a liability incurred by the intervener as surety for a railroad company on an injunction bond to stay the execution of a judgment at law against the company, executed more than 6 years before the date of the filing of the petition in intervention, was held a preferential claim. See, also, Douglass v. Cline, 12 Bush, 608; Skiddy v. Railroad Co., 3 Hughes, 320, Fed. Cas. No. 12,922; Williamson's Adm'rs v. Railroad Co., 33 Grat. 624. In the case at bar the cable was delivered on September 17, 1892, and was placed in use on October 24th of the same year. The defendant motor company was solvent until December 20, 1894, and on December 24th of that year a receiver was appointed by the state court to take possession and charge of the property of the company. The time that elapsed between the delivery of the cable, and the appointment of the receiver by the state court, would therefore be about 26 months, or a little over 2 years. But it is to be observed that the intervener began suit in the state court of Washington before the receiver was appointed, on October 5, 1893, which would be about 12 months after the delivery of the cable. It recovered judgment on April 3, 1896, which was subsequent to the appointment of the receiver by the state court. The period of time that transpired between the time that the intervener instituted its action and the appointment of the receiver cannot properly be included in this computation of time. Such delay as there was, incidental to the proceedings in the state court of Washington, cannot be imputed to, nor tend to the prejudice of the intervener's rights. Without elaborating upon the proposition any further, we are of the opinion that the claim for the cable in question should be made a preferred debt.

The second proposition relates to the question whether the court

below had jurisdiction to make the order of preference appealed from. On December 23, 1896, the same being within the July term, the court below announced its decision from the bench; foreclosing the mortgage held by the complainant, and ordering the sale of the property mortgaged. The final decree, drawn up in pursuance of the court's decision and order, was, however, not actually signed and entered of record until February 19, 1897, a day within the following (February) term. It is contended that the final decree should take effect as of the day on which the court announced its decision and entered its order of foreclosure and sale, viz. on December 23, 1896, and that the court had no power to entertain the petition in intervention; a new term having intervened before the intervener filed its petition. We do not think the point is well taken. In our opinion, the final decree must take effect as of the time it was actually signed by the judge and filed for record with the clerk, and not from the time that the court announced its views, and directed that orders be entered, upon which, subsequently, the final decree was based. The decree cannot be said to have possessed the solemnity of a judicial record until signed and entered for record. As was well said in Lynch v. Gaslight Co., 42 Barb. 591:

"No decree can be said to be entered of record until it is formally drawn out and filed by the clerk. A mere order for a decree, before it is extended in due form and in apt and technical language, cannot be held to be a complete record of the judgment of the court."

See, also, 1 Freem. Judgm. (4th Ed.) § 39. There is no pretense that the final decree was to be entered nunc pro tunc as of the date of December 23, 1896. As the intervener filed its petition in intervention within the same term that the final decree was signed and entered of record, it stands to reason that the court was correct in entertaining the same.

The third point made by the assignments of error is that the claim is stale, and barred by laches. The cable was delivered to the defendant motor company on September 17, 1892. On October 5, 1893, the intervener brought suit against the company, in the state court of Washington, to recover the sum of $2,800, alleged to be the price of the cable. The company disputed the claim, and alleged a counterclaim. The company became, as hereinbefore stated, insolvent in December, 1894; and in the same month the president of the company instituted an action in the state court of Washington, in which a receiver was appointed to take possession of the property of the company. Between December 24, 1894, and April 1, 1895, the intervener notified the receiver appointed by the state court of its claim for $2,800, and that it would claim that it should be paid as a preferential debt, but said claim was rejected. Subsequently the receiver was made a party defendant to the suit instituted by the intervener in the state court for the price of its cable. On April 3, 1896, the intervener recovered judgment against the motor company and the receiver for the sum of $620.45. The suit to foreclose the mortgage was brought by the complainant in the circuit court of the United States for the district of Washington in February, 1895. Thereupon the receivership suit in the state

court was removed to the circuit court, and later an order was made by the court below consolidating the two suits under the title of the suit now under consideration, and appointing an additional receiver to the one appointed by the state court. The court below, by its final decree of February 19, 1897, as previously stated, foreclosed the mortgage, and ordered the property to be sold. In pursuance thereof the property was sold on March 26, 1897, for $100,000, which sale was confirmed by an order of court on March 31, 1897. On the same day, but subsequent to the confirmation of the sale, the intervener moved for leave to intervene, which was granted. From this statement of the proceedings which took place in the respective suits, we cannot say that there were such laches on the part of the intervener as would justify us in declining to recognize its claim. It instituted and prosecuted to judgment the claim in the state court. It notified, and presented its claim to, the receiver appointed in the receivership suit instituted in the state court. It intervened in the circuit court in this suit while the court still retained control and custody of the proceeds of sale from the mortgaged premises. The mere fact that it did not present its claim before the final decree was signed and entered, and the property sold, cannot affect its rights. No showing is made that such delay as there was has or will materially prejudice the rights of any one. Upon the whole of the case, we think that the judgment of the court below, in preferring the claim of the intervener, the Broderick & Bascom Rope Company, in the sum of $620.45, was correct, and the same is hereby affirmed.

HOFFMAN v. McMULLEN.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 334.

1. CONTRACTS AGAINST PUBLIC POLICY—BIDS FOR PUBLIC WORK.
   Agreements which, in their operation upon the action of the parties, tend to restrain their natural rivalry and competition in bidding for public work, are against public policy, and void.

2. SAME.
   A mere honest and open co-operation between two or more persons to accomplish an object which neither could gain if acting alone is not within the rule against combinations to stifle competition.

3. SAME—SUITS INVOLVING ILLEGAL TRANSACTIONS.
   Wherever a party seeking to recover money connected with illegal transactions is obliged to make out his case by showing the illegal contract or transaction, or through its medium, or when it appears that he was privy to it, then he must fail; but when his title or right, though remotely connected with that contract or transaction, is not dependent upon it, and he can prove his case without reference to it, then he may recover.

4. SAME—SHARING PROFITS OF ILLEGAL CONTRACT.
   Where parties combine to stifle competition in bidding on certain public works, and the contract is thereupon secured by one of them, a further agreement between them to share the losses and profits under it is tainted with illegality, and is unenforceable.

5. SAME—BIDS FOR PUBLIC WORK.
   The validity of an agreement between rivals for public work does not depend on whether the public is actually injured, but on the purpose of the parties.
6. SAME—INVESTING PROCEEDS OF ILLEGAL CONTRACT.
   It seems that, if parties to an illegal and unenforceable agreement continue their partnership by investing the proceeds in property, neither of them could set up, as against the other, that the money thus invested was derived as profits from an illegal transaction in which the rights of the public were involved.
7. SAME—ACCOUNT STATED.
   It seems that if one of the parties to an illegal and unenforceable contract, who has received profits under it, admits that a specified sum is due to the other party, the latter might maintain an action upon an account stated between them.

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

Dolph, Mallory & Simon, for appellant.

Cox, Cotton, Teal & Minor and R. Percy Wright, for appellee.

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

HAWLEY, District Judge. This is a suit in equity brought by John McMullen (plaintiff) against Lee Hoffman (defendant) for an accounting of the profits earned on a contract to construct a pipe line by which the city of Portland is supplied with water. Pending the suit, Lee Hoffman died, and the suit was revived against Julia E. Hoffman, executrix of the last will and testament of Lee Hoffman, deceased. The water committee representing the city of Portland having advertised for bids to construct the line, the original parties hereto entered into an agreement by which the defendant, Hoffman, bid for the work, in the name of Hoffman & Bates. The plaintiff, McMullen, with the knowledge and concurrence of the defendant, made a separate bid in the name of the San Francisco Bridge Company, a company controlled by him. This bid was some $49,000 higher than the bid of the defendant. The contract having been awarded to the defendant, a written agreement of partnership was entered into by the parties for the execution of the contract to be entered into by the defendant with the city, which agreement reads as follows:

"This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That whereas, said Hoffman and Bates have, with the assistance of said McMullen, at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expects to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid: It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one-half of the expenses of executing the same, and each to receive one-half of the profits, or bear and pay one-half of the losses, which shall result therefrom. And it is further hereby agreed that, if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and

losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike."

The contract awarded on defendant's bid was formally entered into by the water committee, of the one part, and by the defendant, in the name of Hoffman & Bates, of the other. The contract proved a profitable one, the profits thereunder amounting to nearly $140,000. Hoffman refused to account to McMullen for any part of these profits, upon the ground that the bids made by them tended, under the circumstances, to lessen competition, and operated as a fraud upon the city, and could not be enforced in equity, and upon the further ground that McMullen wholly failed to comply with the contract between the parties, and refused to perform the conditions upon which the defendant's agreement, to share the earnings of the contract with the plaintiff, was made.

The whole transaction grows out of the enterprise undertaken by the city of Portland to conduct the water of Bull Run river some 30 miles, to the city. The water was to be conveyed through steel pipes, and had to be conducted across streams which required the construction of bridges, and expensive and permanent works had to be erected at Bull Run river, where the water was diverted from the river to the pipe. The construction of this work was placed by the legislature in the hands of a committee composed of 15 persons, who managed the business for the city. This committee decided to let this work at a public letting to the lowest bidder, and to that end the work was divided into the following general classes: (1) Head works; (2) bridges; (3) wrought-iron plates; (4) steel conduit of head works to Mt. Tabor; (5) manufacturing and laying wrought-iron or steel pipes from head works to Mt. Tabor; (6) steel plates for pipe; (7) conduit from head works to Mt. Tabor, cast iron; (8) cast-iron pipe for Mt. Tabor City Park; (9) submerged pipes,—and separate bids invited for each. The letting was the ordinary public letting upon sealed proposals. Hoffman and McMullen each undertook to secure contracts to do this work, or some portion of it, by bidding for it, in response to the invitation of the water committee. Bids for each of the following items were accordingly submitted by them to the water committee, Hoffman bidding in the name of Hoffman & Bates, and McMullen bidding in the name of the San Francisco Bridge Company: Head works: Hoffman & Bates, $17,800; San Francisco Bridge Company, $16,550. Bridges: Hoffman & Bates, $33,562.94; San Francisco Bridge Company, $31,279.07. Steel conduit from head works to Mt. Tabor: Hoffman & Bates, $359,278; San Francisco Bridge Company, $348,781. Conduit from head works to Mt. Tabor, of steel or wrought iron, making and laying pipe: Hoffman & Bates, $465,722; San Francisco Bridge Company, $514,664. McMullen submitted a bid in the name of the San Francisco Bridge Company for the submerged pipe of $97,340. For this work Hoffman did not bid. They agreed in advance upon what parts of the work they should bid, upon what their respective bids should be, and upon what portion the bid of the San Francisco Bridge Company should be cheapest. There was also an understanding between them, as to some portions of the work, that the lowest bid should be withdrawn in the event that there

were no other outside bids lower than those of Hoffman & Bates. In other words, they were to pool their bids, and so arrange matters that the highest bid, as between themselves, should, if possible, be accepted, and they would divide the proceeds of the contract. Suggestions were freely made as to the propriety of taking in other bidders, and also the secretary of the committee, so that honest bids might be withheld, and others ascertained, by fraudulent and improper means. The following extract from a letter written by McMullen to Hoffman fairly illustrates the means they proposed to use to accomplish the object they had in view:

"I do not want to let go on that submerged pipe; want to get the job. I think we can make $25,000 on that job, but we must pool it. To do this, we will have to let the secretary, Frank T. Dodge, in, and, if any bids come without personal representatives, have him not receive them until after the letting, and then return them unopened; and we will gather in everybody that is personally represented. Don't think there is many."

The circuit court, upon final hearing, rendered a decree in favor of McMullen for $52,241.18, and one-half of the assets, consisting of plant and tools, furniture, and camp fixtures, of the cost value of $7,857.36, and a disallowed claim against the city of Portland for $16,961.25. From this decree Hoffman appeals. There is also a cross appeal taken by McMullen from the decree of the court allowing Hoffman a salary of $1,000 per month, and from the refusal of the court to allow him interest on the money found due, and refusal to allow him costs. The appeal of Hoffman will first be considered.

The contention of appellant is that the manner in which the parties hereto presented their bids, and sought thereby to procure contracts from the committee, was illegal. It is not seriously denied but what the city of Portland could have successfully defended any action that might have been brought against it by the contractors, Hoffman & Bates, upon the ground that the contract was secured by illegal means. It did not do so. It paid the money to Hoffman. The question here presented is: Can the defendant avail himself of this defense? The authorities answer this question in the affirmative. It is true that the objection that a contract was immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. But it is not for his sake that the objection is ever allowed. The refusal of courts to enforce such contracts is always founded in general principles of public policy, which the defendant may take the advantage of, contrary to the real justice of the case, as between the parties plaintiff and defendant. It is the duty of all courts to keep their eye steadily upon the interests of the public, and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give no countenance or assistance to it in foro civili.

In dealing with illegal contracts, courts do not and cannot look alone to those who are parties to the illegal transaction. The law regards the welfare of society as paramount, and, in enforcing the law, courts will not impair its efficacy or cripple its operations by considerations affecting the interests of those who are participes criminis. The principle of public policy is this: "Ex dolo malo non oritur actio." No court will lend its aid to a man who founds his cause of

action upon immoral or illegal acts. If, from the plaintiff's own showing or otherwise, the cause of action appears to arise ex turpi causa, or out of the transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because it will not lend its aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was bringing his action against the plaintiff, the latter would have the advantage of it; for, where both are equally at fault, potior est conditio defendentis. Bartle v. Coleman, 4 Pet. 184, 189; Tool Co. v. Norris, 2 Wall. 45, 54; McCausland v. Ralston, 12 Nev. 195, 206, et seq., and authorities there cited; Western Union Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 418, 427, 3 Fed. 1; Buck v. Albee, 26 Vt. 184; Hannah v. Fife, 27 Mich. 172, 181; Wooden v. Shotwell, 23 N. J. Law, 465; Price v. Polluck, 37 N. J. Law, 44; Belding v. Pitken, 2 Caines, 147; Leonard v. Poole, 114 N. Y. 271, 379, 21 N. E. 707; Hope v. Association (N. J. Err. & App.) 34 Atl. 1070.

In Bartle v. Coleman the court said:

"The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a particeps criminis, it is but a just infliction for premeditated and deeply practiced fraud, which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws."

A contract to prevent competition and bidding for public work is contrary to public policy, and cannot be enforced. The rule is universal that agreements which, in their necessary operation upon the action of the parties, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principle of sound public policy, and are void. Gulick v. Ward, 10 N. J. Law, 87, 91; Swan v. Chorpenning, 20 Cal. 182, 185; Hannah v. Fife, 27 Mich. 172, 180; Weld v. Lancaster, 56 Me. 453, 457; Noyes v. Day, 14 Vt. 384; Gibbs v. Smith, 115 Mass. 592; Doolin v. Ward, 6 Johns. 194; Wilbur v. How, 8 Johns. 444; Thompson v. Davies, 13 Johns. 112; Kelly v. Devlin, 58 How. Prac. 487; Atcheson v. Mallon, 43 N. Y. 147; Hunter v. Pfeiffer, 108 Ind. 197, 200, 9 N. E. 124; King v. Winants, 71 N. C. 469, 474; Durfee v. Moran, 57 Mo. 374, 379; Lawnin v. Bradley, 13 Mo. App. 361; Engelman v. Skrainka, 14 Mo. App. 438; Woodruff v. Berry, 40 Ark. 252, 267; Hyer v. Traction Co., 80 Fed. 839, 844. Do the facts and circumstances of this case bring it within this general rule? Can this case, consistently with the reasoning of the authorities, be excepted from it? Does it infringe in any manner upon any principle of public policy? It is argued by appellee that the bidding was not illegal, because the proof shows that McMullen and Hoffman were jointly interested in the bid, and that the law allows two or more persons to combine together for the purpose of making one bid. This is true where no fraudulent purpose is involved. An honest co-operation between two or more persons to accomplish an object which neither could gain if acting alone in his individual capacity is not within the rule, al-

though, in a certain sense and to a limited degree, such co-operation might have a tendency to lessen competition. There may be a competition that saves as well as a competition that kills. The amount of work to be performed, the necessity of obtaining means to properly carry on the contract, the responsibility of the parties, their ability to complete the work, etc., are matters which are liable to make it absolutely necessary for rival contractors to combine their forces and unite together, not only in order to secure the contract, but to enable them, if it is obtained, to complete it without financial embarrassments or other difficulties which are liable to arise in cases of individual responsibility. There is no valid objection to such voluntary combinations if the joint action of the parties is done honestly and in good faith. In all contracts secured in such a manner the courts should never hesitate to protect parties in their agreements with each other, and compel them to comply with the terms thereof. It is only where the facts and circumstances surrounding the case clearly show that illegal means or improper and deceptive influences and methods were used to procure the contract that the maxim, "in pari delicto," applies.

In Atcheson v. Mallon, 43 N. Y. 147, 151, the court said:

"A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk as well as the profit is joint and openly assumed. The public may obtain, at least, the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid."

In Gibbs v. Smith, 115 Mass. 592, the court, in drawing the line of distinction in an analogous case, said:

"An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together, or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character, and will be enforced; but such agreement, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy, and in fraud of the just rights of the parties offering it, and therefore illegal."

See, also, Lawnin v. Bradley, supra; Cocks v. Izard, 7 Wall. 559.

The fraud, if any, in the present case, was in withholding the truth, —in fraudulently representing and holding themselves out to the committee and to the public as rival bidders, when in fact they were not. The learned judge who tried this case, in his opinion upon the exceptions to the defendant's answer, said:

"When the parties presented themselves as competitors for the work, they were guilty of a fraud. The tendency of what was thus done was to cause the water committee to believe that the bid of defendant was a favorable one for the city. Moreover, plaintiff's pretended bid had the effect of a representation to the committee that, in plaintiff's opinion, the work could not be profitably done for less than a figure $35,000 higher than that bid by defendant, although, as a matter of fact, plaintiff believed such work could be done, and, except for the collusive agreement with defendant, would have offered to do it, for an amount $75,000 less than that at which the contract was let. Upon all the cases cited or to be found, and in any view of the case consistent with

public policy and the principles of equity, there can be no relief in such a case." McMullen v. Hoffman, 69 Fed. 509, 518.

Upon the final hearing, he came to the conclusion that his former opinion was erroneous, and held that the contract and agreement of the parties were valid as between themselves. McMullen v. Hoffman, 75 Fed. 547.

This case, in principle, cannot, in our opinion, be distinguished from Atcheson v. Mallon, supra, although the facts here as to the illegal character of the transaction are much stronger than in that case. There the parties simply showed each other their bids, and agreed to divide the profits. Mallon was the lowest bidder, and obtained the contract. The money due on the contract when completed was paid to him. The profits amounted to $400. Mallon refused to divide. Atcheson brought suit to recover his share of the profits. The court refused to enforce the contract. After announcing the general rule which we have stated, and declaring the general principles applicable thereto, the court said:

"If Mallon had promised Atcheson a sum of money if he would refrain from making any proposal, and Atcheson, relying upon it, had made none, and then had sought to enforce the agreement, there can be no doubt that the law would have held the promise void. And why? Not out of any consideration for the parties to it, but because its effect was to remove Atcheson from the number of earnest bidders, and thus, by lessening competition, to detriment the public. And the agreement which was made, laying open to Mallon just what was the judgment of Atcheson of a profitable bid, and removing, in effect, an interested rival, tended to affect Mallon's action; while Atcheson, confident that, if Mallon succeeded, it was also his own success, lost the impulse to a real competition with him. It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements courts refuse to enforce."

Nor can this case be distinguished in principle from Swan v. Chorpenning, supra. In that case both parties to the agreement were mail contractors. Swan put in a bid for carrying the mail over a certain route, and agreed with C. to withdraw his bid, and use his influence to induce the government to give to C. a contract for a longer route, including the one bid upon, on consideration that, if C. obtained the contract, S. should have an interest in it, or be paid an equivalent pecuniary compensation. Chorpenning obtained the contract, and, after payment to him, refused to divide the profits. The court, after quoting Gulick v. Ward, said:

"We see no difference in principle between the question in that case and the one now presented, and the cases clearly fall within the same category. In respect to the consideration, it is impossible to distinguish them: for an agreement not to bid and an agreement to withdraw a bid already put in are certainly obnoxious to the same legal objections."

Now, the agreement in the present case was substantially to the same effect. In consideration of sharing in the profits, McMullen did not put in an honest bid. He put in a bid much higher than he would otherwise have done but for the agreement. His object, evidently, was to deceive the committee,—to convey the idea that he was a rival bidder, when in fact he was not. Such conduct certainly tended to destroy competition, and to preclude the advantages which inevitably resulted from it. Equally strong in its similarity as to

the effect of the agreement between the bidders is the case of Hannah v. Fife. That was an action brought by Fife and Haviland against the plaintiff in error, as the sureties of one Oscar L. Noble in a contract between said Noble and Fife and Haviland, by which Noble agreed to enter into and perform a contract with the state for the construction of a swamp land state road, for the building of which said Fife and Haviland had been the lowest bidders, and to give them, as a bonus for being allowed to take their place in the contract, eight sections of swamp lands to be received from the state for the performance of the work. Noble's bid, in the first instance, was in reality less than the bid of Fife and Haviland, but it was not made out in accordance with the plan submitted by the state, and could not be accepted. The bidders obtained a continuance, and, before the bid was let, the agreement in question was made, and Noble got the contract. The court, in the discussion of the case, said:

"Now, if these bidders, Noble, on one side, and Fife and Haviland, on the other, had, before or at the time of making their respective bids, entered into a secret agreement, for their mutual profit and to avoid competition with each other, that, for the purpose of getting a contract from the state for building this road at the highest rate or greatest quantity of land allowed by the law, only one of the parties should put in a bid, which in its terms would accord with the plan of the road adopted by the state, and with the notice given, while the other, though not in accordance with that plan or notice, should in all other respects appear to be in accordance with the terms proposed by the state, and better in some respects than the bid of the other, but which, nevertheless, could not be accepted, because not in accordance with the plan (thus securing in advance the letting of the contract to one of the parties * * * without danger of competition from the other, while keeping up the appearance of competition); and that the contract should be performed by one of the parties for the mutual profit of both; or that the party taking the contract and doing the work should give to the other, as his share of profit, eight sections or any other portion of the land to be received from the state,—if such had been the previous arrangement between the parties, it will not be pretended that such an understanding, or any agreement resting upon it or calculated to carry it into effect, could have been sustained. It would have been so manifestly fraudulent, as against the state, and so subversive of the intentions and objects of the legislation, that no court could hesitate for a moment to declare it illegal and void."

There was no evidence in that case except such as could be legally drawn from the facts that there was any such previous agreement. But the court said it was difficult to resist the conclusion that the facts as proved tended "pretty strongly to show the existence of some such previous understanding," and that the putting in the bid "by Noble in a mode which, under the notice, could not have been accepted, is not, when considered with reference to the subsequent acts of the parties, easily explained upon any other rational theory than that of previous concert for the purpose already intimated." The court further said:

"But whether there was, in fact, any such secret understanding or fraudulent collusion between the bidders or not, is, in my opinion, entirely immaterial to the decision in the present case. It seems to me clear that the tendency of all such contracts between bidders as that here in question, if recognized as valid by the courts, must be to afford encouragement and give facilities to bidders to enter into and give full effect to such secret agreements and combinations, and to enable them to defeat the plain intent and object of the legislature in requiring such contracts to be let to the lowest responsible bidder."

In the present case it is evident that McMullen and Hoffman understood each other; that their intention was to prevent open competition, which the law encourages. In their confederacy they were aiming at the same result,—that of compelling the city to pay a higher price for the work than McMullen believed it was worth.

Breslin v. Brown, 24 Ohio St. 565, 570, is perhaps the strongest case presented in favor of appellee herein as to the right of parties who had intended to bid, and did bid, upon public improvements that were to be let to the lowest bidder, to enter into an agreement to become partners in the work in the event that the contract should be awarded to either, and that the contract, when awarded, should inure to the benefit of the firm. But that case, in its facts, is clearly distinguishable from the case at bar in many of its essential particulars. There separate and independent bids were filed by the respective parties. "The bid of each was based upon his own judgment and filed at his own discretion." It did not appear that either had knowledge of the other's bid, and these facts led the court to the conclusion that the agreement made between the parties, and the result of the bidding, did not have a tendency to stifle competition at the letting of the bid. Here the parties agreed in advance as to what their bids were to be. Each knew what the bid of the other was. The intent, object, and tendency of their co-operation in the contract, as is fully and clearly shown by the testimony, was to deceive the committee, and commit a fraud upon the public.

In Hunter v. Pfeiffer the appellant and the appellee were about to bid for the construction of a public work, but the appellant was induced to withhold his bid in consideration that he should be taken into partnership, and be permitted to share in the profits of any contract which appellee might secure. The court said:

"Upon all such partnerships the law sets the seal of its condemnation. Persons who combine in schemes of the character disclosed can secure no aid from the courts in coercing a division of the profits anticipated or accrued. * * * If the court should lend any countenance to such a contract of partnership as that disclosed in the complaint, in either aspect in which it is presented, the effect would be to afford facilities for bidders to enter into secret agreements and combinations with each other, and thus enable them to defeat the plain purpose of the legislature in requiring such contracts to be let to the lowest and best bidder."

At the close of the opinion the court said:

"If, in letting a contract such as this, parties, without knowledge of the bids of each other, submit their bids as the law requires, and afterwards enter into a partnership for the construction of the work with the knowledge of the officers letting the same, a question of a different character is presented. Such a transaction bears some similitude to the contract which was upheld in Breslin v. Brown, 24 Ohio St. 565, a case which, on account of the liberal view taken of the contract there involved, is not universally indorsed. That case, however, affords no aid to the appellant here."

The cases are too numerous to be specifically reviewed. The dividing line is always sharply drawn with reference to the particular facts of each case, and the conclusion reached that where the parties have acted openly and honestly, and entered into an agreement which neither in its purpose, effect, nor natural tendency is to prevent a fair competition, it can be and should be enforced. But, where there is a

secret combination,—call it partnership or any other name,—the effect of which is, or the natural tendency of which is, to abate honest rivalry or prevent fair competition, it is to be and is condemned, as violative of public policy, and held to be absolutely void. All the authorities hold that, where either the intention, the effect, or the necessary tendency of the combination is to stifle or limit competition, it is contrary to public policy, and, when discovered, will be stamped with marks of disapproval in any court of law or of equity. Were any of the subsequent acts of the parties, or the condition of the contract as to its completion, or any other fact or circumstance established at the trial, of such a character as to take this case out of or away from the general rule hereinbefore stated in relation to illegal contracts?

It is claimed that, before the money was paid by the city, it had knowledge of the true relations existing between McMullen and Hoffman, and, with such knowledge, accepted the work, and paid the contract price therefor, and that the city was not in any manner injured by the illegal acts of the plaintiff and defendant herein. But the law is well settled that the question of the validity of the contract does not depend upon the circumstance whether the public has, in fact, suffered any detriment, but whether the contract is in its nature such as might have been injurious to the public. That which renders the contract illegal is not the injury the parties have actually occasioned, but the purpose they must have contemplated when it was made. Its validity is tested, not by its results, but by its objects, as shown by its terms. In addition to the authorities heretofore cited, see Gibbs v. Smith, 115 Mass. 592; Atcheson v. Mallon, 43 N. Y. 147, 149; Woodworth v. Bennett, 43 N. Y. 273, 278; Weld v. Lancaster, 56 Me. 453, 457; Richardson v. Crandall, 48 N. Y. 348, 362. It is not therefore necessary, in the determination of this case, to inquire whether the effect of the agreement between the parties was in fact detrimental or beneficial to the city of Portland.

Appellee argues that the case as presented comes within the rule, so frequently announced in the authorities, that a contract or an agreement will be enforced, even if it is incidentally or indirectly connected with an illegal transaction, provided it is supported by an independent consideration, so that the plaintiff will not require the aid of the illegal transaction to make out his case. This principle is undisputed. Armstrong v. Bank, 133 U. S. 434, 469, 10 Sup. Ct. 450, and authorities there cited. See, also, Woodworth v. Bennett, 43 N. Y. 273; Buck v. Albee, 26 Vt. 184; Gilliam v. Brown, 43 Miss. 642, 660; Western Union Tel. Co. v. Union Pac. Ry. Co., 1 McCrary, 558, 562, 3 Fed. 423; Swan v. Scott, 11 Serg. & R. 155; Wright v. Pipe Line Co., 101 Pa. St. 204, 208. This argument, with the authorities cited in its support, will be considered in connection with the further contention of appellee that the case, upon its facts, comes within the general principle that, after the illegal contract has been fully executed, one party, in possession of all the gains and profits resulting from the illicit traffic and transaction, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law. McBlair v. Gibbes, 17 How. 232, 237; Railroad Co. v. Durant, 95 U. S. 576, 578; Sharp v. Taylor, 22 Eng. Ch. 801,

817; Gilliam v. Brown, 43 Miss. 642, 664; Lestapies v. Ingraham, 5 Pa. St. 71, 81; Hipple v. Rice, 28 Pa. St. 406; Willson v. Owen, 30 Mich. 474; Richardson v. Welch, 47 Mich. 309, 11 N. W. 172; Wann v. Kelly, 2 McCrary, 628, 630, 5 Fed. 584; Tenant v. Elliott, 1 Bos. & P. 3; Farmer v. Russel, Id. 296; Thomson v. Thomson, 7 Ves. 470; Owen v. Davis, 1 Bailey, 315. There are certain underlying principles—clear and well defined—which govern and control the propositions announced in these authorities; and, from a careful consideration thereof, it can readily be ascertained whether they have or have not any binding force in their application to the facts of this case.

Armstrong v. Bank, supra, which was a suit upon a draft and certificate of deposit, may be taken as a representative case under the first proposition. Armstrong was the receiver of the Fidelity National Bank of Cincinnati, Ohio. The facts were that on June 14, 1887, the Fidelity National Bank of Cincinnati drew a draft for $100,000 on the Chemical National Bank of New York City, payable to the order of the American Exchange National Bank of Chicago, and put it into the hands of one W., who delivered it, for value, to K. & Co. They indorsed it for deposit to their account to the Chicago bank, which credited the amount to them, and paid their checks against it. The court held that W. did not act as the agent of the Cincinnati bank, and that in a suit by the Chicago bank against the receiver of the Cincinnati bank, which had failed, to recover the amount of the draft, the Chicago bank was a bona fide holder of it for value, and want of consideration could not be shown by the receiver. One defense set up to the suit on the certificate of deposit was that H. (the vice president of the Cincinnati bank), its assistant cashier, and W., of W. & Co., conspired to defraud that bank by using its funds in speculating in wheat in Chicago, through K. & Co., so as to make a "corner" in wheat. The court held that the plaintiff could not refuse to honor the checks of K. & Co. against the deposit, on the ground that K. & Co. intended to use the money to pay antecedent losses in the gambling wheat transactions; that, where losses have been made in an illegal transaction, a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. It was these facts, and rulings of the court, that led up to the announcement of the legal principles under consideration. In the discussion of that case the court said:

"When the plaintiff received the deposit from Kershaw & Co., it was bound to honor their checks against it; and it could not refuse to pay them on the ground that Kershaw & Co. intended to make an improper use of the money. If Wilshire, Eckert & Co. and Kershaw & Co. were engaged in gambling, and the former had deposited money in the Fidelity Bank to be transferred to the plaintiff, in order that Kershaw & Co. might check out the amount from the plaintiff's bank in payment of losses sustained in the gambling transactions, and both banks knew that the money was to be so used, still the Fidelity Bank, having received the deposit, could not refuse to pay it over to the plaintiff, and the plaintiff, having received it, could not refuse to honor the checks of Kershaw & Co. drawn against it."

The Armstrong Case is in line with the early English cases of Tenant v. Elliott, Farmer v. Russel, Sharp v. Taylor, and others

heretofore cited, to the effect that A., having received money to the use of B. on an illegal contract between B. and C., shall not be allowed to set up the illegality of the contract as a defense in an action brought by B. for money had and received. The principle of these cases cannot be questioned. But a bare statement of the facts upon which the principles were there applied shows, beyond question, that the facts of the present case are not, and cannot be brought, within the rule there announced. This case belongs to a different class. The distinction between the class of cases is clearly set forth in Thomson v. Thomson, supra. The master of the rolls, after declaring that the agreement there under consideration was illegal, said:

"There is an equity against the fund, I admit, if you can get at it by a legal agreement. The defense is very dishonest, but in all illegal contracts it is against good faith as between the individuals to take advantage of that. A man procures smuggled goods, and keeps them, but refuses to pay for them. So, in the underwriter's case, an insurance contrary to the act of parliament, the brokers had received the money, and refused to pay it over; and it could not be recovered. No matter who complains of it, the thing is illegal. You have no claim to this money except through the medium of an illegal agreement, which, according to the determinations, you cannot support. I should have no difficulty in following the fund, provided you could recover against the party himself. If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing his trust. Tenant v. Elliott is, I think, an authority for that. But in this instance it is paid to the party, for there can be no difference as to the payment to his agent. Then, how are you to get at it except through this agreement? There is nothing collateral, in respect of which, the agreement being out of the question, a collateral demand arises, as in the case of stock-jobbing differences. Here you cannot stir a step but through the illegal agreement; and it is impossible for the court to enforce it."

Brooks v. Martin, 2 Wall. 70, is relied upon by appellee to show that the contract and agreement between the parties had been fully executed and completed. There the parties were partners in buying up soldiers claims, contrary to law. When the suit was brought, all the claims of the soldiers illegally purchased by the partnership, with money advanced by the complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had in many cases been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the land so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were, then, in the hands of the defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It was to have an account of these funds, and a division of these proceeds, that the suit was brought. Upon this statement of the facts the court said:

"Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute enacted for the benefit of the soldier is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so?

The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

In support of these views, the court quotes in extenso from Sharp v. Taylor, supra, which closed with the statement that "the difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in Tenant v. Elliott and Farmer v. Russel, and recognized and approved by Sir William Grant in Thomson v. Thomson"; thus clearly indicating the class of cases to which the case then under consideration belongs. The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had of money connected with illegal transactions, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract or money due him as profits derived from the contract; but when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not dependent upon that contract, but his case may be proved without reference to it, then he is entitled to recover.

The doctrine of Brooks v. Martin and kindred cases is, and always should be, applied in cases where the fraud complained of is between individuals, which does not in any manner affect the public interest. If McMullen and Hoffman had agreed to continue their partnership, by investing the profits received by Hoffman under the illegal contract in the purchase of property, mortgages, bonds, or other securities, neither of them would be permitted, as against the other, to set up the fact that the money so invested was derived as profits from an illegal transaction, in which the rights of the public were involved. Numerous instances are found in the books which present the distinction existing between the two lines of cases under consideration in a very clear light.

In King v. Winants, the court, in reviewing the principles announced in Brooks v. Martin, 2 Wall. 70, said:

"Two men enter into a conspiracy to rob on the highway, and they do rob; and, while one is holding the traveler, the other rifles his pocket of $1,000, and then refuses to divide; and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abused. Now, if these robbers had taken the $1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of Brooks v. Martin, supra, so much relied on by plaintiff."

The learned counsel for appellee, recognizing the force of the reasoning of the authorities, admits, for the purpose of his argument,

that if, after the award was made to Hoffman, he had refused to enter into the partnership arrangement, McMullen could not have compelled him so to do, nor collect any damages for his refusal, "because the grounds then existing as the basis of appellee's claim would have been that he had rendered service in securing the award, and, necessarily counting upon that service, he would have had to bring it into the court, and its character would have been a subject for investigation. But, when Hoffman entered into the partnership agreement, all that matter, as between them, became a dead letter." If this position could be maintained, it would furnish a very convenient way for escaping the penalty which the law imposes upon all persons who have secured contracts in an illegal and unlawful manner. A contract secured by corrupt means—the bribing of public officers, buying off all rival bidders, thus stifling all competition where contracts are to be let to the lowest bidder—could always be enforced by a simple agreement of partnership by the parties guilty of the fraud. The fraud, under this rule, is a thing of the past,—has become "a dead letter," or is made honest by a single stroke of the pen, creating a new agreement to share and share alike in performing the illegal contract. What would there be left to discourage parties in their illegal combinations to defeat the ends of justice if this rule should be adopted and enforced by the court? The illegality of the contract could always be avoided as between the parties to the partnership agreement. We prefer to tread in the beaten path; to follow the safe road which has always been kept clean, in good condition and order, and furnishes a safe method of protection to the public who honestly travel thereon, and provides a penalty to all parties who depart therefrom by crooked ways, which naturally lead and always tend to destroy the public interests. It is manifest to every layman and lawyer, as well as to the courts, that such agreements would destroy all competition in the letting of contracts for public works. In the language of the authorities, such agreements are always declared void. Why? Because men with these agreements in their hands, and relying upon them for gain, do not act towards the public and third persons as they would without them, under the stimulus of competing opposition.

This suit is brought for an accounting between the parties of the profits realized on the contract made with the committee for the city of Portland upon its award to Hoffman & Bates upon the bid of Hoffman. The foundation of the case rests upon the legality of that contract. The case could not be proven without first showing the contract, and then proving the amount of money received and expended thereon. If Hoffman had admitted that a specified sum of money was due to McMullen, it may be that McMullen could have maintained an action upon an account stated between them. Hanks v. Baber, 53 Ill. 292; Chace v. Trafford, 116 Mass. 532; 1 Am. & Eng. Enc. Law (2d Ed.) 437. But it does not appear that any such admission has been made. No promise has been given by Hoffman to McMullen since the completion of the contract upon which a recovery is sought. This suit, as before stated, is for an accounting, and the amount found due in the circuit court was only ascertained, and could only be determined, by an investigation of the transaction between McMullen and

Hoffman arising out of the contract with the committee. The relief prayed for required the court to investigate all of the various transactions of the parties from the beginning to the end, and adjust the differences between them. We are called upon to examine all the evidence as to the manner in which they agreed with each other to put in their bids, and decide which was most faithless to the other, and determine which got away with the most of the spoils, and to help them make a just and equitable division. This is just what the courts in all cases of illegal contracts, agreements, or enterprises have universally refused to do. The act of Hoffman in refusing to divide the profits cannot be too strongly condemned. But it has often been said that courts are not organized to enforce the saying that there is honor among wrongdoers, and the desire to punish the man that fails to observe this rule must not lead the court to a decision that such persons are entitled to the aid of courts to adjust their differences arising out of, and requiring an investigation of, their illegal transactions.

The conclusions reached upon this branch of the case render it unnecessary to consider the question argued by counsel as to whether or not the partnership between Hoffman and McMullen was dissolved long prior to the completion of the contract, or to examine any of the questions presented in the cross appeal by McMullen against Hoffman. The views herein expressed are decisive of the whole case. The judgment and decree of the circuit court are reversed.

CENTRAL TRUST CO. OF NEW YORK v. GEORGIA PAC. RY. CO. (BROOKS et al., Interveners).

(Circuit Court, N. D. Georgia. December 3, 1896.)

1. RAILROADS—CONSTRUCTION—CONTRACTS—CONTRACTORS' LIENS.

   If, under the Mississippi statute, contractors and material men who have graded and constructed a railroad bed, with masonry work, etc., have a lien which is prior in any respect to the lien of a mortgage executed and recorded prior to the making of the construction contract and the commencement of work thereunder, such priority is limited to the embankments actually thrown up and structures erected by such contractors, as distinguished from the land and the right of way; and, as to these latter, the lien of the bondholders has priority.

2. SAME—EVIDENCE.

   Railroad contractors seeking to assert a lien upon embankments and structures actually erected by them cannot recover anything when they fail to prove what improvements or erections they made, with sufficient detail or certainty of value to authorize any findings for any particular amount.

3. RAILROAD MORTGAGES—RECORDING.

   The record of a copy of a railroad mortgage, instead of the original, on the county records, is not good, as constructive notice; but if the original is actually filed with the recorder for record, and he then compares a copy with the original, and thereafter makes the record from the copy, this is sufficient, and the record operates as notice.

4. EQUITY—SPECIAL MASTER'S REPORT—REOPENING CAUSE.

   After the filing of a special master's report, and taking of exceptions thereto, the court will not allow the cause to be reopened to permit the taking of additional evidence on which to base a recovery, in accordance with the views expressed by the master.

This was a petition of intervention by J. M. Brooks and others in the foreclosure suit brought by the Central Trust Company of New York against the Georgia Pacific Railway Company. The interveners set up an alleged contractor's lien under the Mississippi statute, against certain parts of the road, which they claimed was superior to the lien of the mortgage bonds. The cause was heard on exceptions to the report of the special master, which is here set out in full:

By an order of the circuit court of the United States for the Northern district of Georgia, the above-stated intervention was referred to the undersigned, as special master, for hearing and report. The notice for the time and place of hearing was served on the parties complainant and defendant. Judge Frank A. Critz appeared as counsel for the interveners, and Mr. Henry Crawford appeared as counsel for the defendants.

Statement of the Case.

The interveners were contractors and builders in the state of Mississippi, and entered into a contract with the Georgia Pacific Railway Company for the construction of a part of its railroad, the obligation being: "To construct and finish in the most substantial and workmanlike manner, to the satisfaction and acceptance of the general engineer of said company, all the graduation masonry, and such other work as may be required on sections numbers 41 to 50, inclusive, on the Third Division of the Georgia Pacific Railway." The work was to be done according to the specifications in the contract, and the specifications, among many other things, provided for the erection of bridges, grading the roadbed, furnishing cross-ties, and many other things, for a particular enumeration of which it will be necessary to refer to the contract which is sent up with this report. The intervention in this case alleged that the interveners were contractors and subcontractors for the work set out in the contract above alluded to, and that they completed their work, and were, under the statute laws of Mississippi, entitled to a first and superior lien as mechanics and contractors, and that, by an adjudication of their rights in a state court in Mississippi, they obtained a decree which fixed their rights as to amount and dignity. A certified copy thereof is attached to the record in this case, and made a part of this report. The defendant filed a general demurrer in this intervention, but, before a hearing thereon was had, that demurrer was withdrawn, and a consent was entered into, which is so material to a clear understanding of the issue presented in this case that a copy thereof is inserted herewith, and is as follows:

"In the Circuit Court of the United States for the Northern District of Georgia, at Atlanta.

"The Central Trust Company of New York, Complainant, vs. The Georgia Pacific Railway Company et al., Defendants (J. M. Brooks, Surviving Partner of R. M. & J. M. Brooks, et al., Interveners).

"We hereby withdraw the demurrer heretofore filed to the intervention petition of said J. M. Brooks, surviving partner, et al., in the above-stated case, and admit the statements of fact contained in said petition to be true. We agree that Exhibit A to said petition is a true copy of the contract between the Georgia Pacific Railway Company and R. M. and J. M. Brooks, under which the work was done for which allowance is claimed in said intervention; that Exhibit B to said petition is a true copy of the original decree, and Exhibit C to said petition is a true copy of the amendment of said decree in the case of R. M. & J. M. Brooks et al. vs. The Georgia Pacific Railway Company, in the chancery court of Oktibbeha county, Mississippi, as stated in said petition; and we agree that said Exhibits A, B, and C may be used as evidence in the trial of all issues presented by said petition, without further authentication or proof of said exhibits. It is further admitted that on the 18th day of August, 1894, Frank A. Critz, as solicitor of said interveners in the city of Atlanta, Georgia, at the time and place appointed for the sale of the Georgia Pacific Railway in the decree in the above-stated case, and at the sale of said railway

under said decree, before any bid was made by the purchaser at said sale, read, in the presence and in the hearing of said purchaser, notice of the claim of said interveners, and of said intervention, as shown by said written notice filed in this case on said 18th day of August, 1894; and it is agreed that said written notice, with the indorsements thereon, may be used as evidence in the trial and disposition of said intervention. The Mississippi statutes referred in said petition need not be pleaded more fully. The above agreement, however, is made subject to the right, which is hereby expressly reserved, to object to any and all matter offered as evidence which may not be material and relevant to the issue in this intervention.

"Signed this November 3, 1894.

"James Weatherly,
"Sol'r for Ga. Pac. Ry. and Southern Ry. Co., Purchaser.
"Henry Crawford,
"Sol. for Same Parties."

It appears from the intervention filed and the consent above set out that the following are conceded to be the facts in the case:

(1) That the contract was executed.

(2) That the contractors and subcontractors, their rights, position, and situation in respect to the controversy in hand, were properly stated.

(3) That the work by the contractors, under their contract, was commenced about the 23d day of June, 1888, and continued until about November 15, 1888; that the contractors did a very large proportion of the woodwork, earthwork, clearing and grubbing, and furnished a large amount of material for woodwork; and that for a very large portion of said woodwork and material the company had failed and refused to pay and still owes.

(4) That on November 28, 1888, the interveners in this case, being the contractors named in the contract, commenced suit to foreclose a mechanic's lien in the chancery court of Oktibbeha county, in the state of Mississippi, under chapter 53, Code Miss. 1880, as amended by Act March 7, 1882.

(5) That pending said suit a change in the situation of the complainants occurred by death; that proper parties were made, and the cause regularly proceeded.

(6) That a decree was rendered on November 15, 1893, in favor of the complainants in that case, and interveners in this, for the sum of $10,000 principal, and $895.88 costs. This decree declared that the $2,000 which the interveners had deposited to secure the performance of their contract was included in the $10,000 allowed, and that the amount allowed also included the 10 per cent. reserved fund, and all other claims with accrued interest, to which the complainants were entitled. It was provided that the complainants were entitled to a lien on the railway for the amount found in their favor, but restricted it to that part of the railway mentioned in the contract,—to all that part of the railway and right of way in the counties of Clay, Oktibbeha, and Webster, in the state of Mississippi, beginning at a point in Clay county, on said railway, 3,800 feet east of where it crosses the west line of said county, and extending from that point westward 11 miles to a point on said railway, in Webster county, 2,600 feet west of where said railway crosses Spring creek, including all of the sections of the road named in the contract. The decree vested that part of the defendant's property in a commissioner, and provided for a sale. On April 28, 1894, an amendment to the decree was taken, in which the following extension of the scope of the decree was made: In the amended decree above referred to, the complainants were held to have a lien, under the statute above referred to, "upon all the Georgia Pacific Railway in the state of Mississippi, for the payment of all amounts decreed to complainants in said decree; said lien to include, as necessary parts of said railway, all of its rights of way, depots, grounds, yards, tanks, side tracks, roadbed, bridges, culverts, waterways, trestles, rails, freight rooms, and everything else pertaining to said railway as now completed in the state of Mississippi, including that part of said railway described in said decree, and such lien is hereby declared and established; said railway being in the counties of Lowndes, Clay, Oktibbeha, Webster, Montgomery, Carroll, Leflore, Sunflower, Washington, Tallahatchie, Sharkey, and other counties in said state, and extending in a westerly direction from the

eastern line of Mississippi to the Mississippi river." The decree vested all the title in the above-described property in one Charles E. Gay, as special commissioner appointed by the decree for the purpose of enforcing the same. The decree also provided that the railway west of the city of Columbus, known as the "Third Division," that part of it which these contractors worked, extending from Columbus, in Lowndes county, to Greenville, in the county of Washington, and all of its branches connected therewith, might be separated from the balance of the railway without material damage to the property, and the commissioner was empowered to sell all of said railway known as the "Third Division." The amended decree recited that the property was in the hands of the receiver of the United States courts, and the sale was suspended until further orders.

(7) A trust deed was executed, and dated on May 1, 1888, wherein the Georgia Pacific Railway Company conveyed all this property to the Central Trust Company of New York, to secure bonds, and was duly recorded before the contractors filed their contract for record or commenced work.

(8) The road from Columbus east was completed before May, 1888, and had been in operation several years before the date of this trust deed to the Central Trust Company.

(9) No part of the railroad from Columbus west to Johnsonville had been completed when this trust deed was executed, to wit, May 1, 1888.

(10) No part of the Tallahatchie branch was then completed.

(11) All of the main line from Columbus to Johnsonville, 140 miles, and the Tallahatchie branch, about 40 miles, were completed after the deed.

(12) The building of the main line was provided for in the trust deed, and under its terms no bonds could be issued on that 140 miles until the road was completed in sections of ten miles; and, as soon as each ten-mile section was completed, bonds thereon could be issued.

(13) The railway was completed from Columbus west to Suquatouchie creek (about twenty miles) by defendants, November 1, 1888.

(14) No part of the road from said creek west to Johnsonville (120 miles) was completed until after the commencement of the suit in the chancery court.

(15) Interveners did not and do not know when said bonds were sold, or to whom.

(16) The whole of the railroad from Columbus to Johnsonville was constructed about the same time, or the whole of it was in process of construction at the same time, and as one enterprise.

(17) The extension may be separated from that part extending eastward from Columbus without material injury to the property.

(18) The interveners claim a lien on all the railway in Mississippi for $10,000, with interest at six per cent. per annum from November 15, 1893, and costs, and claim that their lien was superior to that of the bondholders. They deny that the bondholders were innocent purchasers or holders of bonds so far as their claim is or was concerned.

(19) Interveners claimed that the eleven miles of road included in their contract is worth $300,000, and that the security of the bondholders is increased by that much; that no work was done on said eleven miles prior to the work done by them; and that they did work and furnished material on said eleven miles of road to about $40,000; that a decree for the balance was due them. They claim that said work was done, and that said material was furnished, with the knowledge and consent and agreement of said Central Trust Company, and that said bondholders received said bonds with the full knowledge of all these facts, and that said work was done and said material was furnished for their benefit. Interveners in the bill ask that said eleven miles be sold for their benefit, and they claim that such sale was ordered by decree of the circuit court of the United States, dated March 27, 1894, for the benefit of them and of the bondholders, and they say that the Central Trust Company is representing the bondholders in this suit.

(20) Interveners charged that the trust company and bondholders were estopped to dispute their lien.

(21) Interveners charged that their claims should have been paid from earnings, and that it was an equitable charge upon all current earnings up to the receivership, and is a charge upon all earnings which have come into the hands of the receivers.

(22) Interveners charge that, under the laws of Mississippi, the lien of the mortgage is subordinated to the lien of the interveners; that the net earnings have been large for 1889, 1890, 1891, 1892, 1893, and 1894, but it is impossible for them to tell the full amount. They charge that all the interest on the bonds have been paid out of the net earnings, and that their money from the 1st of April, 1888, up until the 1st of April, 1892, amounting to about $1,199,600, as shown by the records, had been paid from the earnings of this eleven miles; that, by prorating, an estimate is made that $870,625 was paid from the road in Mississippi, and that $39,592.08 was from said eleven miles. They say that the whole mileage of defendant's road was 553$^{45}/_{100}$ miles, and that 241 miles of that total was in Mississippi. On this calculation they claim that they are entitled to preference and payment from the earnings or from the proceeds of the sale.

(23) Interveners claim that a sum of $2,000 was deposited by them on the 9th of June, 1888, to secure the faithful performance of their contract; that it was to be returned unless 10 per cent. reserved under the contract should amount to that sum; but that the railway company, in the improvement of its property, or for current expenses, or to pay interest, converted this $2,000 to its own use; and that said sum was and is a trust fund; and that they are entitled to receive it from the earnings or proceeds of this sale.

(24) That in 1888 and 1889 the road was built between Columbus and Jacksonville, and that in 1889 and 1890 a branch was built from Itto Beno north about 40 miles, and the charge is made that this branch was paid for out of the earnings of the railway, to which earnings they allege that they had a prior claim.

The interveners pray as follows: (1) That the Georgia Pacific Railway Company, the Central Trust Company, and the receivers be made parties to their intervention; (2) that said railway company make discovery of what it did with the $2,000 deposited; (3) that payment of their claim be made in full out of the income or proceeds of the sale; (4) that their claim for principal, interest, and costs be given priority over bonds, and be paid before anything is paid on the bonds; and (5) for general relief.

By the consent above set out, and by the statement of facts made in the intervention, it would appear that the following general facts are agreed to, namely: That a true copy of the contract and true copies of the decree and amended decree of the chancery court of Mississippi are exhibited; that notice of the interveners' claim was given at the sale, and that the purchaser bought with notice; that the defendant admits the statement of facts contained in said petition (intervention under consideration) to be true; that the documents referred to might be used on the heading of this case, subject to the right of objection only as to immateriality and relevancy; and that the Mississippi statutes need not be pleaded more fully.

The contentions of the parties were as follows, on the part of the interveners: (1) That the lien of the bondholders did not attach until the date of their purchase. (a) That the onus was upon them to show the date of the purchase of the bonds, and they failed to show said date, and therefore it cannot be presumed to be prior to the lienors' claim or the commencement of their suit; that the bondholders should be treated as subsequent incumbrancers or purchasers pendente lite. (b) That the presumption from the terms of the trust deed itself, and the date of its record, is that no part of the bonds could have been issued until after the commencement of the work, and hence the bondholders have no claim to be prior incumbrancers, even if the burden of proof as to the date of sale of the bonds were not upon them. (2) That, even if the bondholders are prior in time, then (a) they took the bonds with full notice from the deed of trust of the future liens of the interveners, and with the understanding that said liens should be first satisfied; (b) that they took the bonds during the progress of the work or after the commencement of the suit, and thereby had full notice of the lienors' claims before said bondholders parted with their money, aside from the trust deed or the notice therein contained. (3) That even if the bondholders' rights dated from the deed of trust or its record, and that they had no notice of the future liens of the interveners, then petitioners have priority as to the entire structure of the new extension of 140 miles, and that a court of equity should pay their claims out of the proceeds of the improvement,

allowing the mortgage priority as to the right of way alone. (4) That, if the $2,000 trust fund deposited constitutes no part of the $10,000 decreed, then petitioners are entitled to priority as to that $2,000, outside of the statutory lien, as a matter of equity.

On the part of defendant it was contended: (1) That the interveners' recovery in the state court is inadmissible to establish any claim upon the railroad as against the record mortgage. (2) That, even if the state court decree be accepted as prima facie evidence of its recitals, it does not establish any statutory lien on the railroad which is superior in rank to the foreclosed mortgage. (3) That the court has no power to confiscate any part of the inadequate security of the bondholders, and pay it over to the interveners, because the road was partly constructed on an embankment graded by them, and not fully paid for. (4) That the principle announced in Fosdick v. Schall, 99 U. S. 235, is not applicable to the interveners' claim, and is not entitled to any priority by virtue of that rule.

It is manifest from the argument of counsel that they have different versions of what has been admitted to be true. According to the contention of counsel for interveners, every fact and recital in the intervention, as well as every allegation therein contained, are admitted to be true. For instance, it is alleged that the trustee and the bondholders had notice of complainants' rights and of their lien; whereas, on the other side, counsel for defendant says that, in the absence of an express statute, the holder of a negotiable security is not put on any notice of any matter except what appears on the face of the valid obligation which he buys. Again, it is asserted on the part of the interveners that the work was done and material furnished with the consent of the Central Trust Company, and that the bondholders received the bonds with full notice of all the facts. Defendant's counsel does not concede any such state of facts. Interveners' counsel contends that the contractors furnished material for the construction of the railway, and that a large part of the railway, as it stood when finished on the sections named in the contract, was the creation of these contractors. Defendant's counsel, on the other hand, says: "The intervener brought no material whatever upon the road. He only graded a roadbed. The material which he put into the roadbed belonged to the railroad, and was subject to the mortgage. He furnished no ties, rails, bridges, depots, or any other personalty." Interveners' counsel contend that they were prepared to prove every material allegation in the intervention, but did not do so, because they are admitted to be true, and that every allegation made and not denied is equivalent to an admitted or established fact. Defendant's counsel does not seem so to construe the situation, but to contend that only such things as are stated as facts are to be so treated, and that such matters as allege that the Central Trust Company was the agent of the bondholders, and gave consent, and had notice, etc., and that the holders of the bonds took with notice, etc., were matters of pleading and of deduction and conclusion, rather than facts. The differences crop out all along the line of the able arguments presented to the master by the distinguished counsel on both sides.

The Real Issues.

It is not so difficult to discover the real issues in this case as it is to properly determine them when found. The controversy might be stated as a sort of "general issue," on the broad question of whether the lien of the contractors who built the road is, under the laws of Mississippi, superior to the lien of the holders of bonds issued under a trust deed recorded before the work was done, and this without specific proof of the time when the bonds were actually sold and put into circulation by the company. There are, however, some intervening questions which must be solved in order to get a proper solution of the general question, and they may be stated as follows:

First: What was covered by the decree and amended decree of the chancery court of Oktibbeha county, Miss.?

Answer: The complainants in the chancery court claimed a lien on the property as contractors and material men under the statutes of Mississippi, and that decree adjudicated every question then pending or existing between the complainants and the defendant, the Georgia Pacific Railway Company. In the case of Buntyn v. Compress Co., 63 Miss. 94 et seq., the court says: "In a suit to en-

force a mechanic's lien, all persons claiming liens on the property sought to be subjected must be made parties; and if another suit to enforce a mechanic's lien on the same property be already pending, and the petitioner in such first suit be not made a party defendant in the second suit, then his rights are unaffected by sale under a judgment obtained in the latter suit."

Second: What effect had the decree in fixing the status of the two thousand dollars put up by the contractors as a deposit, and for which interveners claim an equitable lien?

Answer: In the opinion of the special master, the chancery court considered the two thousand dollars and the ten per cent. reserve fund as a part of the general demand of the contractors, and that they were entitled, under the Mississippi statute, to a lien therefor, as contractors and material men, and the decree placed the two thousand dollars deposit and the ten per cent. reserve exactly on the same footing as the other part of complainants' demand. It follows, therefore, in the opinion of the special master, that where complainants seek relief in the chancery court, submit their whole case, obtain a decree, and acquiesce in it, and then come into the United States court, and, by way of intervention, set up that decree and the lien it established, they are bound by the status the decree fixed for all their claim; that is to say, if interveners are entitled to have their claim paid by virtue of its dignity as fixed by the decree, they must stand by the decree as a whole, and are not entitled now to have a part of their claim considered under the contractor's lien, and another part as being entitled to the consideration of a trust fund and an equitable preference therefor. The special master, in other words, holds that the whole claim must stand or fall together.

Third: Who are concluded by the decree?

Answer: Only the Georgia Pacific Railway Company was bound by the decree in the chancery court of Oktibbeha county, Miss. Neither the Central Trust Company, the bondholders, nor the purchasers were parties thereto. When this intervention was filed, it was within the power of the parties now contesting to have called in question, in so far as their rights were to be affected, every feature of that decree,—as to whether or not the complainants were contractors, as to whether or not the amount claimed was due, whether they had a lien, and what was the value and dignity thereof. These defendants did not contest all these questions, and therefore the special master finds that the decree established the fact that complainants were contractors and material men; that they did the work and furnished material as alleged; and that they have a valid and binding decree for $10.000 and costs, amounting to $895.88, and that the sum of $10,000 bears interest from the date of the decree at 6 per cent. per annum from the date of the decree referred to.

Fourth: To what extent can the defendants, in the present shape of the pleadings and of the evidence, be heard to contest the interveners' claim of lien and preference?

Answer: In the opinion of the special master, the defendants can now contest the extent and dignity of the lien in so far as it is claimed to be superior to the lien of the bondholders, and in so far as it is claimed to operate on the whole property within the state of Mississippi. The defendants can contest the lien in every respect as to its superiority over the lien of the bondholders, but, by the agreement, they have admitted all else except the extent and dignity of the lien.

Fifth: Is the lien established by the decree superior to the lien of the bondholders, and entitled to be paid out of the funds raised by the sale of the property under the decree of the circuit court of the United States for the Northern district of Georgia, or, if necessary, out of funds which the court might order raised from the purchasers of the property?

Answer: The statute of Mississippi embodied in section 1378 of the Alabama Code, as amended by the act of 1882, created a lien in favor of contractors and others doing work or furnishing material, for the debts contracted and owing for labor performed or material furnished about the erection and construction or alterations or repairs, and such debts are declared to be a lien on such building, railroads, or improvements, and on land wherever it stands, including the lot or curtilage whereon the same is erected. This lien was only to take effect as to purchasers and incumbrancers, without notice of such lien from the time of

filing the contract under which such debt was incurred, in the office of the chancery clerk of the county where such land is situated, to be recorded, or of the commencement of a suit in the proper court for the enforcement of the lien. In the controversy with an opposing lienholder, such as a mortgagee, the lien created by this statute appears to be of superior dignity, and all subsequent liens would be postponed to it unless they were liens in favor of purchasers or incumbrancers in good faith and without notice. In other words, if a mechanic or contractor or laborer furnished material and did work upon the land of another, and recorded his lien or commenced a suit therefor, he would have a superior lien to any lien which could be created by mortgage after such record or commencement of such suit. It would appear also that the proper construction of this Mississippi statute leads to the conclusion that the lien given by the section of the Mississippi Code, above referred to, is superior to a pre-existing mortgage in so far as the creation of the thing erected upon the land by such contractor, etc., is concerned; that is to say, if the owner of land executed a mortgage thereon to secure an ordinary debt, the mortgagee would take such mortgage with notice that the state of Mississippi would give a mechanic or contractor a lien superior to his upon a house which such contractor might be subsequently employed by the owner to erect upon the premises. But this lien of the mechanic or contractor would not be superior to the lien of the holder of the mortgage, executed before the building of the house, so far as the land is concerned; and the remedy would appear to be to let the house be sold to satisfy the contractor's claim, and the land could be sold to satisfy the claim of the mortgagee.

In the case of Ivey v. White, 50 Miss. 142, it was held: "Such liens [mechanics' liens] extend to and take hold of the freehold, if such was the nature of the estate, and is superior to subsequent incumbrances." "If there be a prior incumbrance, the lien will be operative on the buildings and erections, but not upon the land itself." "The purchaser under such special judgment acquires the privileges and benefits of the lien, and his title relates back to the lien, and would be superior to a subsequent purchaser." In the case of McLaughlin v. Green, 48 Miss. 175, the court, in discussing the old lien law, which was the act of 1840, says: "Under the mechanic's lien law of 1840, a mechanic or material man has a lien for his labor or materials, prior to all others on the buildings, to the erection of which his labors or materials have been contributed; and, if the buildings have been destroyed by fire, his lien adheres to whatever brick, iron, or other debris may remain." "An older mortgage or other ordinary creditor's lien on the land, even with notice, cannot preclude the mechanic's or material man's liens on the buildings." "The mechanic's lien commences from the time of his contract to do the work, and postpones all subsequent liens or prior liens without notice on the land, and all liens whatever on the buildings." In the case of Buntyn v. Compress Co., supra, the court further says: "In a suit to enforce a mechanic's lien on a structure, for material furnished therefor and work done thereon, it is no answer to the petition for the defendant to say that he has acquired a title to the property sought to be subjected, by virtue of a sale under a deed of trust executed by the owners of the property, since the institution of the suit." In the same case it is further said: "Where A. has a prior lien on property under a deed of trust, and B. has a mechanic's lien on the same property, B. is entitled to enforce his lien by sale of the property, subject to the paramount lien of A." In the case of McAlister v. Clopton, 51 Miss. 257, the court says: "The lien of the mechanic is subordinate to a prior incumbrance so far as respects the land, but is nevertheless valid against the building." The special master can find no Mississippi case which contravenes the doctrine above set forth. It is also confidently believed that when cases can be found which hold that liens created by statutes in favor of contractors, material men, and mechanics have been held to be superior to pre-existing trust deeds and mortgages, duly executed and recorded, there will also be found statutes so declaring at the time of the execution of such deeds or mortgages; and these instruments are presumed to have been made with respect to such enactments, and these enactments are held to have been in contemplation of the parties. The special master so construes the case of Brooks v. Railway Co., 101 U. S. 443. It appears to the special master that the contractors (interveners here) did furnish material and make substantial improvements on the sections of the railway named in the contract. It seems to be in the mind of the defendant that

all the interveners did was to dig up the earth, and move it from one place to another, in grading the roadbed, and to prepare and place in position material furnished by the railway company. These contentions are not sustained by the evidence, and to the mind of the master the defendant has admitted the contrary to be true.

The special master finds that, under the law applicable to this case, the interveners have a lien upon the improvements they made and created on the sections of the railway named in the contract, and that such lien was superior to the lien of the bondholders of either issue of bonds. But what exact improvements were made, their exact kind, character, extent, or value, is not shown, and, according to the testimony produced, cannot be determined. The value of their work must have been proven in the chancery case, which resulted in the decree for a balance of ten thousand dollars; but what the improvements or creations made by them disconnected from the realty and the right of way were does not appear; nor is the pro rata value of improvements by interveners to the value of any other improvements or property shown. The special master holds that, under the facts disclosed upon the record, the trust deed which was executed to secure the bonds was recorded before the work was begun or the suit commenced to enforce the lien of the contractors; and it would therefore follow that as to the land,—the right of way,—the lien of the bondholders would be superior to the lien of the contractors. The interveners contend, however, that this cannot be the true state of the case for two reasons. One is that, at the time the trust deed was executed, the line of road at the point in question had not even been procured or located, and there was nothing to which the mortgage could attach, and that the mortgagees were in no sense incumbrancers in good faith for valuable consideration, and without notice, because no suit could have been started until the work was done, and no contract could have been filed for record before the execution and record of the trust deed, on account of the very nature of things and the situation of the parties. The interveners also confidently contended that, by the very provisions of the mortgage, its lien could not attach to newly constructed road until each ten miles of railroad was completed, and, therefore, that the whole scheme of building the road was founded on the idea of employing contractors, laborers, and material men to create in sections a property upon which the owners of the corporation could hang a credit, attach a lien, and issue bonds to pay for the construction. To the mind of the special master these contentions of the interveners appeal strongly to the sympathy of a court, and to a sense of justice, as the facts are reviewed in the light of subsequent events, when the railway company has become insolvent, and many honest and perhaps needy creditors must lose what they are in law and in equity entitled to receive. As such, we might instance these contractors, who have established the performance of their contract, and have procured a decree of a court of chancery setting up their rights. But, at the time these contractors undertook this work, they knew, or are presumed to have known, that the other contracting party had executed a mortgage on its railway, and it does not violate a reasonable presumption to infer that, as railroad contractors, they might have known that this manner of building railroads was, to say the least, not uncommon. So, it would seem that while the right of way had not been located or procured when the mortgage was executed, or even when it was recorded, yet, before any work could be done by these parties, the road must necessarily have been located, and the right of way procured. Therefore, it would seem that if these contractors had notice of the existence of the mortgage, such as they were required to take under the law, they would have gone to work to construct a railroad upon a right of way covered by an existing mortgage with the certainty that, if they did their work on credit, they would have to rely upon the lien which the law gave them for the collection of their debt, and take chances of a collision between their rights and those of other creditors.

The interveners make as a further contention that the mortgagee and the bondholders who took their securities under the trust deed or mortgage knew that, at the time they were so acting, the railway company had not even procured the right of way, but that it did intend to construct a railroad upon it, when so obtained, by the employment of contractors, material men, and laborers, and that, necessarily, a debt was to be created which would be superior in law and in equity to their claim. To the mind of the special master it does not

appear that the mortgagee or those it represented would necessarily know that a debt was to be created. If the bondholders paid their money for the bonds, could they not reasonably conclude that the mortgagor would use cash, even the cash they paid, to build and pay for other sections of the railroad? As the special master understands this case, there is not only no evidence to show when the holders of these bonds obtained them, but no evidence as to whether they purchased them from the Georgia Pacific Railway Company or from other holders. The general rule seems to be that the holder of a negotiable security, in the absence of express statute, is not put on notice of any matter except what appears on the face of the valid obligation he buys; and in the purchase of a negotiable bond, if the purchaser examined the trust deed, and saw it was in due form, properly executed and recorded, it would not appear to be necessary for him to enter upon the mortgaged premises, and see whether any building to which superior liens might attach had been erected thereon, unless there was a public statute, which he was bound to notice, declaring that a lien would exist on the realty in favor of a contractor or mechanic who should do work in the erection of buildings thereon. The special master therefore concludes on this point that the bondholders, under the evidence produced in the case, are not affected with such notice as would give the interveners a lien on the right of way, or on such parts of the roadbed as was not the creation of the contractors, superior to the lien of the bondholders who hold bonds under a trust deed or mortgage executed and properly recorded before the commencement of the work.

Another contention of the interveners is that they have a lien upon the whole road within the state of Mississippi. In respect to this contention, the special master interprets the law to be that they would not have a lien on that part of the road east of Columbus, because that part of the line seems conceded to be capable of distinct and complete severance from the other part; and this lien would exist only in the event that the lien of the interveners attached to the realty as well as to the buildings and erections placed thereon. In some cases holding a contrary view there was a statutory lien given on the whole property. In the view of this matter taken by the special master, however, it is unimportant to consider whether this lien could, in any event, attach to the whole road in Mississippi, or to that part east of Columbus, as the special master holds that, under the law, the lien of the interveners was only superior to the lien of the bondholders for the improvements and erections made by them upon the sections of the railway named in the contract.

Findings.

The special master finds and reports as follows:

(1) That the interveners, as contractors, have a lien set up and established by the decree set forth in the record of this case, which is superior to the lien of the bondholders only as to the improvements and erections placed by them on the railroad right of way.

(2) That the lien of the bondholders is superior to the lien of the interveners upon the realty composing the right of way and substructure of the railroad, as distinguished from anything like depots, bridges, cross-ties, culverts, or rockwork which the interveners may have furnished and erected.

(3) The proof does not show what work, improvements, or erections the interveners did on the line of road covered by their contract, with sufficient detail or certainty or value to authorize any finding in their favor for any particular amount, and therefore the special master is forced to find against their claim as presented and proven in the proceedings in this case.

(4) The special master finds that it would be destructive of the interests of the defendant railway company and of the interveners and of the purchasers to allow the improvements, whatever they were, erected by the interveners, to be detached or moved away from the premises; and therefore they should have been and were sold together, and whatever was the reasonable value of such improvements and erections has passed ratable into the common fund.

(5) The railway east of Columbus, Miss., was not subject to the lien of the interveners, and therefore should not be taken into account in estimating the pro rata value of the improvements and erections made by interveners.

Respectfully submitted, W. D. Ellis, Special Master.

Critz, Becket & Jones, for interveners.
Henry Crawford and Glenn, Slaton & Phillips, for defendant.

NEWMAN, District Judge. The able and complete report of the special master renders unnecessary any elaborate discussion of this case in disposing of the exceptions filed by the interveners to the report. I am satisfied that, if the interveners had any lien at all, it is not more extensive than that stated by the special master; that is, upon the work done and improvements made by these contractors. It was stated in the argument for the interveners that the special master did not give a lien upon the embankment thrown up and constructed by the contractors, but this is not sustained by an examination of his report. If it was, I should differ with him as to that, because it seems to me clear that the embankment is as much a part of the improvement made by the contractors to the railroad as is the woodwork, masonry, etc. Construing the report in this way, or modifying it, if necessary, so as to give it this effect, I would make that the limit as to the property of the defendant upon which a lien would be given having preference over the bondholders. The third paragraph of the intervention in this case is as follows:

"That said R. M. & J. M. Brooks commenced said work about the 23d day of June, 1888, and they and their subcontractors worked from that day till the 14th or 15th day of November, 1888, under said written contract, and did a very large proportion of the woodwork, earthwork, clearing, and grubbing upon said sections 40 to 50, inclusive, upon said railway, and furnished a large amount of material for the woodwork thereof. That, for a very large portion of said work and material, said company failed and refused to pay, and there is still due the petitioners herein a large balance for said work and material."

So, it seems that interveners claim to have done only a "large proportion" of the work on sections 40 to 50, inclusive. This complicates the matter, but, even if they did the entire work on these sections, there is no evidence whatever as to the proportionate value of that part of the road on which they worked, to the whole road in Mississippi; nor is there any evidence, if we consider the part of the road on which they worked alone, as to the proportion their work bears to the aggregate value of the property as it stood after the work was done,—that is, the right of way with this work on it; nor is there any evidence as to the proportion these contractors' work bore to the railroad when completed, when the cross-ties and rails were added. Some evidence of this sort is absolutely necessary to the determination of the case, assuming them to have such superior lien as the special master finds. Of course, the work done by them cannot be severed physically from the other part of the road. Necessarily, therefore, there must be proof of the kind suggested to enable the court to make an intelligent disposition of the matter, or to render any proper decree in favor of these interveners.

There was an agreement by counsel for the defendants that the facts set out in the intervention were true. It is claimed that by this agreement certain admissions were made as to the value of the work done and the improvement made on the road by the interveners. It is denied, on the other hand, that the agreement goes to the extent claimed. The special master, before whom this agreement was made,

seems to be doubtful as to its extent and effect. But, even if it be given the full effect contended for by the interveners, it does not relieve the difficulty which has been mentioned as to the relative value of the improvement made and the remainder of the road. In the third finding by the special master, he says:

"The proof does not show what work, improvements, or erections the interveners did on the line of road covered by their contract with sufficient detail or certainty of value to authorize any finding in their favor for any particular amount; and therefore the special master is forced to find against their claim as presented and proven in the proceedings in this case."

Approving this view of the case taken by the special master, I must, for the reason he gives, as well as for the reasons above stated, concur with him in the final conclusions reached in the report.

As the foregoing view of the case controls it adversely to the interveners, it is unnecessary for me to pass upon the question as to whether or not the interveners have any lien whatever superior to that of the bondholders secured by the trust deed. It has been a question of grave doubt with me, since the case was first presented here, as to whether these interveners have had any such preference over the bonds. It would be unnecessary to allude to this matter at all except that I do not wish to be understood as deciding that question. I only hold that, if a lien exists, it does not go beyond that allowed by the special master, and that there is no evidence by which a lien of that kind can be given any practical effect in favor of the interveners.

Counsel for the interveners, during the argument of the case, suggested their desire to amend, and to apply for leave to offer further evidence, in the event the court should differ with them. For this reason, no order overruling the exceptions and confirming the report will be entered until they may have the opportunity which they desire, at an early date, to make their motion, and have it determined.

On Application of Interveners for Leave to File a Supplemental Bill.

(April 10, 1897.)

At the stage of this case indicated by the closing paragraph of the former opinion rendered herein, on the 3d day of December, 1896, interveners' counsel came before the court, and asked leave to file a supplemental bill, or petition in the nature of a supplemental bill, making a new question in the case, and to set up new facts which they did not know until recently, notwithstanding the exercise of what they claim to be due diligence on their part. It has been assumed all along in this case that the mortgage with which the interveners were contending as to priority was properly admitted to record in the various counties of Mississippi in which its record was material. They now desire by their supplemental bill to make the question that the mortgage was not properly recorded, and did not operate as constructive notice, for the reason that the copy, instead of the original mortgage, was admitted to record in each of these counties.

On this question of the record of a copy of a mortgage, instead of the original, on the county records kept for that purpose, the authorities seem to be unanimous, and to the effect that such record is not

good as constructive notice. To that effect, see Blight v. Banks, 6 T. B. Mon. 192; Lewis v. Baird, 3 McLean, 56, Fed. Cas. No. 8,316; St. John v. Conger, 40 Ill. 535; Lund v. Rice, 9 Minn. 230 (Gil. 215); Marsden v. Cornell, 62 N. Y. 215; and Stevens v. Brown, 3 Vt. 420.

An extract from the case of Porter v. Dement, 35 Ill. 478, will sufficiently give the view taken by the courts of this question, and the reasons for the same:

"The original mortgage is required to be recorded in the recorder's office, and it is the duty of the recorder to correctly transcribe the same. To do this, he must have the original before him. The law has made no provision for authenticating to the recorder a copy of such mortgage. He has no authority to transcribe a supposed copy of such an instrument on the records of his office. He is not responsible for the correctness of any such transcript. A copy or duplicate mortgage was not, and does not appear to have been, acknowledged as the law requires, and for that reason is invalid as an original mortgage. The justice has no authority to certify that it was a copy. A certificate of the mortgagor or of the chairman of the board of supervisors, or a letter from an acquaintance, would have been as effectual to authenticate a copy of the mortgage as the certificate of the justice. The recorder did not know whether the copy was a correct one or not. He had no authority to record it, and, when transcribed, it would appear to the world as a transcript of a paper which some estimable gentleman supposed to be a copy of the mortgage. We think this is not such a recording of the original mortgage as the statute requires."

In response to the rule to show cause why the interveners should not be allowed to file their supplemental bill, the defendant brings into court the original mortgage, with entries thereon of its filing and record in each of the counties material here, giving the day and the hour of such filing. In addition to that, they produce the affidavit of one Robert R. Brown, who testifies that he, in person, carried the original mortgage to each of the counties through which the road ran in Georgia, Alabama, and Mississippi, and that he filed the original mortgage with the several clerks, and that the entries of the clerks thereon were made in his presence. Some affidavits are produced by the interveners which tend to show, and indeed, I think, do show, together with the other apparent facts in the case, that while the original mortgage was filed for record, and the entry of record made thereon, the actual work of entering the mortgage on the record book was done from a printed copy of the original mortgage. None of the cases above cited have in them the facts presented for determination in this case. In each of those cases it was the clear-cut question of the record of a copy of a deed or mortgage, pure and simple. In one of the affidavits presented here, it appears that the clerk compared the printed copy of the mortgage presented to him with the original mortgage sufficiently to satisfy himself that it was a true copy; and this, it would probably be fair to assume, in view of the usual presumption as to the proper discharge of official duty in the absence of evidence to the contrary, was done by all the clerks who made these entries on the original mortgage.

I have given very careful consideration to the question presented on the application to reopen this case by the filing of a supplemental bill. The question involved has not, so far as I am aware, ever been presented to the courts of this state in any shape for determination. The facts brought out by the answer to the rule to show cause are not

seriously questioned, except with the qualification I have suggested as to the actual work of record having been done from a copy. The transaction, I think, must be taken to have occurred in about the way that has been stated. In this view, and determining the case upon this state of facts, and conceding the law to be as announced in the decisions referred to, I do not believe that in this case it is the record of a copy of the instrument, but it must be held to be the filing for record and the record of the original in a manner satisfactory to the clerk, and reasonably necessary under the circumstances, considering the character of the mortgage and the property it covers, and sufficient in law. To allow this case to be reopened, and the interveners to take additional testimony, and to go to further expense, would be wrong, when I am satisfied that they can obtain no final benefit thereby. If there was any substantial dispute as to the real facts in the matter, notwithstanding the lapse of time and the long trial in this case upon other issues, I might feel it my duty to allow the interveners to file their supplemental bill, and be further heard; but in view of what must be recognized as the truth of the transaction, and, indeed, what I understand to be recognized by counsel on both sides, the application to file their supplemental bill must be denied.

Another ground has been urged for reopening this case, and that is to take additional evidence on which to base a recovery in accordance with the views expressed by the special master in his report, and which was concurred in by the court. To allow the case to be reopened for this purpose would violate the precedent established in this court, and cannot be allowed. Clyde v. Railroad Co., 59 Fed. 394; Central Trust Co. v. Richmond & D. R. Co., 69 Fed. 761.

MOORE et al. v. SOUTHERN STATES LAND & TIMBER CO. (McDONNELL et al., Interveners).

(Circuit Court, S. D. Alabama. July 27, 1896.)

No. 196.

1. INSOLVENT CORPORATION—RECEIVERSHIP—JUDGMENT CREDITORS—NOTICE TO FILE CLAIMS—PRIORITY.

 In a suit to foreclose a mortgage, and also for the administration of the assets of the mortgagor, an insolvent corporation, a receiver of all its property was appointed, a decree pro confesso entered, and a reference made to a master; but it was only by the decree as subsequently amended that the court first showed its ulterior intent to make an equitable distribution of the funds among all the creditors, and provided for notice to them to file their claims. *Held*, that until the amended decree the creditors were entitled to sue at law, and by judgment acquire a priority in the equitable distribution of the property, other than that covered by the mortgage, over less diligent creditors.

2. MORTGAGE—MORTGAGOR'S RIGHT TO REMOVE TIMBER.

 A provision in a mortgage of timber lands, by which the mortgagor reserves the right to enjoy the premises, receive the profits, and let, deal with, and manage the same in the ordinary course of business, authorizes him, in accordance with such ordinary course, to cut and remove logs, manufacture lumber from them, and give good title to a purchaser of the lumber.

This was a suit in equity by George H. Moore and others against the Southern States Land & Timber Company, in which James McDonnell and others intervened. The cause was heard on exceptions filed by the interveners to the special master's report.

Leopold Wallach, King & Spalding, Bestor & Gray, and Blount & Blount, for complainants.

Gregory L. & H. T. Smith and John C. Avery, for interveners.

TOULMIN, District Judge. The bill in this case is not strictly or technically a general creditors' bill. Primarily, it is a bill for the foreclosure of a mortgage; but it avers the insolvency of the defendant corporation, and prays for a foreclosure of the mortgage, a marshaling of the assets of the corporation, and an ascertainment of its debts, and that the court will sell the property as an entirety (that uncovered as well as that covered by the mortgage lien), because its value largely depends on its "unity and integrity," and further prays that the court will administer the estate as a trust for the benefit of all parties interested therein, according to their equities and priorities. In short, the bill is for a foreclosure, and for the administration of the assets of an insolvent corporation. These are functions of a court of equity, and I think the bill is sufficient to enable the court to administer the property of the defendant, and to marshal its debts; making proper parties before adjudging the merits of the cause. Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 459, 6 Sup. Ct. 809. The court, having jurisdiction of the subject-matter, has adjudicated the insolvency of the corporation by the decree pro confesso rendered in the cause, and it will administer the property and marshal the debts; making proper parties in due time, and before adjudging the merits of the case. So long as a corporation has not been declared insolvent, and no injunction or order of the court exists, restraining the bringing of suits against it, it can still be sued; but no person can acquire any lien upon the property of the corporation, by judgment, execution, or attachment, after the property has passed into the hands and possession of a receiver, without leave of the court appointing him. Gluck & B. Rec. pp. 131, 132, and note. It has, however, been held that when a decree appointing a receiver and awarding an injunction, so far as disclosed upon its face, was to provide for the safe-keeping of the property of the corporation, and to prevent any transfers thereof, and such decree did not state that the ulterior intent of the court was to make an equitable distribution of the funds, and contained no direction to the receiver to give notice to the creditors to file their claims, the decree imposed no restrictions upon creditors in prosecuting their claims, either at law or in equity, and a judgment subsequently recovered by a creditor is as much a lien on the real estate of the corporation debtor as if the appointment of a receiver had never been made. Gluck & B. Rec. p. 24, § 7; High, Rec. p. 310, § 349; Ellicott v. Insurance Co., 7 Gill, 307. I think this ruling is founded in reason, and my opinion is that until the court has made some decree showing that its ulterior intent is to make an equitable distribution of the funds, and giving notice

to the creditors to file their claims, such creditors may sue at law, and acquire a priority. Up to that time the complainant is permitted to dismiss the case and discharge the receiver.

1. The court will recognize the priority of those judgment creditors who have obtained judgments prior to the decree pro confesso rendered in the cause, and who would have obtained, by the levy of an execution, such priority, if no obstacles had stood in the way of the levy of such process by the action of the court in its appointment of receivers to take possession of the property of the defendant. George v. Railway Co., 44 Fed. 117. And the court holds that the interveners whose judgments were recovered before the decree, though after the appointment of receivers, shall have a lien upon all the property and effects of the defendant not covered by the mortgage, and in the hands of the receivers, and recognizes the right in the said interveners, paramount to the other creditors, to be paid out of such property and effects. The lien is not one that can be enforced or perfected by an execution, because of the rule that a judgment recovered after the appointment of a receiver does not become a lien upon property in his hands, but it is such a lien as will be recognized in equity. The petitions herein were filed before any order calling creditors in to establish their claims, and before any decree pro confesso against the defendant was rendered, and its insolvency adjudicated, and the judgments set up were all obtained prior thereto. Jackson v. Lahee, 114 Ill. 297, 2 N. E. 172.

2. The court holds that the logs cut from the lands covered by the mortgage, and removed to the mills, and the lumber manufactured from such logs, are not covered by the mortgage lien. By the terms of the mortgage the defendant had the right "to enjoy the mortgage premises, and to receive the profits thereof, and to let, deal with, and manage the same in the ordinary course of business," which was to cut and remove the logs to the mills, to manufacture lumber from them, and to pledge or sell that lumber. The purchaser of such lumber acquired a good title to it. The title to the logs from which the lumber was made must then have been in the corporation, to enable it to so use and deal with them; and in the exercise of its right, or claim of right, to do this, an injunction to prevent waste could not have been maintained against it. Angier v. Agnew, 98 Pa. St. R. 587; Jones, Mortg. § 4578; 1 Hil. Mortg. p. 226, note A. So far as the lumber is concerned, I think the proposition is clear, and beyond question. So far as the unmanufactured logs are concerned, I am not so free from doubt. But I now make the same ruling as to both.

The exceptions to that part of the master's report finding that petitioners have no lien, nor right to priority of payment out of the property and effects of defendant not covered by the mortgage, are sustained. The exceptions to that part of the report finding that the logs and lumber are covered by the mortgage lien are sustained, and the exceptions to that part of the report finding that railway equipments are covered by the mortgage are sustained. The exceptions to that part of the report finding that the mills, etc., at Millview, Fla., are covered by the mortgage, are overruled.

On Exceptions to Report of Special Master Richard Jones.

(February 4, 1897.)

At the last term of the court, when this cause came on to be heard on the exceptions to the report of Special Master Mitchell, the court decided that it would recognize the priority of those judgment creditors who had obtained judgments prior to the decree pro confesso rendered in the cause, and who would have obtained, by the levy of an execution, a priority, if no obstacles had stood in the way of the levy of such process by the action of the court in its appointment of receivers to take possession of the property of the defendant, and held that until the court had made some decree showing that its ulterior intent was to make an equitable distribution of the funds of the defendant among its creditors, and gave notice to them to come in and file their claims, such creditors might sue at law and acquire a priority, and that the court would recognize the priority of those creditors who obtained such judgments and executions prior to the decree pro confesso over other creditors who were less diligent. The opinion filed in connection with this ruling was prepared in some haste, and amid the pressure of other duties, as stated at the time; and it seems not to have been sufficiently explicit to prevent misapprehension, and perhaps to have been misleading or misunderstood. The points now presented and argued are the same as were raised on the former hearing. I wish now to state that the decree pro confesso referred to in the former opinion was the decree rendered in the cause on May 20, 1896. On November 4, 1895, the plaintiff entered an order in the order book that the bill be taken pro confesso. On May 20, 1896, the court proceeded to a decree; reciting the decree pro confesso of November 4, 1895, and making a reference to Special Master Jones to ascertain and report the number and amount of outstanding and unpaid debentures issued by the defendant, and secured by the deed of trust, and the owners of said debentures. On June 18, 1896, the decree of May 20th was amended by ordering the master to ascertain and report the names of all creditors of the defendant, and the amount due to each, and whether any of the creditors claim a lien upon any of the property, and upon what property such lien is claimed, and the manner in which it is claimed, and ordering him to give notice calling upon all creditors, other than the debenture holders, to present their claims to him, as master, on or before a certain day, to be named in said notice. In connection with the statement in my former opinion that, until the court made a decree giving notice to the creditors to present their claims, they might sue and acquire priorities, I referred to the decree pro confesso (meaning the decree of May 20, 1896), on the idea or assumption that it provided for such notice. This was an inadvertence or error on my part. The decree of May 20th did not provide for such notice until amended by the decree of June 18th. According to my view then, this last decree was the limitation within which creditors might have prosecuted their claims to judgment, and have acquired a right of priority. The court, on further consideration, still holds

that such judgment creditors are entitled to an equitable lien on the property of the defendant not covered by the deed of trust, and which was in the hands of the receivers at the time the judgments were obtained, and to priority of payment out of said property over the simple contract creditors. Such lien is not a common-law or statutory lien,—a lien that can be enforced or perfected by an execution, because of the rule that a judgment recovered after the appointment of a receiver does not become a lien upon property in his hands,—but such a lien or priority as exists in equity, and of which courts of equity take cognizance in the distribution of a trust fund.

The accounts, bills receivable, and cash in the hands of the receiver, as reported by the master, were not subject to levy and sale under execution, and no lien could have been acquired on them by a judgment and execution at law. No other proceedings were taken by the interveners to subject them, or to obtain a lien on them.

The exceptions of the interveners to the master's report relative to the claims of the judgment creditors Charles Seales and J. J. Fitzgerald are sustained. All other exceptions of interveners and the exceptions by the complainants to said report are overruled, and the additional exceptions numbered 12, 13, and 16, to said report, filed by the complainants, are also overruled. All other additional exceptions filed by the complainants are sustained. A decree will be entered in accordance herewith.

CÆSAR et al. v. CAPELL et al.

(Circuit Court, W. D. Tennessee. August 17, 1897.)

1. FORECLOSURE SUIT—PLEADING—INNOCENT PURCHASER.
   Averments in a bill for the foreclosure of a mortgage, filed some time after maturity of the bond secured, that plaintiffs are the owners of such bond, and that it was assigned to them by the payee for value, are insufficient to give them standing as innocent purchasers before maturity without notice of defenses.

2. SAME—SUFFICIENCY OF PLEA — STATUTES REGULATING FOREIGN CORPORATIONS.
   A plea to a bill for the foreclosure of a mortgage which avers that the mortgage contract was made in Tennessee, that the mortgagee was a foreign corporation which had not complied with the requirements of the statutes to entitle it to do business in the state, that it had opened an office in the state for the purpose of making loans, and securing the same by mortgages of lands in the state, and had been, and then was, doing "an extensive loan and mortgage business" throughout the state, does not sufficiently plead facts showing that the making of the contract in suit was not an isolated transaction, or that the corporation was "carrying on business" or "attempting to do business" in the state, within the prohibition of the statutes.

3. FOREIGN CORPORATIONS—REGULATION BY STATE—"DOING BUSINESS" IN THE STATE.
   Where a foreign corporation, which has not complied with the statutes of Tennessee by filing its charter, etc., through any agency whatever, makes a loan of money to a citizen of Tennessee, which the latter contracts to repay at the domicile of the corporation, and secures by a mortgage on land in the state of Tennessee, such transaction does not constitute a "doing of business" by the corporation in the state of Tennessee, within the prohibitory and penal provisions of the statute.

4. FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES—RULES OF DECISION.
While federal courts follow the construction of a state statute by the courts of the state, they are not required to adopt a construction based on implications from the language of a judicial opinion.

5. CONTRACTS—LAW GOVERNING—INTENTION OF PARTIES.
Where a citizen of Tennessee and a corporation of Missouri entered into a contract which would have been invalid under the laws of Tennessee, but valid under those of Missouri, and by its terms made it a Missouri contract, and to be there performed, it will be presumed that they intended it to be governed by the laws of that state.

6. SAME—EFFECT OF MORTGAGE ON PLACE OF CONTRACT.
A contract for a loan of money and its repayment, evidenced by a bond dated and payable in Missouri, is not rendered a Tennessee contract by the fact that the debt is secured by mortgage on land in that state.

7. FOREIGN CORPORATIONS—STATE REGULATION—MORTGAGES.
The provision of the statutes of Tennessee prohibiting foreign corporations, unless they comply with its requirements, from owning or acquiring property within the state, do not render invalid a mortgage on lands within the state securing a valid debt to such a corporation.

8. SAME—STATUTES OF TENNESSEE CONSTRUED.
Under Laws Tenn. 1877, c. 31, and Laws 1891, cc. 95, 122, regulating foreign corporations "doing business" in the state, a corporation is to be considered as doing business in the state only where it becomes in a sense domesticated therein, subject to be sued in the courts of the state, and responsible to its citizens as are domestic corporations.

9. SAME—FAILURE TO COMPLY WITH STATE STATUTE—EFFECT OF SUBSEQUENT COMPLIANCE ON CONTRACTS.
Under the Tennessee statutes requiring foreign corporations to comply with certain conditions to entitle them to do business in the state, a contract made by a foreign corporation which had not complied with the conditions becomes enforceable on a subsequent compliance.

10. FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES—RULES OF DECISION.
Federal courts are not bound by the construction of a state statute by the courts of the state, as applied to contracts entered into before such construction was adopted.

11. EQUITY—DEPOSIT IN COURT AS TENDER—POWERS OF COURT.
Where a defendant in a foreclosure suit before answer or plea voluntarily pays into court a sum as a tender, with an admission that such sum is due, and without imposing conditions as to the deposit, the court has power to refuse to permit the withdrawal of the money, and to order it paid to the plaintiff as a payment pro tanto on the mortgage debt, though defendant by his pleading has put in issue the validity of the mortgage contract. Such order, however, will be made without prejudice to the right of defendant to make his full defense.

In Equity.

Hearing on Plea.

(August 17, 1897.)

The bill alleges that the widowed defendant and her husband in his lifetime executed a deed of trust to the plaintiff Jarvis, now a citizen of the state of New York, whereby was conveyed a tract of land of 484 acres situated in Haywood county, Tenn., in trust to secure to the Jarvis-Conklin Mortgage Trust Company the payment of a bond for $6,000 executed and delivered by them for money loaned, due five years after date, with interest payable semiannually on the 1st days of February and August. There are no distinctive allegations in the bill setting forth the tenor and effect of the bond, but it is made an exhibit to the bill, and appears to be a coupon bond by which, five years after date, the obligors promise to pay to the order of the Jarvis-Conklin Mortgage Trust Company, "at its office in Kansas City, Missouri," $6,000, with interest at the rate of 6 per cent. per annum, payable semiannually according to the tenor and effect of the interest notes thereto attached, and of even date therewith. Then fol-

lows this recital: "This note is given for an actual loan of the above amount, and is secured by a trust deed of even date herewith, which is a first lien on the property herein described." The paper is dated at Kansas City, Mo., August 1, 1891, and signed by William E. Capell and Lezinka Capell. Then follow, in the inverse order of their numbers, the four unpaid coupons, each for the sum of $180, No. 10 of which reads as follows:

"On August first, 1896, for value received, we promise to pay to the Jarvis-Conklin Mortgage Trust Company or bearer, at the office of said company in Kansas City, Missouri, one hundred and eighty dollars, for interest due on a principal note of six thousand dollars. This coupon note bears interest at the rate of six per cent. per annum after due.

"[Signed] Wm. E. Capell.
"Lezinka Capell.

"Dated Kansas City, Mo., August 1st, 1891."

The others are in the same form and words, except as to payment dates.

The bill alleges that "said bond is now the property of complainants Cæsar and Fowler, is overdue and wholly unpaid, together with interest thereon payable semiannually from August 1, 1894." Cæsar and Fowler are British subjects, complainants in the bill along with Jarvis, the trustee. The bill alleges that the Jarvis-Conklin Mortgage Trust Company, the payee in the bond, was a corporation organized and existing under the laws of the state of Missouri, with its principal office in Kansas City, in that state, and then avers that, "being such, was the owner of said bond, and assigned and delivered the same to these complainants for value." The bill again alleges that the obligors have not paid any part of the principal and interest, except as before mentioned, and contains other allegations not necessary now to be noticed. The bill does not set out the tenor and effect of the deed of trust, except so far as to state that it was made to secure payment of the bond above mentioned; but it also is made an exhibit to the bill, and prayed to be taken as a part of it. From its inspection in aid of the bill, it appears to be an indenture between William E. Capell and his wife, Lezinka Capell, of the county of Haywood and state of Tennessee, and Samuel M. Jarvis, trustee, of the county of Jackson and state of Missouri, by which they recite that they "are justly indebted unto the Jarvis-Conklin Mortgage Trust Company in the sum of six thousand dollars, borrowed money, as is evidenced by their note of even date herewith for the sum of six thousand dollars, due and payable on the first day of August, 1896, with interest at the rate of six per cent. per annum from date until maturity." It also recites that the interest payments are evidenced by 10 coupons, and that said note and coupons are payable to the order of the Jarvis-Conklin Mortgage Trust Company at its office in Kansas City, Mo. In the usual form, the instrument then conveys the 484 acres of land in Haywood county by metes and bounds to said trustee or his successors, in trust, forever, releases claims of homestead and dower, waives the equity of redemption, and states the trust to be that in case of default in the payment of the indebtedness, or any part thereof, according to the tenor and effect of the bond and coupons, on the application of the legal holder of the note, it shall be lawful for the trustee to sell the premises upon certain named conditions, and place the proceeds to the payment of costs and expenses of executing the trust, including the attorney's fee of $600, compensation to the trustee, and all sums paid for taxes, insurance, assessments, and charges to protect the title, and finally to the payment of the principal and interest due upon the note and its coupons. The bill prays in the ordinary form for a foreclosure, for an account, and application of the proceeds of the sale that is to be made under judicial decree according to the tenor and effect of the deed of trust itself.

The defendants appeared, and on the 5th day of June, 1897, filed their plea, by which it is averred that the Jarvis-Conklin Mortgage Trust Company at the time of the making of the loan and the execution of the mortgage was a foreign corporation organized and chartered under the laws of the state of Missouri, and that at that time, to wit, August 1, 1891, it had not filed a copy of its charter with the secretary of state of the state of Tennessee, and had not caused an abstract of same to be recorded in the register's office of Haywood

county, Tenn., as required by the acts of the legislature of Tennessee (chapter 122 of the Acts of 1891 and chapter 31 of the Acts of 1877 of said state), although the said Jarvis-Conklin Mortgage Trust Company was at that time doing business in said state and in the said county of Haywood in violation of said acts (the said company having opened an office in the city of Memphis. Shelby county, Tenn., for the purpose of making loans in Haywood and other counties throughout the said state, and securing the same by mortgages and deeds of trust on lands situated in said counties in the said state), and that the said company was in fact at that time, before, and after, doing an extensive loan and mortgage business throughout the state, and also did and was doing a large business in the said county of Haywood, through the said local agencies, and in violation of said acts, and that the loan herein sued on was made through the said agencies, and in violation of said acts (the said loan being negotiated in Haywood county, Tenn., where the said William E. Capell and wife, Lezinka Capell, lived and resided, and where they executed the bond and coupons, and where they received the money for the same, and where the lands are situated which are secured in the deed of trust, and the said trust deed being also executed and acknowledged in this state); that the said company, although it did business "as above set out" from 1890 to the year 1893, did not comply with the said act of 1897 (chapter 122) until the 30th of March. 1892, when a copy of its charter was filed with the secretary of state, and on May 16, 1892, when an abstract of the same was filed in the register's office of Haywood county, Tenn.; that the said loan with its trust deed, bond, and coupons, set out and exhibited with complainants' bill, was therefore null and void; that the legislature of Tennessee, by an act of 1895 (chapter 119), extended the time in which foreign corporations having made loans in violation of said act could file their charters. and that complainants. if entitled to recover in this case at all, are only entitled to recover under and by virtue of said act of 1895 (chapter 119), and that under this act no suit can be brought to recover thereunder within two years from the passage thereof. to wit, May 10, 1895, and therefore May 10, 1897, was the earliest possible day in which complainants' suit could have been legally instituted, and the same, having been brought on April 22, 1897, was therefore premature, wherefore the defendants pray that the same may be abated and dismissed, and demand judgment of this honorable court whether they ought to be compelled to make any answer to said bill of complaint, and pray that they may be hence dismissed with their reasonable costs in this behalf. On the 9th of June, 1897, the minor defendants, who are joined in the foregoing plea by their guardian ad litem, filed a separate plea in all respects the same as that which is above set out, the two being copies of each other.

Scruggs & Henderson, for plaintiffs.
Lee Thornton, for defendants.

HAMMOND, J. (after stating the facts as above). The pleas in this case are somewhat inartificial. They are, in the first place, without leave of the court, double, inasmuch as they set up matter both in bar and in abatement. They also do not within themselves state all that is necessary to render the pleas a complete equitable bar to the case made by the bill, by clear and distinct averments of the facts themselves, but deal mostly in mere conclusions of fact and law drawn by the pleader from the undisclosed circumstances or supposed facts of the case. Also they ignore certain material facts stated in the bill, bearing upon the issue tendered by the pleas. For instance, it appears by the bill that the note and coupons were dated at Kansas City, Mo., and were to be paid there; also, it appears by the deed of trust that it was given for a note and coupons payable to the Jarvis-Conklin Mortgage Trust Company at its office in Kansas City, Mo.; and thus,

upon the very face of the contract itself, both as to the indebtedness and the security, it is recited that the obligation was to be performed in the state of Missouri. These averments are not traversed by the plea nor any answer accompanying it, nor are there any averments of either plea or answer by way of confession and avoidance of the effect of these acknowledged statements in the bill; and finally, in the averments themselves that are relied upon as showing that in this transaction between the Jarvis-Conklin Company and the defendants' intestate there was a violation of the statutes of Tennessee which have been pleaded in defense, there is almost a total absence of any statement of specific and definite facts which might show that the Jarvis-Conklin Company did or attempted to do business in the state of Tennessee without having complied with the provisions of the statute which is relied upon as a defense. It is stated that it was at that time doing business in the state of Tennessee and county of Haywood, in violation of the acts; but this is only a conclusion of fact or an inference drawn by the pleader, and not a statement of any fact itself. It is stated that the company had at that time opened an office in the city of Memphis for the purpose of making loans in Haywood and other counties throughout the state, and securing the same by mortgages and deeds of trust; but, again, this is not an averment of specific facts that would enable the court to see from the recitals of the plea itself that an office was opened in the city of Memphis, and the nature and character of that office, and the other facts from which it is assumed that it had a purpose to make loans, and secure the same upon mortgages throughout the state. Again, it is said that it was before and afterwards doing an extensive loan and mortgage business, and also did and was doing a large business in the county of Haywood, through the said local agencies, without stating any particular facts from which the court can see that the business done was a loan business and a mortgage business, and how it was done through the local agencies. There is no averment of fact in this, but only the inference which the pleader draws from what he seems to know or to have been informed concerning the business of the Jarvis-Conklin Mortgage Trust Company; and yet again it states that the loan herein sued upon was made through said agencies, and in violation of said acts, which is the very question to be determined by this litigation, both as to the fact and law. It is not stated specifically how the loan was made through the agency, who was the agent, what was the character of his agency and the extent of his authority, what he did, how he did it, where he did it, and all the circumstances that would show upon the face of the plea that the business was done in the state of Tennessee. It is next said that this loan was negotiated in Haywood county, Tenn., where the defendants resided, and where they "executed" the bond and coupons sued on, and where they "received" the money for the same. This averment does not show the facts which are described as "negotiations," does not show what facts are relied upon to sustain the averment that the bond and coupons were executed in Tennessee, nor how the money was received,—whether it was by draft payable at Kansas City, Mo., or New York, or elsewhere, which for their convenience was cashed in Tennessee at their request by some banker

who was willing to do that, or whether it was directly paid over to the makers of the note by some agent of the company within the state of Tennessee. In other words, almost every averment of this plea in respect of this transaction is a mere general conclusion of fact drawn by the pleader, and not the averment of any specific act done by the parties or their agents. The same may be substantially said about most of the other averments in the plea, and, taken altogether, it would be entirely competent to decide this case upon the insufficiency of this plea in respect of its form; for it surely does not comply with the description of sufficient pleas as laid down in Mitf. Eq. Pl. (6th Ed.) 341, 351, et seq., and 1 Daniell, Ch. Prac. (5th Ed.) 684 et seq. But these authorities show that courts of equity are very liberal in the matter of pleading, and do not deny to the parties the defenses they make because of any mere defects of form; and as the bill itself is also quite inartificial, depending in many of its material averments upon the assistance which it gets by an inspection of the exhibits to the bill, rather than the averments contained in it, and a decision on that ground would only result in amendments to the bill and the pleas, I have concluded to determine the questions at issue without reference to these inconvenient defects in the pleadings.

Plaintiffs rely in argument upon a defense of innocent purchaser without notice, sustained by the case of Lauter v. Trust Co., — Fed. —, in the United States circuit court of appeals for the Sixth circuit, and decided May 17, 1897, which would be an all-sufficient defense if it were available to complainants on the pleadings in this case, but it is not. The bill by way of anticipation nowhere states facts entitling complainants to claim as innocent purchasers before maturity for value, without notice. It does aver that the bond is the property of the plaintiffs Cæsar and Fowler, and in another place that the Jarvis-Conklin Mortgage Trust Company, being the owner thereof, assigned and delivered the bond and coupon to these plaintiffs for value, but it does not aver that this assignment was in due course of business and before maturity; and, as the bond became due on the 1st of August, 1896, we cannot say but that this assignment was within the nine months from that maturity to the filing of the bill. Again, the bill does not aver that at the time of that assignment, whether before or after maturity, the plaintiffs Cæsar and Fowler, who are now the holders of the paper, had no knowledge of the fact that the Jarvis-Conklin Mortgage Trust Company, at the time the loan was made, being a corporation of the state of Missouri, had not filed a copy of its charter with the secretary of state, and had not caused an abstract of the same to be recorded in the register's office of Haywood county, Tenn., where the land lies, as required by the acts of the legislature which are set up in the plea. If the bill had averred these facts, the plea must have been accompanied by an answer denying them, before it could be a defense; but as there was nothing in the bill showing that the holders were innocent purchasers for value before maturity, without notice of the infirmity, it was not required that the plea should be accompanied by an answer denying these alleged facts, nor can we know now what the real facts are in that regard. In the Lauter Case, above cited, it

appeared that the note was assigned before maturity, in due course of business, for value, and without any notice of the infirmity, and it has therefore no application here; and we must decide this case without regard to that defense against the alleged illegality of the transaction. It may be open to the plaintiffs to set up the facts only by way of amendment to the bill, since the abolition of special rejoinders to pleas in equity which have fallen into disuse. Mitf. Eq. Pl. 382. But, until this be done, we need pay no further attention to that defense.

This plea broadly assumes that every business transaction having any connection of fact with this state by a foreign corporation which has not complied with the statutes is the doing of business, or attempting to do business, in contravention of them, and that all contracts arising out of such transactions are null and void. This cannot be so, and a properly drawn plea should show, either directly or by its necessary implications, that the particular contract involved in the litigation is not within any category of transactions not comprehended within the prohibitions of the statute, whatever they be. For instance, the statute cannot constitutionally apply to any transactions within the category of foreign interstate commerce, as was asserted by two of the justices in their concurring opinion in the case of Manufacturing Co. v. Ferguson, 113 U. S. 727, 736, 5 Sup. Ct. 739, nor within the category of an isolated transaction, as was decided in that case by all the other justices of the court. In Paul v. Virginia, 8 Wall. 168, it was decided that the transaction of insuring against fire is one concerning an instrumentality of commerce, and not commerce itself; and the court there cites approvingly the case of Nathan v. Louisiana, 8 How. 73, and gives the opinion in that case a somewhat more extensive application than its technical limitations as a precise adjudication would require, from which it may be assumed in favor of the defendants here that, if dealing in the purchasing and selling of foreign bills of exchange is not foreign or interstate commerce, dealing in bond and mortgage securities, by either lending on them originally, or buying and selling them afterwards, is also not interstate commerce, particularly as we have been cited to no case holding otherwise. But it does not appear in this plea by any negative averment that this was not an isolated transaction of its kind, as was that in Manufacturing Co. v. Ferguson, supra. It is true that the plea avers in the general way already stated that this company was doing an extensive "loan and mortgage" business in the state, but it does not aver that the specific nature and character of that other business was just like this contract, not even by saying that the other transactions were similar to this, or that they were analogous in all substantial respects to that we have here. It need not have averred each particular transaction to be given in evidence in support of this plea, perhaps, but it should have shown that the other business was the same as this business, or sufficiently like it to take it out of the category of isolated transactions; and therefore we cannot say from this plea, or from anything we have before us, that this was not a single transaction like that in Manufacturing Co. v. Ferguson, supra. For anything that appears definitely from the

allegations of the plea, it may have been. Doubtless the plea could have been framed to show that the company was making contracts of loan and mortgage other than this that were, in their legal effect and character, Tennessee transactions or Tennessee contracts, if that be the fact; or, sustaining the broadest construction of the statute in favor of the defendants, it might have shown that this foreign corporation was doing, in any way whatever, any other business whatever within the scope of its charter, which amounted to "carrying on business" in Tennessee, or "attempting to do business" in Tennessee, to use the language of the statute, so that it was really not engaged in a single transaction, but in many, all in defiance of the prohibitions of the statute. But this plea does nothing of the kind. On the contrary, it conveniently and gratuitously presupposes that this particular transaction was a Tennessee contract, and that all and any business that could be done by this company concerning lands in this state could only be done in violation of the statute, without pleading any other circumstance concerning the contract to make that fact plain. In other words, the plea assumes that a foreign corporation which has not complied with the regulations of the statute cannot have a loan and mortgage transaction with a citizen of Tennessee, conveying lands in Tennessee, without the business being done in that state. This is a mistaken assumption, and a plea based upon it cannot be a sufficient defense as showing the invalidity of a contract arising out of a violation of the prohibitions of a statute. This is made entirely plain by the decision of the supreme court of Tennessee in the case of Loan Co. v. Cannon, 96 Tenn. 599, 36 S. W. 386. In that case, Cannon, a citizen of Memphis, had a loan from a building and loan association in the state of Minnesota, secured by a deed of trust upon lands in Shelby county, Tenn. He and his wife executed a joint note to the company, and, to use the language of the opinion, "this note was dated and made payable at Minneapolis," and provided for the payment of 5 per cent. premium and 5 per cent. interest, and for 10 per cent. attorney's fee in default of payment of the note. One of the defenses set up there was that the Minnesota corporation had not complied with the statutes we now have under consideration, and therefore the transaction was void. but that was sufficiently answered by the showing made that the loan was effected prior to the passage of the act of 1891, and was therefore not within its provisions. But another defense was made, that the transaction was usurious, in violation of another penal act of Tennessee which makes void any note agreeing on its face to pay more than the lawful interest allowed; and in reply to that defense the supreme court of Tennessee says that although the note stipulates on its face to pay 5 per cent. interest and 5 per cent. premium, as it was dated and made payable at Minneapolis. and the interest and premium were payable at the office of the company in Minneapolis, Minn., it was a Minnesota contract, and, being expressly authorized by the charter of the company and by the laws of that state, it was valid. In other words, being a Minnesota contract it was not amenable to the penal laws of Tennessee. Precisely the same reasoning would have led the court to say that it was not amenable to the penal

laws of Tennessee in regard to the prohibition laid upon foreign corporations from doing business in Tennessee, for the simple reason that the making of such a contract is not doing business in Tennessee, but in Minnesota. The court did not find it necessary in that case to decide this, because there was another sufficient answer to the defense set up under the later penal statute of Tennessee, that it was made before the statute was passed. Counsel do not cite and I have found no case in Tennessee directly deciding this point, but for my part I am unable to see any reason why that contract should have been exempt from the penalties of the usury laws of Tennessee, any more than it should be exempt from the penalties of the foreign corporation act of 1891. They are both penal statutes, both based on public policy which the legislature has declared for the protection of the citizens of Tennessee in their business dealings, and, so far as I can see, are, in respect of this question of invalidity, precisely the same in their nature and character; and, if the fact that the contract is to be performed in the state of the domicile of the foreign corporation relieves it from the penalties in the one case. I do not see why it should not relieve it in the other. It does not appear in the Case of Cannon where the "negotiations" for the loan were had, whether in Tennessee or in Minnesota; but it is altogether inferable that Cannon and his wife did not go to Minnesota to make the negotiations, but that it was done either through the agency of the United States mails, or through the agency of other representatives of the foreign insurance company in the state of Tennessee. The trustee in the mortgage was a citizen of Tennessee and of Shelby county, and, to one as familiar as the writer of this opinion is with the citizens of this county, it is not an unfair inference that he was likewise the agent through whom the loan was negotiated, and that that fact would appear by an inspection of the full record in the case, as it rests in the chancery court of Shelby county or the supreme court of Tennessee. We may take judicial notice of the fact that ordinarily the business of the county is done in that way, and, while I would not extend the facts of the case beyond the recitals of the reporter, I think, from the nature and character of the transaction, we may at least suggest that there is nothing in the case to show that the negotiations preceding the loan in that transaction were very dissimilar to those which are set up in this plea.

In another case pending before me, involving these Jarvis-Conklin Mortgage Trust Company mortgages, counsel for the company has cited an unreported case of Partridge & Wife v. The Jarvis-Conklin Mortgage Trust Company, arising in the chancery court of Tennessee, and going by appeal to the supreme court of Tennessee, from the record of which it appears that that company had made a loan to Partridge and wife, and taken a mortgage very similar, if not precisely like this. The trustee advertised the property for sale on default of payment, and Partridge and wife filed a bill to enjoin the sale upon the ground that the contract was usurious. By the agreed statement of facts it was admitted that 10 per cent. interest was charged, although the papers were written upon their face to bear only 6 per cent.; but it was also agreed that, by the laws of the state of Mis-

souri then in force, it was lawful to charge 10 per cent. It was also agreed that the application for the loan was made to one W. A. Smith, the agent of the Jarvis-Conklin Mortgage Trust Company at Memphis, Tenn., and that he forwarded the application to the home office, at Kansas City, Mo., where the loan was allowed by the company, acting through its proper officers at Kansas City. It was further agreed that the notes, though signed in Memphis, were dated at Kansas City, Mo., and that the money was paid in Kansas City, Mo., through the banks, upon a draft given by the agent at Memphis. Upon this agreed statement of facts the chancellor dissolved the injunction, and upon an appeal to the supreme court the judgment was affirmed. There were no opinions prepared and filed, but it is understood that both courts based the judgment upon the fact that the contract was not made in Tennessee, but was made in Kansas City, Mo. It is said in the brief of counsel furnishing us with the abstract of this case that there are two other cases involving Jarvis-Conklin Mortgage Trust Company mortgages of similar import to the last-mentioned Partridge Case; the court holding that the contract was not complete until the company agreed to it in Kansas City, Mo., and that it was a Missouri contract. It is greatly to be regretted that we have not been favored with opinions by the supreme court of Tennessee in these cases, but, presumably, they base their judgment upon the case of Loan Co. v. Cannon, 96 Tenn. 599, 36 S. W. 386.

One of the latest and most extensive writers upon the law of corporations in several chapters has treated of the relation of foreign corporations to other states in which they do business, with or without permission, express or implied; and he has gathered and classified the most important and modern cases upon that subject, with a general tendency in his text to support the most absolute powers of prohibition on the part of the states as against foreign corporations. 6 Thomp. Corp. §§ 7875–7984. But one cannot read the cases relating to the restrictive legislation of the states without at once observing that the courts everywhere are doing all that they can to confine this absolutism, which nowhere else exists under our laws, within the reasonable bounds of due regard for the ordinary principles of justice, at least. It may be that the absolute power of a state to prohibit foreign corporations from doing business within that state when they are not engaged in strictly interstate commerce will enable the legislature of a state to say that no contract made by a foreign corporation with a citizen of that state, or concerning land situated in that state, shall be valid, or that it shall not be valid except upon compliance with arbitrary conditions prescribed at the unrestrained will of the legislature. But I am satisfied that the legislation of the state of Tennessee which we are now considering has not gone to that extent, and yet we must go precisely to that limit in order to sustain this plea, for that is the very thing which it avers. For my part, I am not willing judicially to concede this, notwithstanding the broad language of much of the writing upon this subject,—that it is within the power of the legislature of the state of Tennessee to annul a contract made by one of its citizens with a foreign corporation simply because the parties to the contract deal with each other across the state lines;

each remaining within his own domicile, and using the ordinary instrumentalities of intercommunication for the purpose of reaching their agreement; not upon any theory that this is doing business with a foreign corporation which may be excluded from any given state other than that of its domicile. The state may prohibit the foreign corporation from becoming domesticated within its boundaries; it may prohibit it from residing there, in the sense that it establishes its working agencies within that state, and it may use all the appliances open to governmental power to exclude such agencies; it may close its courts to the foreign corporation, deny it all protection of its laws, punish it with any instrumentality of governmental force available for punishing those who violate the prohibitions of the statutes; and it may do all this under circumstances that, if the corporation were an ordinary citizen, might provoke retaliation by his government, or even provoke war, as against those barbarians upon whom the ordinary intercourse of civilization is sometimes imposed by war. But it does not follow from all this that in the relations that exist between our states, as members of a Union, and under a common constitution, the states can make absolutely null and void all contracts that are made between a corporation of one state and a citizen of another state, so that the courts sitting within the boundaries of the latter shall be under a prohibition to enforce the contract. If the courts of the state are required to do this, and to an extent that the constitution of the United States would not permit the obligation of the contract to be interfered with if the stockholders had been acting jointly in their individual capacity, or as partners of each other, in the exercise of that freedom of citizens of the states to contract and trade with each other which it is the object of our constitution to secure, there is yet no authoritative decision going that far in its adjudication, whatever language may be used in writing about it. Suppose a corporation of the state of Missouri opens communication by mail with a citizen of Tennessee to do precisely that which was done in this case, and it should result in precisely the contracts that were made. Would not the postmaster general, the postmaster at Kansas City, the postmaster at Memphis, and all the letter carriers active in the operation, be human agencies of the foreign corporation for doing the business in the state of Tennessee? Would they not be as much the agents of the foreign corporation, in offering or accepting the loan, and in conducting the particular negotiations, as any other duly-accredited agents would be who are temporarily sent into the state of Tennessee, or reside there, for the purpose of making these negotiations, and would not the foreign corporation, through these epistolary agencies, be doing business in Tennessee as much in the one case as it would in the other? Or suppose the citizen of Tennessee goes to Missouri, and there executes and delivers the bond and mortgage, or, first executing them in Tennessee, he takes them to Missouri for delivery. Would not this be also doing business in Tennessee? Now, under any or all of these circumstances, could the legislature of Tennessee say that this contract should be null and void? It has the same control over foreign corporations, to prohibit the doing of business in the state, in the one case as in the other, if we are to accept the absolutism of this doctrine to

its utmost limits, and it is just this power that is invoked in aid of this plea, with the practical result, if allowed, that a citizen of Tennessee would be permitted to take from citizens of Missouri, acting in a corporate capacity in that state, a large sum of money, appropriate it to his own use, and refuse to repay it according to the terms and tenor of his own contract, which is neither hurtful in itself, nor in any sense immoral or wrongful in its uses or purposes. Such a right of annulment must rest solely and entirely upon the most arbitrary exercise of unrestrained governmental power, which exists in no constitutional country, unless it may be as against corporate entities.

Certainly the courts will not aid either party to such a contract in escaping its obligations upon any doubtful construction of the legislation, and not until the legislature of Tennessee has said in plain and unequivocal terms that a bond dated at Kansas City, Mo., with the contract of loan to be performed there, or the security only incident to that contract upon lands in Tennessee, is to be held null and void because the foreign corporation has not previously filed its charter with the secretary of state, and caused an abstract thereof to be recorded in the county where the land lies; or not until the supreme court of the state has, by an unequivocal declaration, announced that such a contract is within the equivocal prohibitions of the statute, will the courts of the United States import such prohibitions into the statute by any implication or doubtful or elastic words. It is quite true that that which is prohibited cannot be enforced, and that contracts made in contravention of lawful and constitutional legislation may be invalid, if the legislature says so, either expressly or by necessary implication; and it is the duty of all courts, state and federal, to give effect to this principle, but not until the effect of the prohibition is beyond all controversy and doubt. What we hold here is that where a foreign corporation, which has not complied with prohibitory and penal statutory regulations about filing its charters and abstracts in the state of Tennessee through any agency whatever, makes an agreement with a citizen of that state to lend him money, which the citizen of Tennessee agrees to repay to the foreign corporation at its own domicile, and, to secure that payment, gives a mortgage upon lands situated in the state of Tennessee, there is no "carrying on of its business," or "acquiring or owning property," or "doing" or "attempting to do any business," within the state of Tennessee, according to the tenor and effect of this statute. That is doing business in Missouri with a citizen of Tennessee, or it is the "doing of business" in the state of Missouri by a citizen of Tennessee with a corporation created by the laws of Missouri, and not amenable because of this transaction to the authority of the state of Tennessee, or at least the legislature of the latter state has not attempted by this act to annul such a contract as that. The cases cited from the supreme court of Tennessee by counsel do not sustain the position that such a transaction is doing business within the state, within the purview of any of these statutes. The supreme court of Tennessee considered them in the case of State v. Phœnix Ins. Co., 92 Tenn. 420, 21 S. W. 893, deciding that foreign fire insurance companies which had already complied with other laws of Tennessee especially prescribing regulations for the government of domes-

tic and foreign insurance companies establishing themselves in Tennessee were nevertheless required, under these general acts governing all corporations, to comply with their regulations about filing their charters and abstracts of them in the several counties of the state where they did business, and that they were liable to the privilege taxes and official fees imposed upon companies complying with these general acts. The opinion claims for the legislative power the utmost absolutism over foreign corporations, but the facts of the case show that those companies were confessedly doing an established business in Tennessee in the same manner that domestic insurance companies do their business within the state. In reaching this conclusion the court overruled a contrary opinion of one of the circuit judges, who is now one of the justices of the supreme court; and the then chief justice of the supreme court, who is now one of the United States circuit judges for this circuit, dissented; showing that judicial opinion was not unanimous in respect of this construction of the statutes. The case of Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743, always relied upon in favor of the invalidity of these contracts, was one where there was a contract for the building of a house in the city of Memphis, Tenn.; and, the contractor having abandoned it, the owners undertook to complete the house themselves. A foreign insurance company, using the language of the court, "furnished lumber and material in the construction of the house for a price amounting to $1,249." It does not appear from the report of the case how this building material was furnished by the foreign insurance company, nor whether it might have been interstate commerce, such as two of the justices thought the machinery furnished in Manufacturing Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, was, nor whether it was an isolated transaction, as the other justices decided it to be in that case. Indeed, the whole report is very bare of any information about the nature and character of that transaction; but from the fact that the defense of interstate commerce was not dealt with by the court, and from the fact that it does appear by the report that the lumber company had subsequently complied with the statutes by registering its charter and abstracts as required by the act of 1891, seemingly a short time after the building materials were furnished, it must be inferred that it was a foreign corporation engaged in the domestic commerce of dealing in lumber in Tennessee. The act of 1891 went into effect on the 26th of March, and the lumber company registered its charter and abstracts on the 5th of July, 1891; and, although the dates do not otherwise appear, it must have been that this contract for furnishing the materials was made between those dates, and it therefore is to be taken, in considering the effect of that opinion, to have been the fact that the foreign corporation was engaged in domestic commerce and doing an established business in Tennessee as other lumber dealers do such business,—wholly within the state. This was the view taken of the effect of that decision in the case of Lauter v. Trust Co., supra, by the circuit court of appeals for the Sixth circuit, and in the case of Railroad Co. v. Evans, 14 C. C. A. 116, 66 Fed. 809, 816, by the same court. It was held in the last case that the statute was not broad enough to impose a forfeiture of property already acquired by a foreign corporation through a prohibition of

the sale of that property, or an annulment of a contract to sell it without having first complied with the registration regulations of the act. The case does not deny to the legislature of Tennessee the power to do such a thing as that, but simply decides that it has not been done. It takes occasion to call attention to the broad language of the supreme court of Tennessee in the case of Lumber Co. v. Thomas, and refuses to be governed by the implications of argument based upon such a broad declaration of an agreed principle, and to comprehend within the authority of the case such a forfeiture as was insisted upon in that case, very much as we decline here to apply the agreed principle to the annulment of a contract to be performed outside of the state of Tennessee. If all should agree that it is within the power of the legislature, by reason of its control over foreign corporations, to impose forfeitures such as that which was insisted upon in the case of Railroad Co. v. Evans, or to declare the annulment of a contract like that we have in this case, it is sufficient to say that until the statute has, in explicit and express language, declared such forfeitures and annulments, the courts will not do this upon any implications of loose and indefinite language and phraseology like that of "carrying on" or "doing business within the state." And if it be conceded, as we do concede, that it is the duty of the federal courts to follow the construction of the state statutes by the courts of the state, and that such results as we have just mentioned may be reached by implication from the words of the statute, without express language, yet, until the supreme court of the state has definitely declared that it is a proper construction of the statute to include such forfeitures and annulments, the federal courts cannot be bound to declare them upon any implication based on the language used in judicial opinions. It was conceded in Bank v. Matthews, 98 U. S. 621, that such prohibitions may be raised by implication, without express language in the statute, where it was clearly the intention of the legislature to include them; but at the same time it is said that if the statute be silent upon such a subject, as it would be easy for the legislature to declare in express terms such a result, it is hardly to be believed that they have that intention, or have left the question to be settled by the uncertain result of litigation and judicial opinion, and, further, that a court of equity is always reluctant, in the last degree, to make a decree which will effect a forfeiture, in the absence of the most imperative command of the legislative will. Therefore we cannot be asked, because of the emphatic language used in this opinion of Lumber Co. v. Thomas, to go beyond the adjudication, and declare forfeitures and annul contracts which are not distinctly within the adjudication itself. The supreme court of Tennessee does not say in this case that it was the intention of the legislature to declare null and void contracts made with a foreign corporation, to be performed within the limits of its own domicile, because they were made by citizens of Tennessee without its charter and abstracts having been registered as required by the act. Neither has it made such a declaration in the case of Insurance Co. v. Kennedy, 96 Tenn. 711, 36 S. W. 709, so much relied upon in argument. The insurance company in that case had been doing business in Tennessee by establishing agencies, just as domestic insurance companies do business in that

state, and had a contract with its agents at Memphis that they were personally to be responsible for uncollected premiums. After the passage of the act of 1891 it declined to comply with that statute, but for a while its business went on, notwithstanding the act, until the agents were indebted to their company for uncollected premiums, and upon settlement gave their notes for the amount. Being sued on the notes, they set up the illegality of the transactions out of which the premiums arose, and the defense was allowed to be available. But here, again, it appears beyond any controversy that the company was doing business in Tennessee as domestic corporations do their insurance business, and there is nothing in the case to show that the supreme court would have annulled any such contracts as we have in this case, or would have declared that the statute comprehended such contracts. And even in that case the court is moved to say that, if the agents had actually got the money, they would be required to pay it to the company, and would be estopped to set up the invalidity of the contracts, so as to keep the money (citing the case of State v. O'Brien, 94 Tenn. 79, 28 S. W. 311, as authority for that position); showing, as we have before remarked, that the courts everywhere struggle against the bald injustice of allowing a citizen of the state to appropriate the money of a foreign corporation to his own use through a reliance upon such a prohibition as we have in this case.

We have examined all the other cases cited by counsel, and those cited in those cases, that have considered this statute, in the supreme court of Tennessee,—cases like that of Haworth v. Montgomery, 91 Tenn. 16, 18 S. W. 399, where Mr. Circuit Judge Lurton, then chief justice of the supreme court of Tennessee, said:

"Where a statute has for its manifest purpose the promotion of some object of public policy, and prohibits the carrying on of a profession, occupation, trade, or business, except in compliance with the statute, a contract made in violation of the statute cannot be enforced."

Not one of them establishes any principle that can control our judgment here in favor of the contention of the defendants. It may be said, upon the authority of these Tennessee cases, that that state has placed itself in a group with those which inexorably hold that, if a foreign corporation does business within the state contrary to the prohibitions of its statutes, it will not be allowed to enforce its contracts in the courts of the state (6 Thomp. Corp. § 7950), and that this exclusion applies without regard to any distinction between that which is malum in se and that which is merely malum prohibitum. Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co., 11 Humph. 1, 11, and Gibbs v. Gas Co., 130 U. S. 396, 411, 9 Sup. Ct. 553, where Mr. Justice Totten, of the supreme court of Tennessee, and Chief Justice Fuller, of the supreme court of the United States, use almost identical words in considering this distinction. 6 Thomp. Corp. §§ 7955, 7958. Nor do the courts of Tennessee draw any distinction in respect of this between statutes that impose a penalty and those which do not, but take the broad position that, in addition to the penalties imposed by the statute, the courts will not enforce a contract made contrary to its prohibitions, and will not be satisfied with merely enforcing the penalties. 6 Thomp. Corp. § 7958; Perkins v. Watson, 2 Baxt. 173.

And yet the case last cited is another illustration of the fact that the courts will not extend these penal statutes beyond their clear and explicit commands, whether expressed or implied, and will not give what Mr. Justice Gray has called "ubiquitous effect to a penal law." Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 290, 8 Sup. Ct. 1370. In this last case the state of Wisconsin had recovered a large judgment against a foreign insurance company for doing business in the state contrary to the regulations of the statute accumulating penalties similar to those imposed by this Tennessee act; and the judgment being sued on in the courts of the United States, namely, by original suit in the supreme court itself, the suit was dismissed because to give a judgment for the penalties would be to give extraterritorial effect to the penal laws of Wisconsin. So we say here that to enforce the penalty of invalidity demonstrated by the statute on the construction given to it by the defendants, as to a contract made by a citizen of Tennessee with a foreign corporation to be performed in the state of the foreign company, would be to extend the penal laws of Tennessee to contracts made in the state of Missouri, which surely cannot be done. That Missouri was the situs of the contract, in relation to such penal statutes, we have already shown by citations from the supreme court of Tennessee; and that doctrine is supported by the decisions of other states as well, though it seems that there are decisions to the contrary, at least in the application of the principle to policies of insurance. 6 Thomp. Corp. §§ 7968, 7970; Coghlan v. Railroad Co., 142 U. S. 101, 12 Sup. Ct. 150; Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154; Society v. Clements, 140 U. S. 226, 11 Sup. Ct. 822; Supervisors v. Galbraith, 99 U. S. 214, 218; Cook v. Moffat, 5 How. 295, 307, 314, 315; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102; Story, Confl. Laws, § 287.

Whatever conflict of authority there may be on this subject, or whatever confusion in judicial decision, as shown by the cases, it cannot stand in the way of reaching correct conclusions, if attention be paid to the discriminating judgment of Mr. Justice Matthews in the case of Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, which has made everywhere quite easy the solution of the difficulties surrounding this subject, and has been frequently reaffirmed by the supreme court of the United States. Coghlan v. Railroad Co., 142 U. S. 101, 12 Sup. Ct. 150. The governing principle is that in every case the validity of the contract is to be determined by that law which, either expressly or presumptively, the parties themselves have incorporated into the contract, as constituting its obligation. There is no hard and fast rule by which the question is to be determined, but the intention of the parties is to be reached, as in other cases, according to the facts and circumstances as they appear in that particular transaction, and they are to be held to have contracted in view of the law of that place which they themselves have selected as the law of their contract, according to its nature; and, wherever there are peculiar characteristics, these are to be considered along with the rest. Here we have the case of a state prohibition, passed on the 26th of March, 1891, imposing onerous and burdensome conditions upon a company which the plea says prior to that time had

been engaged in "doing business in the state of Tennessee,"—whether of the precise character of the transaction we have now under consideration or not does not appear by any averments in the plea. but it may be assumed that the companv was engaged in lending money upon mortgages of real estate according to such terms and conditions as the parties mignt agree upon. Now, let us suppose that a citizen of Tennessee on the 1st of August, 1891, aware of this statute, and the managers of this loan and mortgage company, also aware of it, have in contemplation, on the one hand, that the citizen of Tennessee wishes to borrow of the foreign corporation a large sum of money, to be secured by a mortgage upon his real property in Tennessee, and, on the other hand, that the foreign corporation is willing to lend it if the parties can effectuate the transaction without the violation of this statute, and without incurring its penalties. Is it possible for them to do so? If so, how may they effect such a contract? To do the business in Tennessee by agreeing that it should be performed in that state would be to make it invalid, let us say; while to make it in Missouri, to be performed in Missouri, would make it valid, let us say. Is it not reasonable to suppose that both parties, being honest, and intending honestly to deal with each other, would embody into the contract the laws of Missouri, and make it a valid transaction, as between them, according to those laws, and they were not, presumptively, on the other hand, intending to make it a Tennessee contract, to be avoided and made invalid by a resort to the prohibitions of the statutes of that state,—in the absence of definite proof to the contrary, that they resorted to the state and the law which would give full effect to their contract on both sides? If we then find them making the contract on its face appear to be a Missouri contract, and by its own stipulations providing for a performance in the state of Missouri, is it not conclusive that they were contracting with a view of the laws of the state of Missouri, and not with a view of the laws of the state of Tennessee? And is it not a mere sticking in the bark of the circumstances of such a transaction to say that because these parties stood each within the limits of his own state, and carried on their intercommunications about this contract through any convenient agency that might exist for that purpose. it is a Tennessee contract? Should it be so held merely because one party to the contract resided in Tennessee, and because the agencies used in and about the preliminary negotiations were found operating within the boundaries of the state, and because the money was delivered to him there, if indeed it was in this case? In the case of Pritchard v. Norton, supra, one of the obligors of the bond lived in the state of New York, and the other in the state of Delaware. The bond was executed, signed, and delivered in the state of New York, and possibly through agents of the obligee in that state, just as completelv as this transaction can be said, by reason of the particular circumstances mentioned in this plea, to have been executed in Tennessee. By the statute of New York the obligation was null and void for want of consideration to support it, and yet it was held that inasmuch as, from the nature and character of the obligation, it was to be fulfilled in Louisiana, although not so expressed in the

body of the instrument, as it is in this case, that the contract was to be governed by the law of Louisiana, that being the lex loci solutionis; because, presumably, that was the law that was in the contemplation of the parties at the time of the making of the contract. On the authority of that case, and the case of Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 458, 9 Sup. Ct. 469, it was held in Coghlan v. Railroad Co., supra, where the bonds were payable at a future day, both principal and interest, in London, that, in the absence of attendant circumstances to show to the contrary, the parties were contracting with reference to the law of England; the court saying that the law of the place where the contract is signed, or even delivered, can never be the governing law, when the transaction is entered into with an express view to the law of another country, and that, presumptively, if the contrary does not distinctly appear, they have in contemplation that country within which the contract is to be entirely performed. Here the contract was to be entirely performed, as to the payment of principal and interest, within the state of Missouri; and therefore, so far, at least, as the agreement of loan and repayment is concerned, it was wholly a Missouri contract. Does it make any difference that the incidental security of the mortgage was upon lands within the dominion of Tennessee? Surely not, for it is held everywhere that the mortgage or other security goes with the contract, as a mere incident to it; and as stated by our circuit court of appeals in the Lauter Case, supra, the mortgage to secure this note was a mere security, and followed the debt.

It must be admitted that everywhere the law is that the control of a state over land situated within its boundaries is quite absolute, and it may declare its own public policy and its own rules and regulations governing all dealings and all rights of property therein, and surely this statute does say that all foreign corporations not complying with its terms shall not own or acquire any property within the state; but this does not necessarily imply that the state of Tennessee has chosen to exercise the dominion it may have over lands in Tennessee to the extent of declaring that there shall never be any mortgages made to secure obligations to be performed in the other states of the Union unless the foreign corporation shall come here and register its charters and abstracts. Possibly the state has the power to do this, but it is sufficient to say that it has not done so in express words, there is no decision of the state of Tennessee that has construed the statute as doing that thing, and there is nothing in the facts and circumstances of this case to induce any court to make that ruling as one of original instance. It is outside of any manifest purpose, as expressed in the legislation of the state, to so invalidate securities given for the contracts of citizens of the state to be performed in other states; and it is not to be presumed, in the absence of express words or necessary implication, that the state would desire any policy that would prohibit its citizens from borrowing money in other states upon liens on property situated here. The purposes and policies of the statute are fully met by denying to this and other foreign corporations the privilege of coming into Tennessee, by bringing their capital here and making contracts that are to

be performed within this state on both sides, and doing business in the same way and to the same full extent that our own domestic corporations might do in that line of business; but if a citizen of Tennessee should choose to go to the state of Missouri, the state of New York, or elsewhere, and there make a contract to be performed in other places than the state of Tennessee, there is no public policy obviously in these statutes against such a transaction as that. There is nothing wrongful of itself, arising out of the nature and character of the transaction, and therefore the case falls within the principle recognized by the supreme court of the United States in Gibbs v. Gas Co., 130 U. S. 408, 9 Sup. Ct. 553, where the chief justice says that the prohibitions of public law and public policy should not be arbitrarily extended so as to interfere with the freedom of contract; citing Registering Co. v. Sampson, L. R. 19 Eq. 462, where the master of the rolls says:

"If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost power of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice, and that this is a paramount public policy, and that you are not lightly to interfere with this freedom of contract."

It is not to be supposed that if, in Pritchard v. Norton, supra, the New York citizen had given a mortgage upon land situated in New York to secure the contract which was to be performed in Louisiana, there would have been any different decision, in the absence of the most positive prohibition against the giving of such a security, or that it would have been held that the mortgage was anything more than a mere incident to the contract itself, which would be always valid where the contract was valid, so far as relates to any mere infirmity like this. It may be that, in a certain common and superficial sense, a corporation of the state of Missouri, undertaking to lend money to a citizen residing in Tennessee, secured by a mortgage upon lands in Tennessee, is doing business in that state, particularly where the citizen of Tennessee remains physically within the boundaries of that state, and the preliminary negotiations are carried on with him there through the agencies of epistolary correspondence by the mails, or verbal negotiations with a different class of agents; but in a technical and legal sense the "business" done is the ultimate making of the contract which is the result of the preliminary negotiations. If that is to be performed in Tennessee, it is ordinarily a Tennessee contract, and the business is done in Tennessee; but, if it is to be performed in any other state, the contract belongs ordinarily to that state, and it is "business done" there, and it is that law, ordinarily and presumably, that the parties intended should govern the contract in all its incidents, and by which its validity or invalidity is to be determined, unless the contrary manifestly appears from the attendant circumstances.

We had occasion in this court to consider the meaning of the phrase "doing business in a state" in the case of Hazeltine v. Insurance Co., 55 Fed. 743, where many cases dealing with the phrase are gathered and commented upon, both American and English. It was

there held that a Tennessee corporation insuring property in the state of Maine by a correspondence through the mails was not doing business in that state, within the purview of the statutes of Maine regulating the service of process upon foreign insurance companies, and the suggestion is there made that the remedy against the ambiguity of this phrase can be better met by legislation which shall within itself more explicitly define the conditions upon which the companies may act; and it will be found by an examination of the legislation cited in Thomp. Corp., supra, that many of the states, in drafting these restrictive acts, have with commendable distinctness declared the particular conduct on the part of the companies which is prohibited, so that we can tell precisely what they mean by "doing business within the state." It seems to be the result of the English cases cited in that case that there must be a managing, controlling, or governmental element in the business done by the corporation in England,—a sort of branch of the foreign company established there, —and that the foreign corporation, in a sense, must be domiciled in England, very much as if it had been chartered there. And one cannot read the act of the Tennessee legislature of March 21, 1877 (chapter 31), and of March 17, 1891 (chapter 95), and of March 26, 1891 (chapter 122), without coming to the conclusion that this was the dominant idea in the mind of that legislature at the time of the passage of these acts, namely, that these foreign corporations should be domesticated in the state of Tennessee and become, pro hac, Tennessee corporations, suable in the courts of the state, responsible to the citizens of the state just as its domestic corporations were, and that it is that kind of "doing business" within the state which was contemplated by the statute,—very much as the phrase is defined by the English cases above referred to. In one of these English cases it was held that a foreign corporation could continuously run a railroad upon the soil of England, with all the appurtenances of agents and the like, and still not be "doing business," within the meaning of this phrase. The phrase was also somewhat considered in the case of Henning v. Insurance Co., 28 Fed. 440, where the property insured was situated in Minnesota, and the business was done by the mail, and through a broker residing in Illinois. From the cases referred to, it will be seen that the phrase "doing business" is to be interpreted with regard to something more than the mere linguistic signification of the words used to the ordinary ear, and that it has acquired in legal terminology a much narrower meaning than that which is given to it in the argument in favor of this plea. The result of this consideration is that the contract involved in this case is not affected by this legislation, and that it is not invalid or nonenforceable in the courts of Tennessee, as has been supposed in favor of the defense set up by the plea.

The second branch of the plea, however, also requires some consideration at our hands. The defense made is that the suit prematurely brought, even if the contract be valid, but this defense proceeds upon the theory that the contract originally was invalid, but has been given vitality by the curative act of May 10, 1895, c. 119. It is to be observed here that the prohibitive act of 1891 took effect on the 26th of March,

1891. This contract was made on the 1st of August, 1891, and that curative act (so called in the argument) took effect on the 10th of May, 1895. It appears by this plea that, more than three years before the curative act was passed, this company had complied with the act of 1891, and on the 30th of March, 1892, had filed a copy of its charter with the secretary of state, and on the 16th of May, 1892, had filed an abstract in the register's office of Haywood county, where this land lies. The argument in favor of the plea assumes that on the 1st of August, 1891, when this contract was made, it was invalid, because of the previous noncompliance with the regulations of the statute of the March preceding, and that the subsequent compliance with the statute in May, 1892, had no force and effect whatever to validate this contract,—accomplished nothing in its behalf,—and that it lay dormant until the passage of the act of 1895. Conceding that the transaction was within the prohibition of 1891, and this result does not follow necessarily. The groundwork of the argument is that the contract was absolutely null and void. It may be doubtful if the Tennessee cases have taken this position. They decide that prohibited contracts cannot be enforced in the courts of Tennessee, which is not the same thing, but far less than being null and void. But, in every case where this has been said, it has been said with reference to a still subsisting infirmity, and the cases, as far as I have seen them, have had no reference to a condition where that infirmity may be said to have been removed by any subsequent compliance of the parties with the regulations of the prohibitory act; and, so far as we are advised, it does not appear that the supreme court of Tennessee has considered that question in relation to this class of statutes. It will be observed in reading the text of Mr. Thompson on Corporations, at the sections already cited, that he notes that the decisions in the several states are of irreconcilable contradiction as to whether the contracts are void, only voidable, or only nonenforceable, as well as in other respects relating to their legal effect. It is stated that the supreme court of Indiana at first treated the contract as void at the election of the citizen of the state, and that he might even sue to recover the money back, but that the demoralization produced by this sanction of repudiation and spoliation induced that court, upon a reconsideration, to take the position —much commended by the author—that a failure to comply with the regulations of the statute does not make the contract absolutely void, but only operates to suspend the remedy until such time as the foreign insurance company shall comply with the statute; that until such compliance should take place any suit brought to enforce the contract would be only prematurely brought, and a plea setting up the defense should be, not a plea in bar because of the invalidity of the contract, but only a plea in abatement to dismiss that particular suit. As a result of this position, the compliance of the company with the regulations of the statute subsequently to the making of a contract would, ipso facto, vitalize that contract, and therefore it could be enforceable between the parties. 6 Thomp. Corp. §§ 7950, 7956; citing Insurance Co. v. Thomas, 46 Ind. 44, and Machine Co. v. Caldwell, 54 Ind. 270, 281. If this be the correct rule of judgment, when this company, in May, 1892, complied with the regulations of the statute, this contract

was at once, by that compliance, made good, and thereafter stood as if there had never been any infirmity in it.

It is to be observed that our act of 1891 does not impose any time, or limitation of time, within which the compliance of the foreign insurance company shall take place; there not being even an intimation in the act of such a limitation. Wherefore it would seem, from ordinary analogies, that by legislative permission the companies might at any time when they chose to do so comply with the terms of the act. It is then a wholly gratuitous assumption to maintain that the contracts made prior to that time, and in violation of the act, remain in the same state of infirmity in which they were when no such compliance had taken place. There is nothing in the nature and character of the prohibition—it not being immoral or vicious in itself—to support such a claim of invalidity. Whatever invalidity and infirmity there was arose solely and entirely out of the fact that the legislature had prohibited the making of the contract, and out of the sentiment that that which the legislature chooses to prohibit is just as much unlawful as if it were within itself vicious and immoral. Concede this; yet, if we find that the prohibition itself is only provisional, and not absolute; that the infirmity only arises under prescribed conditions, which may be removed, and that by the very terms of the act itself the conditions are such that they are within the control of the foreign corporation itself; that it may, by doing or not doing a particular thing, create the conditions or remove them,—it necessarily follows, it would seem, that the act of the party itself is all-sufficient to give that validity or invalidity to the contract which depends alone upon compliance or noncompliance with the conditions, according to its choice. Where the conduct is not within itself vicious and immoral, or condemned by a public policy existing entirely outside of any mere legislative expression of it, there would seem to be no very sound reason for holding to the sentimental idea that, once a contract is prohibited, it remains always prohibited, until the legislature may choose, by subsequent enactment, to remove the prohibition. The legislature might undoubtedly in the beginning have imposed such absolute prohibition, but it did not. It imposed only conditional prohibitions, and those conditions were left within the control of the parties to the contract, or one of them. Therefore it seems to us to be correct in principle to hold that subsequent compliance with the conditions of the statute would remove any objection that might ever have been made to the making of the contract, in such a case as that. It is no objection to this reasoning to say that this is giving retroactive effect to the act of compliance, because there is no reason why it should not be retroactive; and, in the very nature of the subject-matter of the legislation, such retroactive effect is possible, and will be presumed, in favor of the paramount public policy of freedom of contract, to have been within the contemplation of the legislature, and within its grant of a power to remove by compliance the obstructive conditions. Therefore we think that the compliance in May, 1892, was in itself an act which removed whatever infirmity there was in this contract, and that thereafter it might be enforced by the courts without regard to the act of 1895, subsequently passed. The infirmity theretofore existing was

that the courts of Tennessee, state and federal, would not enforce a contract made in disobedience of the statute; but whenever that disobedience was removed, and the parties complied with the conditions, there was no longer any substantial reason why the courts should not enforce it. Any reason that might be assigned for not enforcing it would be neither within the mischiefs to be remedied by the statute, nor within the enforcement of any public policy declared by it, but purely and entirely sentimental; the sentiment being that the contract, having been originally made in disrespect of the statute, should be forever disfavored by the courts, and repelled from their precincts, until the legislature had granted a statutory pardon. We think it will be found that courts do not proceed upon any such theory, unless the infirmity inheres in the vicious and immoral or criminal nature of the act itself. The act of 1891 carried its own curative remedies. In Haworth v. Montgomery, 91 Tenn. 16, 18 S. W. 399, the statute required that satisfactory proofs that the applicant possessed the necessary qualifications to practice medicine should be made within six months after the passage of the act, and this was a positive limitation of the time within which the thing required should be done,—a condition wholly wanting, as before remarked, in this act of 1891 in relation to foreign corporations; and this is a distinction that must not be overlooked in the cases treating of this subject.

It has been held, and it is an obviously correct principle, that it is within the power of the legislature, where such contracts as this are made void, to make them valid by retroactive operation of legislative authority, inasmuch as they do not impair the obligation of a contract, nor devest the parties of any of their rights of property, so that neither constitutional inhibitions against retroactive laws, nor the general public policy against them, shall prevent the operation of such beneficial retrospective laws; and it is also obvious that to bring them within this principle requires quite the same reasoning that we have already indulged in favor of this contract because of the subsequent compliance with the statute that took place in May, 1895. The implied vitality arising, under the original act of 1891, whenever a foreign corporation should comply with the statute subsequently to the making of a contract which was prohibited before it had complied therewith, rests upon precisely the same ground with the more direct and express grant of vitality contained in a retroactive law subsequently enacted for the purpose. 6 Thomp. Corp. § 7963, citing Mortgage Co. v. Gross, 93 Ill. 483, 494. Somewhat upon the same principle, that such statutory and constitutional prohibitions will not be extended beyond the reasonable intendment of the legislature in the enforcement of its policy, it was held in Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, that the title to real estate acquired in the teeth of a prohibition like this, notwithstanding the more absolute dominion of the state over the lands lying within its own territory, and notwithstanding that the corporation violated the statute, might be transmitted by the corporation, and be available in an action of ejectment. Other cases to a like effect will be found cited in 6 Thomp. Corp. § 7964; and from these cases it will be seen that all courts everywhere do everything they

can to preserve to the parties the benefits of their contracts, and their right to enforce them, in all cases where there is not inherent in the contract itself some hurtful vice or immorality or the like. Where the thing itself is harmless the legislature is not presumed to do anything more than to protect the public against the mischief which is indicated by the nature and character of the legislation itself, and that indicated by this legislation was that of having foreign corporations "doing business within the state of Tennessee" without sufficient information on the part of the people of the nature and character of their charters held under a foreign authority. It was only a policy of registration, for the purpose of convenient evidence and domestication, and perhaps for the purpose of subjecting the company conveniently to the processes of the state courts; and possibly there was some intention of ousting the jurisdiction of the federal courts, by making these foreign corporations domestic corporations, pro hac. But this last, as we now know, is impossible of accomplishment, since the subsequent decisions declaring the surer and more satisfactory foundations on which the federal jurisdiction has been placed by the constitution and legislation under it. Railway Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621; U. S. v. Express Co., 164 U. S. 686, 17 Sup. Ct. 206; Railway Co. v. Steele, 167 U. S. 659, 17 Sup. Ct. 925. Therefore the public policy indicated by these statutes must be confined to that of securing a speedy response to the processes of the state courts, and the furnishing of convenient evidence of chartered rights and privileges, all of which is fully accomplished by actual compliance with the statute subsequent to the making of any given contract, and there is no longer any reason for holding it invalid or unenforceable.

It is suggested that the act of May 10, 1895 (chapter 119), called in the argument the "curative act" of 1895, is a legislative expression contrary to this view, inasmuch as by that act it is assumed that contracts made under the circumstances in which this was made, without first having complied with the provisions of the act, were invalid, and required the curative administration of legislative authority as contained in this latter act of 1895. If it should be conceded that this was the view of the legislature in passing this act, it is at least only a construction by implication; and yet it is entirely consistent with the act itself to hold it to be one of supplementary caution, favoring a policy of rendering efficacious contracts made without compliance with the statutes, were it not for the conditions attached, which are to be presently considered. But whatever may be said in favor of it as a legislative exposition of a former statute, or a legislative declaration of the force and effect of a compliance by a foreign corporation subsequent to the making of a contract, such exposition, while having great weight and persuasive force, is not binding on the courts, especially when it operates to defeat contracts entered into before the recent legislation. Sedg. St. & Const. Law, 252; Wade, Retro. Laws, §§ 30–32; Cooley, Const. Lim. 93.

It cannot be denied, however, that this act does assume that all contracts made by a foreign corporation prior to a compliance with the act of 1891 are nonenforceable or invalid, and it permits them

to be enforced or makes them valid only upon condition that the creditor shall give the debtor two additional years after the passage of the act for the payment of the debt secured by the mortgage. This is a condition precedent to the legislative authority to enforce the contract. Whether or not it be constitutional, as against the prohibitions of the federal constitution against impairing the obligation of a contract, might be an interesting subject of inquiry, if the rights of these parties depended upon it. The argument in favor of its constitutionality is that it does not impair the obligation of the contract, but that it extends legislative grace and authority to a contract already invalid, or so infirm that it cannot be enforced, upon a condition with which the creditor may or may not comply, as he chooses, but the new grant only operates upon the creditors consenting to the extension of time for the enforcement of the mortgage lien. We say that it is possible, where the legislature has any favor to grant, that it may attach this condition without its action being obnoxious to the constitution of the United States in respect to the obligation of a contract, or the provisions of the state constitution in the same behalf; but, having reached the conclusion that the contract we have under consideration did not need any curative process on the part of the legislature, we feel relieved from the necessity of considering these questions.

But there is another view of this act which it is well enough to notice. All the decisions of the supreme court of Tennessee relied upon as a construction of the act of 1891 have been made since the 1st of August, 1891, which was the date of the making of the contract which we have under consideration; and it is the settled law of the federal courts that, where a contract or obligation has been entered into before there has been any judicial construction of a state statute by the courts of the state, a subsequent judicial construction of the statute by the state courts is not binding on the federal courts. If the parties to the contract find a construction by the state courts already existing at the time they made the contract, they are presumed to have entered into it with due regard to that construction, but they are not presumed to know that the legislature or the courts would subsequently place upon equivocal legislation a different construction from that implied by the making of the contract; and in the federal courts, at least, such subsequent judicial construction is not binding on the parties as a rule of statutory decision or property right. Therefore it is that, even if the defendants here be correct in their argument that the supreme court of Tennessee has construed this legislation as invalidating this contract, it is not, under the decisions, binding on us. Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 334, 76 Fed. 296; Jones v. Hotel Co., 79 Fed. 477; Douglass v. Pike County, 101 U. S. 677; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10; Pleasant Tp. v. Aetna Life Ins. Co., 138 U. S. 67, 11 Sup. Ct. 215; Butz v. City of Muscatine, 8 Wall. 575. This case falls within the exception last mentioned by Mr. Circuit Judge Lurton in Louisville Trust Co. v. City of Cincinnati, supra, "where contracts and obligations have been entered into before there has been any judicial construction of the statutes upon which the con-

tract or obligation depends by the highest court of the state whose statute is involved." 22 C. C. A. 334, 76 Fed. 296, 301. Whether this rule is likewise to be applied to subsequent legislative construction, we do not decide, but suggest that there seems to be no substantial reason for any difference in this regard. But the federal courts are always reluctant to rely upon this principle, and are anxious to conform to the decisions of the state court whose statute is involved, and they resort to this independence of judgment only when impelled thereto by the impossibility of agreement with the judicial decisions of the state courts. We do not feel this necessity upon us in this case, and therefore do not base our judgment so much upon this independent power of construing the statute as we do upon the earnest conviction that, notwithstanding the very broad language found in the opinions of the supreme court of Tennessee, it has not construed this legislation so as to invalidate this contract, under any view whatever that may be taken of the facts of this case.

On the whole, we are of the opinion that this plea is insufficient as presenting any defense, either in bar of the relief prayed for by the bill, or in abatement of it; and it will be so declared, with leave to the defendants to answer over according to the practice of the court.

Application to Pay out Money.

(August 17, 1897.)

This bill was filed to foreclose a mortgage made to the Jarvis-Conklin Mortgage Trust Company by William E. Capell and Lezinka Capell, his wife.

The bill was filed on the 22d of April, 1897, and before any steps were taken in defense, by plea or answer or otherwise, and without any order of court, on the 24th of April, 1897, the defendants voluntarily appeared in the clerk's office, and paid into court, in legal-tender money, the sum of $6,163.50, and the following entry appears on the docket of the court in relation thereto:

"Memphis, Tenn., April 24th, 1897.

"Lee Thornton, as attorney for defendants in this cause, paid into court as follows:

Legal-tender treasury notes	$6,000 00
Gold coin	160 00
Silver	3 50
	$6,163 50

"And same is deposited in registry of the court by me.

"[Signed] John B. Clough, Clerk."

At the same time the clerk executed the following receipt in duplicate, a copy of which was retained and filed by him:

"Memphis, Tenn., April 24, 1897.

"Received from Lee Thornton, solicitor for all the defendants, the sum of six thousand one hundred and sixty-three and fifty-one one-hundredths dollars; the same being paid by defendant Lezinka Capell, on behalf of all the defendants, as a tender of the amount admitted by defendants to be due, of principal, interest, and costs, in equity cause No. 514, J. W. Cæsar et al. against Lezinka Capell et al., in U. S. circuit court at Memphis, Tenn.

"[Signed] John B. Clough, Clerk U. S. Circuit Court at Memphis, Tenn."

"$6,163.50."

Subsequently to the payment of the money into court the defendants appeared, on the 5th day of June, 1897, and filed their plea setting up the invalidity of the contract because the foreign corporation had not complied with certain statutes of Tennessee requiring the registration of its charter and abstracts thereof before doing business in the state. That plea has just been disposed of by an order pronouncing its insufficiency as a defense, and the plaintiffs move to have the money paid over to themselves.

HAMMOND, J. (after stating the facts as above). Plaintiffs have asked for an order to have the money that has been paid into the registry of the court by the defendants paid immediately over to them. It will be seen by reference to the receipt given for the money, and the memorandum on the docket of the court in relation thereto, that two days after the bill was filed, and more than a month before the pleas were filed or any defense was made, the defendants deposited in the registry of the court, voluntarily, and without any previous order or directions, and wholly of their own accord, the sum of $6,163.50, "as a tender of the amount admitted by the defendants to be due of principal, interest, and costs," to use the language of the receipt, which was accepted from the clerk. It is contended by the defendants that this money must remain here until the final judgment of the court, and that there is no authority to pay it to the plaintiffs, except upon the condition that they shall accept the same as all that is due to them, and end the litigation, or, more broadly, that it shall remain here until all the questions that are made by this plea or any subsequent answer that may be filed shall have been finally determined by the court; that it was paid in only for the purpose of securing the ultimate judgment of the court, and to prevent a sale of the property under the mortgage, or the necessity of applying for any injunction to restrain the exercise of the powers of sale therein contained. It will be seen by an inspection of the receipt that was accepted from the clerk that no such conditions were attached to the tender, or, if they were, it does not appear by anything now before us.

We do not find, upon a somewhat extended examination of our equity practice, that the law of tender, as known to the common-law courts, is applicable to courts of equity. The common-law courts borrowed their law from the equity courts, to some degree, when they departed from the ancient common law of tender between the parties inter sese before the suit was brought, and the continuing offer expressed in the plea of the defendant that he was still ready and willing to pay, and established a practice that the defendant might, outside of, and wholly beyond, that kind of an offer to make a plea of former tender good, come into court, and by its permission, and under its direction, pay money into court, to be dealt with under its orders according to the conditions accompanying the payment into court, established either by the rule of the court based upon the intention of the parties, or otherwise. There is no more obscure, difficult, and perplexing subject than the practice of the law courts in respect of such tenders, and there has been no subject upon which the decisions of the courts of England have been so vacillating. Finally they have come to regulate the matter by orders or rules of

court, either parliamentary or judicial, so that now, as we understand the authorities, the practice in courts of law is very much like that insisted upon by the defendants in this case, namely, that the money will remain in court until the final determination of the case. This is not, perhaps, an absolute rule, but altogether it is the general practice. The difficulty under the old law was one rather of pleading than of right to the money. The ancient law of pleading was so logical and sensible, and at the same time sensitive, that antagonistic or even inconsistent averments in the pleadings were not allowed to pollute the record; but the modern improvements by statutes have treated this as supersensitiveness, and impractical adherence to mere æsthetic form, and these now permit alternative or even inconsistent pleas to appear in the same record. In deference to this sensitiveness to pleadings in the old common-law courts, this payment of money into court was to be managed outside of the technical record, and it was so managed and conducted wholly by rules and orders of court, under which the practice became, as before stated, very perplexing. Owen v. Morgan, 35 Ch. Div. 492. The best and most instructive historical exposition of the subject of tender of money into court we have found is in the judgment of Williams, J., in the case of Wheeler v. Telephone Co. (1884) 13 Q. B. Div. 597, 603, et seq.; and again in the judgment of Read, J., in Levan v. Sternfeld, 55 N. J. Law, 41, 25 Atl. 854; and yet again by Wilkes, J., in Jonathan Turner's Sons v. Lee Gin & Mach. Co. (1897; Tenn. Sup.) 41 S. W. 57.

The result of the authorities, in their relation to the practice of the courts of law, seems to be that modern statutes like that we have in Tennessee, considered by Mr. Justice Wilkes in the case just cited, and the modern orders governing perhaps all the courts of both law and equity in England, require the retention of the money in court until final judgment, unless the plaintiff takes it out by leave of the court, with the understanding that he accepts the tender upon the conditions that have been made by the defendant, and in full satisfaction or amends of his claim. In other words, by a legislative sanction, or by order of court under a legislative sanction, as in England, the courts have ultimately rid themselves of the perplexities formerly existing, by adopting the simple rule that the money will be paid out only upon such conditions as the party who pays it in has attached to its payment, and will be treated rather as a security for the final judgment, if the plaintiff shall obtain one, than as any offer of intermediate amends or satisfaction. This has been more definitely settled to be the rule by the orders in England than it has by the statutes of Tennessee, or other analogous American statutes; for I understand Mr. Justice Wilkes to hold in the case just cited from Tennessee that there may be yet two sorts of tender,—one made strictly under the statute as it was in that case, and governed by the statutory rule,—but still payments may be made "under special rules prescribing conditions and terms." And, of course, where the tender is not made under the statute, the conditions and terms may be anything that is established by the rules and orders of court. The result of our Tennessee statute, as it is there construed, is that the defendant tendering money under it,

and paying money into court, does so in full satisfaction and liquidation of the plaintiff's demand, and, if accepted by the plaintiff, it must be so received. And it was held that the tender in that case was made under the statute. The money having been taken out without any order of the court, the plaintiff was held bound by the statutory imposition of satisfaction. Yet I understand the court to there maintain that the money may be "withdrawn by consent or under order of court, the order or consent fixing the terms of withdrawal"; and from many expressions and the general trend of the opinion in that case, as I understand it, the money, even under the Tennessee statute, is still within the control of the court, and may be withdrawn by its order; that order prescribing the terms and conditions which shall bind the parties in reference to that withdrawal. Be that as it may, I do not understand that this court is at all bound by that statute, being a court of equity, whose practice is regulated solely by the acts of congress and the rules of equity prescribed by the supreme court of the United States, which conforms in all cases to the practice as it existed in England in 1842, at the time of the adoption of the rules, except so far as it has been changed by act of congress, or by these rules prescribed by the supreme court. A payment into court, on the law side of our docket, might be taken as a payment made under this Tennessee statute; but a payment made by the defendants voluntarily into court, on the equity side of the docket, must be taken to be governed by the equity practice as established by the rules of the supreme court of the United States; and the question we have to determine is, what practice governs us in a case like this? And I must say that it seems to be quite as obscure as the other, but less perplexing, by reason of the fact that there never was a time when a court of equity did not have complete control of the question of the payment of money into court, or the payment of money out of it,—quite as complete control as the courts of admiralty have; and the practice is very similar in each of the courts. Daniell, Ch. Prac. (5th Ed.) 1770, 1793; Id. 1794–1816; Id. (1st Ed.) 498.

Strictly speaking, it is our belief that you cannot say that the law of tender, as known to the common-law courts, had any application to a court of equity or its practice, although when it appeared that a defendant had offered to a complainant in equity, before the suit was commenced, to do what he ought to do, a court of equity, in adjudicating between the parties, and particularly in determining the question of costs, which do not go in equity, as at law, absolutely according to the judgment, would be governed in the exercise of its discretion by that fact in determining who should pay the costs. But, beyond this, there was and is a requirement of a court of equity that both the plaintiff and a defendant who shall ask relief shall offer to do what is equitable and right to be done in the matter of paying money admitted to be due; and therefore, if one files a bill setting up, for example, the defense of usury, or the like, or, for another example, the defense of the invalidity of the contract under some statute, a court of equity would require the defendant, if he had received money, to pay that which was absolutely due, without regard to the defense of usury, and, if he set up the defense of the invalidity of the contract, that he should re-

fund the money he had received in the attempt to deal under the invalidating statute, before a court of equity would grant any affirmative relief. Daniell, Ch. Prac., supra. Also, there was another principle, that if a defendant came in, and by his answer admitted that a certain sum of money was due to the plaintiff, the court would, upon the application of the plaintiff, require the defendant to pay that which was admitted to be due into court, upon the bare admissions of his answer, either by way of security for the final judgment, or by way of immediate payment to the plaintiff, under such terms and conditions as the court should prescribe. And the court would, according to the circumstances of the case, hold the money as security, or immediately pay it out, upon the application of the plaintiff, to him. The courts do not always exercise this power upon the admission of the defendant debtor, nor under all circumstances would they grant the application to have money paid in; but they would frequently do so, according to the rights of the parties and the justice of the case, and the relation of the parties to each other. It was a more common practice in former times than now, to compel a defendant to pay money upon his admissions of what he considered to be due. Now, if a defendant, along with his plea or answer, or before plea or answer, should come and voluntarily pay the money into court upon an admission that that much was due to the plaintiff, the money would stand in the court subject to its orders and decrees, just as it would be if the money had been paid upon similar admissions under the direction of the court, according to the practice just adverted to. And I think that, for the purposes of this case, it may be conceded—though it is difficult to say upon the authorities just how the rule would be—that always heretofore, and certainly now, according to the practice in England, the court would recognize and enforce such conditions as the defendant would attach upon his voluntary payment of money into court, and compel the plaintiff to comply with those conditions, or else hold the money, even as against the conditions, until the final judgment of the court, as a security for that judgment, whatever it might be. But I do not find any suggestion of authority whatever that when a defendant has voluntarily paid money upon his admissions that so much and no more is due, without any conditions attached, he would be allowed under any circumstances to withdraw it, or to deny the right of the plaintiff to receive it according to the practice of the court. Nor do I find any suggestion of authority that if the defendant, in making such voluntary payment, choose to impose or attach conditions, the court will, after the money has been paid, if it can see that the plaintiff is entitled to it, allow the defendant to withdraw it because the conditions have not been accepted, and force the plaintiff to the execution of his decree by other means; and it is my judgment that the inference to be drawn from all the authorities is that the court, having once got hold of the money, either by the voluntary payment of the defendant into court, or by an enforced payment such as has been suggested, will hold onto it, and deal with it as the right and justice of the case demands, and will exercise the widest and most complete discretion, unhesitatingly, for the purpose of doing justice between the parties, notwithstanding any conditions that have been attached, unless it may be that, in the nature and char-

acter of those conditions, rights of property and title would require that the money be returned to the defendant notwithstanding his liability to the plaintiff. If such a condition as that existed, the court would return it to the defendant, and leave the plaintiff to whatever remedy he had otherwise to enforce his just claims against the defendant. A court of equity has the amplest powers to deal with a fund according to the right, and has, I think, never been embarrassed by any such perplexities as those which have concerned the courts of law. Mr. Daniell says:

"When money has been paid, stock transferred, or specific articles deposited in court, on decree or order at the original hearing, or upon further consideration of the cause, the matter furnished provides for the payment, transfer, or delivery of the same to the parties then entitled thereto." 2 Daniell, Ch. Prac. 1794.

This original hearing referred to means the hearing at the time the money was ordered to be paid in, when the rights of the parties probably should be settled, and that might be by interlocutory or final decree, according to the circumstances; and it will be seen, abundantly, from reading the text as to the payment of money into court and the payment of money out of court, that the party entitled thereto, whether plaintiff or defendant, has always had the right to apply to the court—upon petition, usually, and according to the ordinary practice, but sometimes upon motion—for the immediate payment of the money to him who was entitled to it. 2 Daniell, Ch. Prac. 1396, under title "Costs"; Id. 1391,—where it is said that if a first mortgagee receives from a second mortgagee a tender of all that is due of principal, interest, and costs, the first mortgagee will not be entitled to the costs of a foreclosure suit after the tender; and it seems to be principally a question of costs, where the money has been voluntarily paid as the amount admitted to be due to the plaintiff. If a mortgagor tenders money, interest shall cease, and the mortgagor ought not to keep the pledge. Manning v. Burges, 1 Ch. Cas. 29; Gyles v. Hall, 2 P. Wms. 378; 2 Chit. Ed. Dig. tit. "Tender," p. 1255; Id. tit. "Practice; Payment into Court," p. 1109; Id. p. 1111; Broughton v. Pitchford, 6 Madd. 295 (the latter case is an example of where the money is paid in as a security, and not as a payment); 5 Chit. Eq. Dig. p. 5134; Strange v. Harris, 3 Brown, Ch. 365; Brown v. De Tastet, 4 Russ. 126; Woods v. Downes, 1 Ves. & B. 49. And it will appear from the cases, also, that even where admissions are not made in the answers upon which moneys can be ordered to be paid, and where it has not been voluntarily paid, if, during the progress of the taking of an account, or at any stage of the proceedings, it shall appear in any way that a sum of money is actually due, the court has power to order it to be paid in and out immediately to the party who is entitled to it; and, so far as I can see, originally there was scarcely any limitation upon the power of a court of equity in dealing with such matters, though it must be confessed that the tendency of modern practice and modern decisions is to treat the money paid in as a security for the final decree; and it is not now nearly so common to order the money to be paid either in or out until after final decree; but if it does come in, in any way,

the court is not apt to hold it until the ultimate decree if it can be seen that, with due regard to the rights of all the parties, it can be justly paid out at once to him who is entitled to it. In Richardson v. Bank, 4 Mylne & C. 165, Lord Cottenham reviews the law of requiring money to be paid in upon admissions in the defendant's answer, which case well illustrates the former practice before it was changed by the rules and orders of court above referred to. Knight v. Haythorne, 4 Jur. 361; Rogers v. Grazebrook, 12 Sim. 557. In Emden v. Carte, 45 Law T. (N. S.) 329, as digested by Chitty (5 Eq. Dig. p. 5136, par. 10), it is said:

"Where a defendant by his statement of a defense denies that he is under any liability to the plaintiff, and at the same time pays money into court. and pleads that, although he is under no liability, the sum paid in is enough to satisfy the plaintiff's claim, the plaintiff may obtain payment out, under rule 4 of order 30, Judicature Act, and may either, under rule 4, accept it in satisfaction of his claim, and tax his costs, and sign judgment for the costs, or may go on with his action for the purpose of recovering more; and where the plaintiff succeeds or fails in recovering more, or even fails altogether in establishing that the defendant is under any liability, he will be entitled to retain the money so taken out of court."

These rules of English chancery practice were understood, as it will appear from the authorities, to express, not new legislation, but the then existing law upon the subject, and it is my judgment that this statement is a succinct exposition of the chancery practice as it had been understood from the earliest times. Emden v. Carte, 17 Ch. Div. 169, 768; Id., 19 Ch. Div. 311; Berdan v. Greenwood, 3 Exch. Div. 251; Hawkesley v. Bradshaw, 5 Q. B. Div. 302; Wheeler v. Telephone Co., 13 Q. B. Div. 597; Goutard v. Carr, Id. 598, in the note; London Syndicate v. Lord, 8 Ch. Div. 84; Gretton v. Mees, 7 Ch. Div. 839; Spurr v. Hall, 2 Q. B. Div. 615; Clover v. Adams, 6 Q. B. Div. 622; Emden v. Carte, 17 Ch. Div. 168, 768; Id., 19 Ch. Div. 311; Nichols v. Evens, 22 Ch. Div. 611; Harper v. Davis, 19 Q. B. Div. 170; Maple v. Earl of Shrewsbury, Id. 463; Greenwood v. Sutcliffe [1892] 1 Ch. Div. 1; Westacott v. Bevan [1891] 1 Q. B. 774. See, also, Nelson v. Loder, 132 N. Y. 288, 30 N. E. 369; Taylor v. Railroad Co., 119 N Y. 561, 23 N. E. 1106; Foster v. Mayer, 65 Hun, 610, 20 N. Y. Supp. 487; Wilson v. Doran, 40 Hun, 633; Coghlan v. Railroad Co., 32 Fed. 316; Califarno v. MacAndrews, 51 Fed. 300.

It is another result of these cases, and their authorities to which they lead, that, where money has been paid into court upon an admission that that amount is due, the defendant will not be allowed to retake it, scarcely under any circumstances, though it might be that under some peculiar conditions it could be repaid to him. It would not do to say that the court has not the power to refund it to the party who paid it in, even upon such an admission, if it should turn out that the voluntary payment had been made under some misapprehension that would excuse its force and effect as being a voluntary appropriation of an amount that was due; but, except under special or irregular emergencies, it would not be repaid. Here, in this case, therefore, inasmuch as the defendants admitted that the amount of money they paid in was due, and voluntarily deposited it in the registry of the court before they had filed any plea or made

any answer, it does not follow that they can subsequently, by plea or by answer, set up a defense which would defeat the plaintiffs' right to the money so voluntarily appropriated to the plaintiffs and paid in. They might defeat the plaintiffs' right to costs or to any further interest, or of any right to foreclose the lien or make a sale under his mortgage or to recover any more than they paid in; but, as to the amount thus paid in unconditionally and voluntarily, the plaintiffs' title to the money would be quite as effectual and absolute as if the party had voluntarily, out of court, tendered it, and it had been accepted by the plaintiffs as an execution of the contract. This is not to be misunderstood as saying that by such a payment the defendants disable themselves from making defenses, but only that the fact that they have voluntarily paid the money may materially affect the defenses that they do make, and sometimes may make them nugatory and ineffectual. If, therefore, it should have turned out that we were of the opinion here that this contract was invalid, and that the parties had no right to make it in the teeth of the statute, and that it was absolutely null and void, yet if the defendants pay the money, and it is accepted by the plaintiffs, either voluntarily or under an order of the court, the defendants would then, as they do now, stand in the attitude, after having paid the money upon an invalid contract, of asking to recover it back; and where they have received plaintiffs' money in consideration of their mortgage, and appropriated it to their own use, and the repayment was nothing more than what an honest man should do, a court of equity would never be disposed to allow them to recover it back because, forsooth, the contract had been prohibited by the statute. Indeed, as we have shown already, were they to file a bill to enjoin the foreclosure of the mortgage, or to resist the payment of usury, or to make any such defense as that, the court would require, even if the contract were invalid, that they should refund the money, before it would give any aid in resisting the execution of the trust. Under such circumstances as these the defendants here would not be entitled to demand that the money be repaid to them, no matter what the court might ultimately think of the effect of the Tennessee legislation upon this contract. Equitably considered, the case is bare of the remotest equity on the part of the defendants to keep the money, and therefore it would have no hesitancy in paying it out to the plaintiffs at the earliest possible opportunity.

Without pursuing the subject further, we are satisfied that the plaintiffs are entitled to an order for the payment of this money to them. Strict practice, however, would require that the application should be made by petition, and not by motion, though it is sometimes done in that way; but I do not think it is material that the proceeding should be by petition, except where the petitioner wishes to offer to take it upon certain suggested conditions. 5 Chit. Eq. Dig. 5153; Daniell, Ch. Prac. 1794; Garratt v. Niblock, 5 Beav. 143; Petty v. Petty, 12 Beav. 170; Shipbrooke v. Hinchingbrook, 13 Ves. 394; Anon., 4 Madd. 228; Heathcote v. Edwards, Jac. 504; Oliver v. Burt, 1 Beav. 583. But this motion will not be granted except upon the condition, to be fixed in the order, that this payment un-

der the order of court is not to preclude the defendants from making any further defenses that they can make, in as full a manner as they could have made them if this order had not been made and the money had remained in court. Nor shall the payment to the plaintiffs be regarded as any acknowledgment by them that no more is due than the amount so paid under the terms of this contract; and all questions of costs and interest and the actual amount due shall be reserved until the final determination of the case, and this payment shall be held to be only a satisfaction pro tanto of the amount ultimately found due the plaintiffs under the terms of the contract. Also, out of abundant caution, the decree will contain a reservation of the right of the court to compel the plaintiffs to repay the money if it should turn out upon final hearing that the defendants are entitled to have it refunded to them. Ordered accordingly.

SARANAC LAND & TIMBER CO. v. ROBERTS, Comptroller.

(Circuit Court, N. D. New York. November 12, 1897.)

No. 3,110.

SALE FOR TAXES—CONCLUSIVENESS OF TAX DEED—VALIDITY OF STATUTE.

Laws N. Y. 1885, c. 448, making tax deeds which had been on record for two years prior to the passage of the act conclusive evidence of the regularity of the sale, and all proceedings prior thereto, if not assailed by direct proceeding within six months after the taking effect of the law, is, according to its principal intent and effect, a statute of limitations, and is not repugnant to any provision of the constitution of the United States. Turner v. People, 18 Sup. Ct. 38, followed.

This was an action of ejectment by the Saranac Land & Timber Company against James A. Roberts, as comptroller of the state of New York. A demurrer to the complaint on the ground that the court was without jurisdiction was heretofore overruled. See 68 Fed. 521.

Frank E. Smith and Weeds, Smith & Conway, for plaintiff.

T. E. Hancock, G. D. B. Hasbrouck, E. H. Leggett, and John H. Burke, for defendant.

COXE, District Judge. I am of the opinion that this cause must be decided in favor of the defendant upon the authority of People v. Turner, 145 N. Y. 451, 40 N. E. 400, affirmed by the supreme court of the United States, October 18, 1897. 18 Sup. Ct. 38. By these decisions the constitutionality of chapter 448 of the Laws of New York of 1885 is affirmed and its validity as a curative act and as a short statute of limitations is fully recognized. The defects involved in the Turner Case were similar to, and, in some instances, identical with those relied on by the plaintiff in the case at bar. Assuming these defects to be proved, they were irregularities which were cured by the act of 1885. The plaintiff has failed to show either the payment of the taxes or that they were levied without legal right. In other words, it has failed to show jurisdictional errors such as would render the assessment proceedings void and which the legislature had no power to remedy. The court cannot adopt the view of

the learned counsel for the plaintiff in his ingenious effort to prove that the constitutionality of the act of 1885 is still an open question. His argument is sufficiently answered by the plain and unequivocal language of the supreme court, as follows:

"It was argued in behalf of the plaintiff in error that the statute was unconstitutional, because it did not allow him any opportunity to assert his rights, even within six months after its passage. But the statute did not take away any right of action which he had before its passage, but merely limited the time within which he might assert such a right. Within the six months, he had every remedy which he would have had before the passage of the statute. If he had no remedy before, the statute took none away. From the judgments of the court of appeals in the case at bar, and in the subsequent case of People v. Roberts, 151 N. Y. 540, 45 N. E. 941, there would appear to have been some difference of opinion in that court upon the question whether his proper remedy was by direct application to the comptroller to cancel the sale, or by action of ejectment against the comptroller or the forest commissioners. But as that court has uniformly held that he had a remedy, it is not for us to determine what that remedy was under the local constitution and laws."

The plaintiff has failed to prove that it "is seised in fee simple and entitled to the possession" of the lands in dispute. The complaint is dismissed, with costs.

CHICAGO, ST. P., M. & O. RY. CO. v. BELLIWITH.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1897.)

No. 869.

1. CONTRACTS—PARTY UNABLE TO READ.
   If one cannot read a contract which he is about to execute, it is as much his duty to procure some reliable person to read and explain it to him before he signs it as it would be to read it himself if he were able to do so, and his failure to obtain a reading and an explanation of it is such gross negligence as will estop him from repudiating it on the ground that he was ignorant of its contents. One who has received the benefits of a written contract in silence cannot escape its burdens by proof that he did not know and did not inquire what these burdens were when he assumed them.

2. PRINCIPAL AND AGENT—NOTICE.
   Notice to and knowledge of an agent or attorney, acquired and present in his mind while he is exercising the powers and discharging the duties of his agency, are notice to and knowledge of his principal.

3. CONTRACTS—FRAUD AND MISTAKE.
   A written instrument cannot be avoided for fraud or mistake unless the evidence of the fraud or mistake is clear, unequivocal, and convincing.

4. TRIAL IN FEDERAL COURTS—DIRECTING VERDICTS.
   The judges of the federal courts are not required to submit a question to the jury merely because there is some evidence in support of the case of the party who has the burden of proof, but at the close of the evidence it is their duty to direct a verdict for the party who is clearly entitled to it, when it would be their duty to set aside a verdict in favor of his opponent if one were rendered. At the close of the evidence there is always a preliminary question for the judge,—not whether there is literally no evidence, but whether there is any substantial evidence, upon which the jury can properly render a verdict in favor of the party who produces it.

5. ADMISSIBILITY OF EVIDENCE—HEARSAY—WAIVER OF SETTLEMENT.
   Where a railroad company, through its attorney, made a settlement with one claiming damages for personal injuries, and took a release from him, *held*, that testimony that a claim agent of the company, who was not present at such settlement, had afterwards said to the witnesses that the company had never made any general settlement with the claimant, but had only given

him a little money to help him along, was inadmissible to show a waiver of the settlement, in the absence of anything to show that such agent had any authority to abrogate or waive settlements made by the company's counsel, and also as being mere hearsay.

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

On September 15, 1894, a freight train was wrecked on the track of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, the plaintiff in error, on its road between Minneapolis and Menomonie, in the state of Wisconsin. A tank in the wreck, which contained oil, took fire about 7 o'clock in the morning of that day, and, after burning about four hours, exploded and burned John Belliwith, the defendant in error. He was a passenger on a train which started that morning from Minneapolis, and arrived at the scene of the wreck in the forenoon of that day, before the explosion. The company stopped this train at a safe distance from the burning tank, made a gap in the fence on the south side of its right of way, opposite this train, and conducted Belliwith and the other passengers around the burning tank, through a field, to a point on the right of way a safe distance east of the tank, where they were led through another gap made in the fence, and left to await the arrival of a passenger train which was coming from the east to take them forward on their journey. After Belliwith had been safely led around the burning tank to this point, he voluntarily started back towards the passenger train which had brought him from Minneapolis, for the purpose, as he testified, of getting a package which he had forgotten and left in the car which he had occupied. The flames from the burning tank were leaping high in the air, and making so much noise that they were the most conspicuous objects in view. Instead of passing around them through the field, in the safe way in which he had been led east by the employés of the railway company, he went materially nearer the right of way of the company and the burning tank as he proceeded westward; and, just as he came near the tank, it exploded, and he was burned. He sued the company for negligence. It answered that it was not negligent; that Belliwith brought his injuries upon himself, by leaving the safe place to which he had been conducted by the company, and approaching nearer to the burning tank, without its knowledge or consent; and that on November 30, 1894, he had compromised his claim, and released the company from all liability for the injuries which he sustained from the explosion and burning, in consideration of $300, which the company had paid him on that day. Belliwith filed a reply to this answer, in which he denied that he had been negligent, denied the compromise and release, and alleged that he could not read or write; that on November 30, 1894, he demanded of the company a money settlement for his injuries; that the company would not pay him what he demanded, but paid him $200, and told him that it would help him along temporarily, and settle with him later. He also alleged that if the company had any release, claimed to be signed by him, it was a fabrication, and his consent to it was procured by artifice and deceit, and under a mistake, with no intention on his part to release any claim against the company, except for the value of the goods which he lost at the time of the accident. The case was tried to a jury, and these facts were established without controversy: Belliwith was a German peddler, who had been in this country 20 years, and had been engaged in his occupation of a peddler for 5 or 6 years. He could not read or write, but he gave more than 50 printed pages of testimony, in English, in this case, without the aid of an interpreter; and it evinces a ready understanding and a proper use by him of the English language. After his injuries he was treated in a hospital in St. Paul. When he had recovered sufficiently to go out on the streets of the city, and on the 21st day of November, 1894, he met an attorney at law, told him the facts regarding his claim against the railway company which is in suit here, employed him to prosecute that claim, and gave him a written power of attorney "to receipt for, settle, and compromise said cause of action as to him may seem fit, as fully and completely as said second party [Belliwith] might do if he were personally present, hereby ratifying every act by him done in the premises." His attorney immediately filed a copy of this power of attorney with the railway company, and commenced negotiations with Mr. Wilson, the general counsel of the company, for a settlement of this claim. Mr. Wilson

denied all liability on the part of the company, but after several interviews, and on November 29, 1894, he offered the attorney of Belliwith $300 for a compromise of the claim, and a release of the company from all liability on account of it. On the same day the attorney reported this offer to Belliwith, and on the next day they went together to Mr. Wilson's office, where, after some conversation, a written release and discharge of the claim, for the expressed consideration of $300, was prepared by Mr. Perrin, an assistant of Mr. Wilson, was signed with the name of Belliwith, by his attorney, while he touched the pen, and was delivered to the company; and $300 was then paid for it by the corporation to the attorney of Belliwith, who retained $100 for his fees, and gave $200 of it to his client. Belliwith went home, spent his money, and at the end of four months appeared to the company for the first time after the settlement, and presented a demand for more money and more settlement. The foregoing facts are undisputed, but the testimony which follows is contradicted: To avoid the written contract of compromise and release which he had made, Belliwith introduced in evidence, over the objection of the company, the testimony of one Kort, to the effect that Poole, who was the claim agent of the company, but who was not present at, and took no part in, the compromise made on November 30, 1894, said, six months after that settlement was made, that the company had never made a general settlement with Belliwith, but had given him a little money—a few hundred dollars—to help him out. For the purpose of avoiding the release, Belliwith himself testified that he lost a package worth $4.11 at the time of the accident; that the company never asked him to make a settlement; that he could not read or write; that he did not ask to have the paper that he touched the pen to read to him, and that it was never read to him; that his attorney told him that it was the settlement for the $4.11; that he supposed that it was; and that he never signed any release of any claim, except for the $4.11. But he also testified that when he saw his lawyer receive the $300 he knew it was more money than $4.11; that when he got home he found he had received $200; that he did not pay this money back to the company, but that he used it at home; and that it was a present to him from the company. He testified that his lawyer told him on the day before he executed the release that Mr. Wilson offered $300 to help him out, and that he replied that he did not want it, because they told him that to accept it would be to settle his claim; and he testified that, at the interview with Mr. Wilson on the day when the release was signed, Mr. Wilson offered him $300, and refused to pay him any more; that he told Mr. Wilson that he did not want it; and that he knew that, if he took it, its acceptance was a settlement. His attorney, who wrote Belliwith's name to the release while he touched the pen, and the assistant of Mr. Wilson, who drew the release, testified that after it was drawn, and before it was signed, it was handed to his attorney, who read it aloud in the presence of Belliwith. The court below refused to instruct the jury, at the request of the plaintiff in error, to return a verdict in its favor upon this evidence, refused to give other instructions which it requested, and gave instructions to which it excepted. These rulings are assigned as error.

L. K. Luse, for plaintiff in error.

Benjamin Davenport, for defendant in error.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

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

A written contract of release cannot be annulled or avoided by proof that one of the parties to it, who was sound in mind and able in body, could not read or write, did not know the terms of the agreement, and neglected to ask any one to read it to him when he signed it. A written contract is the highest evidence of the terms of an agreement between the parties to it, and it is the duty of every contracting party to learn and know its contents before he signs and delivers it. He owes this duty to the other party to the contract,

because the latter may. and probably will, pay his money and shape his action in reliance upon the agreement. He owes it to the public, which, as a matter of public policy, treats the written contract as a conclusive answer to the question, what was the agreement? If one can read his contract, his failure to do so is such gross negligence that it will estop him from denying it, unless he has been dissuaded from reading it by some trick or artifice practiced by the opposite party. If he cannot read it, it is as much his duty to procure some reliable person to read and explain it to him, before he signs it, as it would be to read it before he signed it if he were able to do so; and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents. This is a just and salutary rule, because the other contracting party universally acts and changes his position on the faith of the contract; and it would be a gross fraud upon him to permit one, who has received the benefits of the agreement in silence, to escape from its burdens by proof that he did not know and did not inquire what these burdens were, when he assumed them. Upton v. Tribilcock, 91 U. S. 45, 50; Fuller v. Insurance Co., 36 Wis. 599, 603; Sanger v. Dun, 47 Wis. 615, 620, 3 N. W. 388; Albrecht v. Railroad Co., 87 Wis. 105, 109, 58 N. W. 72; Wheaton v. Fay, 62 N. Y. 275, 283; Germania Fire Ins. Co. v. Memphis & C. R. Co., 72 N. Y. 90, 93; Hill v. Railroad Co., 73 N. Y. 351–353; authorities cited in Insurance Co. v. Norwood, 32 U. S. App. 490, 507, 16 C. C. A. 136, 145, and 69 Fed. 71, 80. A case in which the excessive zeal of a claim agent leads him to force his way into the sick room of an injured employé, where he lies alone, confined to his bed, and to procure a release from him by false representations, when his senses have been so stupefied by the use of opiates administered to relieve the tortures of excruciating physical pain that he cannot read it, and does not know its contents, or what course he ought to pursue to learn them, as in Railway Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843; Id., 27 U. S. App. 450, 455, 12 C. C. A. 598, 601, and 63 Fed. 800, 803,—constitutes a rare exception to this general rule, which must not be permitted to interfere with its steady and uniform application to the cases which fall within it. Notice to and knowledge of the agent or attorney, acquired and present in his mind while he is exercising the powers and discharging the duties of his agency, are notice to and the knowledge of his principal. Smith v. Ayer, 101 U. S. 320, 325. A written instrument cannot be avoided for fraud or mistake unless the evidence of the fraud or mistake is clear, unequivocal, and convincing. Insurance Co. v. Nelson, 103 U. S. 544, 548, 549; Maxwell Land-Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. 1015; Howland v. Blake, 97 U. S. 624, 626; Insurance Co. v. Henderson, 32 U. S. App. 536, 541, 542, 16 C. C. A. 390, and 69 Fed. 762. The judges of the national courts are not required to submit a question to a jury merely because there is some evidence in support of the case of the party who has the burden of proof; but, at the close of the evidence, it is their duty to direct a verdict for the party who is clearly entitled to it, when it would be their duty to set aside a verdict in favor of his opponent, if one were rendered. At the close of the evidence there is always a pre-

liminary question for the judge, before the case can properly be submitted to the jury; and that question is not whether there is literally no evidence, but whether there is any substantial evidence, upon which the jury can properly render a verdict in favor of the party who produces it. Commissioners of Marion Co. v. Clark, 94 U. S. 278, 284; North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago, 123 U. S. 727, 733, 8 Sup. Ct. 266; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569; Laclede Fire-Brick Manuf'g Co. v. Hartford Steam-Boiler Inspection & Ins. Co., 19 U. S. App. 510, 515, 9 C. C. A. 1, 4, and 60 Fed. 351, 354; Gowen v. Harley, 12 U. S. App. 574, 585, 6 C. C. A. 190, 197, and 56 Fed. 973, 980; Motey v. Granite Co., 36 U. S. App. 682, 686, 20 C. C. A. 366, 368, and 74 Fed. 155, 157.

These are unquestioned rules of law and practice. In the case at bar, the written contract of release was on its face a complete bar to this action. The most important question in this case is, did the defendant in error produce such clear, convincing, and unequivocal evidence that his signature to this release was procured by artifice, deceit, or mistake, that the jury could properly find that fact? There was certainly no evidence which, under the law, would warrant the avoidance of this contract on the ground of mistake. If, as Belliwith testifies, he could not read or write; if, as he says, the contract was not read to him, and he did not know its contents,—that was the result of his own gross negligence; for he testified himself that he did not ask anyone to read it to him, and he said that he signed it under the supposition that it was the release of his claim for $4.11 for the loss of a package. Fifty pages of his printed testimony demonstrate the fact that he knew perfectly well the difference between his claim for personal injuries and his claim for the lost package, and that, if the release had been read to him, he could not have failed to understand its effect. He was willing to receive, and did receive, the $300 for this release, without reading it or hearing it read; and he cannot be, and ought not to be, now heard, while he retains its benefits, to say that his own ignorance and negligence exempt him from its obligations. If, on the other hand, the release was read to him, as his attorney and the attorney of the company testify, he signed it with full knowledge of its contents, and is, of course, bound by it. Moreover, whether it was read to him or not, he was charged with knowledge of its contents when he signed it, because the testimony is clear and uncontradicted that his attorney, whom he had authorized by a written power of attorney to compromise this claim for him, read the release, understood its contents, signed Belliwith's name to it while the latter touched the pen, received the $300, and divided it between himself and his client. Under the law, the knowledge of this attorney was the knowledge of the defendant in error. Nor was there any evidence upon which a finding that this release was procured by artifice or deceit can be lawfully sustained for a moment. The fact that, as we have seen, the plaintiff was charged under the law with full knowledge of the contents of this agreement, is itself fatal to this claim, for there could be no deceit where there was no ignorance and no concealment. It is true that Belli-

with testified that he was told by his attorney that the release evidenced a settlement of his claim for $4.11, only, and that he supposed this to be true when he signed the contract. But the solemn, written agreements of men cannot be whistled down the wind by the testimony of one of the parties to them to such a story as this, in the teeth of the power of attorney he executed, and his own testimony that he had employed his lawyer to prosecute and settle this claim for personal injuries; that his attorney had reported to him the day before his settlement that Mr. Wilson offered him $300 for the release of this claim, and that he replied that he did not want it, because they told him that its receipt would settle his demand; that Mr. Wilson made him the same offer the next day, and he then knew that, if he took it, its acceptance would constitute a settlement, and told Mr. Wilson that he did not want it; that he knew when the money was paid to his attorney that there was more than $4.11; that he knew when he got home on that day that he had received $200; and that this $200 was a present to him from the company, and so he kept it, and used it at his home. In view of this testimony, and the facts that this settlement was made in the presence of the defendant in error, by his chosen attorney, after a negotiation which continued through several days; that he was charged, under the law, with knowledge of the contents of the release he signed; that he took and used the proceeds of the settlement, and has never offered to return them, —the evidence in this case comes far short of that clear, convincing, and unequivocal proof which would warrant either a jury or a court in finding either mistake, fraud, or deceit in the execution of this contract, and the court below was in error when it refused to instruct the jury to return a verdict for the company.

In the consideration of the sufficiency of the evidence to warrant the verdict, we have not referred to the testimony of Kort and others that Poole told him six months after this release was executed that the company had never made any general settlement with Belliwith, but had given him a little money—a few hundred dollars—to help him out, because, in our opinion, that testimony was incompetent, and should not have been received by the court or considered by the jury. This statement of Poole was not admissible in evidence as an admission of the company, because, although Poole was its claim agent, and may have been empowered to settle claims against it, there is no evidence in this record that he had any authority to abrogate settlements which the general counsel of the company had made, or to admit on behalf of the company that such settlements had not been made. He was not present on the day when Mr. Wilson closed the negotiations, made the settlement, and obtained the release of this claim of the defendant in error, and he could have known what was said and done on that day by hearsay only. The company, so far as this record shows, had never delegated to him the power to admit that the settlement which Mr. Wilson had made had not been made, and it required a special delegation of such a power to authorize the destruction of the contract of release by any such admission. The testimony of Kort and others was therefore not competent as evidence of an admission of the company. Nor was it admissible as proof of

a verbal act, which was a part of the res gestæ. The statement of Poole was not made at or near the time when the act to which it refers was done. It was not made until about six months after the event which it describes had happened, and it was a mere narration of this past event, founded, not on what Poole saw or heard at the time, but on what some one else had told him that he saw or heard. This statement was entirely detached from any material act that is pertinent to the issue in this case, and was itself nothing but hearsay. Insurance Co. v. Mosley, 8 Wall. 397, 405, 416; Vicksburg & M. R. Co. v. O'Brien, 119 U. S. 99, 104, 105, 7 Sup. Ct. 118; Association v. Shyrock, 36 U. S. App. 658, 667, 20 C. C. A. 3, 8, and 73 Fed. 774, 778. The testimony of Kort was therefore hearsay repeating hearsay, and it should have been rejected.

It is assigned as error that the court refused to give to the jury the following instruction:

"If you find that the plaintiff, after going round to the east gap, where he understood he was to wait for the incoming train, from motives of curiosity, or for his own pleasure, went much nearer the burning tank, and was injured by reason of so doing, he cannot recover; and you are to consider, in that connection, whether the reason which he now gives for going back is truthful, or whether it is a mere subterfuge to excuse his conduct."

With the exception of that part which relates to the reason which Belliwith gave for going back, this is substantially the same instruction which we held in Chicago, St. P., M. & O. Ry. Co. v. Myers, 25 C. C. A. 486, 80 Fed. 361,—a case arising out of the same accident,—should have been given. Our reasons for this view, and some of the authorities which support it, will be found in Judge Thayer's opinion in that case, and will not be repeated here. Belliwith testified that he went back towards the burning tank to get a package that he had left in the passenger car which he had occupied on his way from Minneapolis. Several witnesses, however, testified that he had told them at various times that he went back to find his handkerchief, which he discovered he had lost from his pocket. In view of the testimony of these witnesses, and the general character of the evidence given by Belliwith, we think the latter part of this request was not objectionable, and are of the opinion that the entire request should have been given, if the case was to be submitted to the jury at all.

There are other assignments of error in this record, but the questions which they present are not likely to arise again in the case, and no good purpose would be served by discussing them. The judgment below must be reversed, with costs, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.

HAMBLY v. BANCROFT.

(Circuit Court, N. D. California. November 15, 1897.)

No. 12,385.

1. ACTION FOR SALARY—PARTNERSHIP.

S. made an agreement with defendant by which, in consideration of past services rendered by S. to a certain business about to be incorporated as the H. Co., defendant sold to him a one-tenth interest in that company and in its assets; and S. agreed, for at least 10 years to come, to devote his entire attention to the business of the company. Upon the incorporation of the company, S. was to receive one-tenth of the stock, subject to forfeiture for his breach, and subject to defeasance, as to one-half, in case of his death within five years. The agreement added, "The salary of the said S. shall be $350 a month." *Held*, that the contract was one of employment, and not of partnership, and that defendant was personally liable for S.'s salary.

2. JUDICIARY ACT—STATE LAW AS RULE OF DECISION.

Section 34 of the judiciary act of 1789 (1 Stat. 92; Rev. St. § 721), providing that "the laws of the several states * * * shall be regarded as rules of decision * * * in the courts of the United States * * *," does not apply to a decision of a state court determining the construction of a contract.

This was an action at law by H. B. Hambly against H. H. Bancroft to recover the sum of $9,833.33, alleged to be due as salary owing under a contract of employment. Demurrer that the complaint does not state facts sufficient to constitute a cause of action.

Reddy, Campbell & Metson, for plaintiff.
Page, McCutchen & Eells, for defendant.

MORROW, Circuit Judge. The present suit was removed to this court on June 21, 1897, from the superior court of this state in and for the city and county of San Francisco. The plaintiff is a citizen of this state; and the defendant, a citizen of the state of Massachusetts. The action is brought by the plaintiff, H. B. Hambly, as the assignee of N. J. Stone, to recover the sum of $9,833.33, alleged to be due by the defendant, H. H. Bancroft, as salary owing to Stone under a contract of employment. The case now comes up on a demurrer to the complaint, it being claimed that the facts stated in the complaint are not sufficient to constitute a cause of action. The complaint sets out, substantially, that on the 20th day of August, 1886, N. J. Stone and the defendant, H. H. Bancroft, made and entered into the following agreement:

"That in consideration of the valuable services done by the said Stone in conducting the publication and sale of the historical works of the said Bancroft,—the business formerly being conducted as the Bancroft's Works Department of A. L. Bancroft & Co., but now being done and shortly to be incorporated under the laws of the state of California as the History Company,—the said Bancroft hereby sells and assigns to the said Stone a one-tenth interest in the said History Company, plates, paper, stock, money outstanding, accounts, or other property of said company, upon the following conditions: The said N. J. Stone is to devote his whole time and best energies, so far as his health and strength shall permit, for a period of not less than ten years from the date of this agreement, to the publication and sale of the historical works of H. H. Bancroft, and of such other works, and conduct such other business, as may be from time to time taken up and entered into by said History Company; and the said

Stone agrees not to enter into or engage in, directly or indirectly, any other mercantile or manufacturing business, or in any other business or occupation which shall in any wise absorb his mind and strength, or interfere with his interest or efforts on behalf of the said History Company, during the said term of ten years. Upon the incorporation of the History Company, one-tenth of the whole number of shares shall be issued and delivered to the said N. J. Stone; but should the said Stone fail in any wise to carry out this agreement, or any part thereof, in its full letter and spirit, then the said one-tenth interest in the said History Company shall be forfeited, and revert to the said H. H. Bancroft: provided, and it is distinctly understood and agreed, that, in case of the death of the said N. J. Stone before the expiration of five years from the date of this agreement, the said Stone having fulfilled all the conditions of this agreement up to that time, then one-half of the said one-tenth interest of the said Stone in the History Company shall go to his heirs, and be their property, unconditionally; and in the event of the death of the said Stone at any time after the expiration of five years from the date of this agreement, the terms hereof having been fully complied with, then the whole of the said one-tenth interest shall belong to his heirs, unconditionally. The salary of the said Stone shall be $350 a month. The copyright of the said historical works belongs exclusively to the said Bancroft, and shall be fifty cents a volume for the History and Diaz, and twenty cents on the little History of Mexico.

"Signed in San Francisco the twentieth day of August, 1886.

"H. H. Bancroft.
"N. J. Stone.

"Witness: W. N. Hartwell."

It is further averred that N. J. Stone duly performed all the conditions of said contract on his part to be kept and performed, and that he is now, and always has been, ready and willing to perform all the terms and conditions of said contract on his part to be kept and performed, but that said defendant has failed and neglected to perform the terms and conditions of said contract upon his part to be kept and performed, and has failed and neglected and refused to pay or cause to be paid to the said Stone the salary mentioned in said contract, and still refuses to pay said salary, although often requested so to do; that no part of said salary has been paid to said Stone from the 1st day of April, 1894, to the 20th day of August, 1896; that prior to the commencement of this action, to wit, on the 13th day of June, 1896, said Stone sold, assigned, and transferred to the plaintiff herein all of his right, title, and interest in any moneys then due or thereafter to become due under the said contract with the said defendant as hereinbefore set forth; that nothing has been paid by defendant to plaintiff on account thereof. It is contended upon this demurrer by counsel for the defendant that the parties, by the terms of the contract set out in the complaint, created a partnership, and not a contract of employment, and that, therefore, the present suit, being predicated upon a contract of employment, cannot be maintained. On the other hand, it is contended by counsel for the plaintiff that the contract sued upon is one of employment, and that the supreme court of this state, in a case involving the same contract, and between the parties to it, so decided, and that this decision is binding on this court. The interpretation of the contract sued on in this case was involved in the suit of Stone v. Bancroft, brought in the state court. Stone sued Bancroft in the state court for his salary at the contract rate of $350 per month for the period of 14 months. He re-

covered judgment, and the case was appealed to the supreme court, where the judgment was affirmed. 112 Cal. 652, 44 Pac. 1069. The supreme court held that the contract was one of employment, and not of partnership, and that the action to recover his salary was a proper one, instead of a suit for damages for breach of contract, in view of the fact that the evidence introduced in that case showed that Stone had never been discharged by Bancroft from his employment under the contract. That suit was brought by Stone to recover his salary for the period extending from January 1, 1892, to May 1, 1893. The present suit is brought to recover his salary from April 1, 1894, to August 20, 1896.

The first question which arises is whether the interpretation placed by the supreme court of this state on the contract sued upon is binding on this court, under the thirty-fourth section of the judiciary act of 1789 (1 Stat. 92; section 721, Rev. St.). That section provides that:

"The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The expression "laws of the several states" includes the decisions of the state courts construing the laws. Swift v. Tyson, 16 Pet. 1. The general rule as to when decisions of the state courts, under the above-quoted section, are binding on the federal courts, and when they are not, is well stated in the case just cited, in the following language:

"In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws, strictly local; that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It has never been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves; that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed."

It is true that in the case cited the supreme court were considering and interpreting a negotiable instrument in the light of the principles of commercial law, but their language is equally applicable to the interpretation of ordinary contracts. Subsequent de-

cisions only tend to reaffirm this rule, and in Lane v. Vick, 3 How. 464, it was said:

"With the greatest respect, it may be proper to say that this court do not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes."

See, also, Carpenter v. Insurance Co., 16 Pet. 495; Butz v. City of Muscatine, 8 Wall. 575; Oates v. Bank, 100 U. S. 239; Watson v. Tarpley, 18 How. 517; Amis v. Smith, 16 Pet. 303, 314; Railroad Co. v. National Bank, 102 U. S. 14, 54; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 443, 9 Sup. Ct. 469.

The only question involved in the case at bar, as in the suit of Stone v. Bancroft in the state court, is one of the interpretation of the contract sued upon. No rule of property can be said to be involved, nor does the decision in the case depend upon the construction given by the state court, in the case referred to, to the laws of this state. The question is confined to the single inquiry as to the interpretation to be given the contract sued on; that is, whether it is one of hiring or one of partnership. This obviously calls for the independent judgment of the court. Reverting, therefore, to the ground of demurrer, that the complaint does not state facts sufficient to constitute the cause of action sought to be made, it is plain that the disposition of this question depends upon the interpretation to be given to the contract set out in the complaint. Looking at the instrument without the aid of any extraneous evidence, it is difficult to escape the conclusion that it was drawn up as, and expresses, a contract of employment, and not of partnership. Stone agreed with Bancroft that he would render certain services in connection with the publication and sale of the historical works of Bancroft, and of such other work, and conduct such other business, as might be, from time to time, taken up and entered into by the History Company, for which services he was to receive a monthly salary of $350. He was engaged by Bancroft, and the latter agreed to pay him. Stone, in return, agreed "to devote his whole time and best energies, so far as his health and strength shall permit, for a period of not less than ten years from the date of the agreement," to the purposes and objects above specified. The period of service was distinctly stated and agreed upon to be not less than 10 years, and Bancroft, fully cognizant of this stipulation, nevertheless agreed to pay Stone during that period, for the services rendered under the contract, the sum of $350 a month. This Bancroft agreed to do, although it is recited in the agreement for the employment of Stone's services that the History Company, so-called, was shortly to be incorporated. Therefore, from the terms of the contract itself, Bancroft deliberately engaged and contracted that Stone should render services to himself and to the History Company, when it should be incorporated, for a certain period, specified at not less than 10 years, and for a stipulated salary. The fact that, upon the incorporation of the company, Stone was to render his services, under the contract with Bancroft, to the company, does not, in law, relieve Bancroft from his solemn engagement to pay Stone for the services called for by the contract, and which the latter was ready

and willing to render. It is immaterial whether the services were rendered to Bancroft personally, or to the History Company. It is enough that Stone was engaged by Bancroft to do certain work, and that he entered upon the discharge of his duties at the solicitation of Bancroft, and upon his written promise to pay for such services. The company might receive, under the terms of the contract between Stone and Bancroft, the benefit of Stone's services, and yet, in law, Bancroft, by virtue of his written promise, be liable for the payment of the salary. That one may engage the services of another to be rendered to a third party is elementary law. 1 Add. Cont. (3d Am. Ed.) § 38; Craig v. Fry, 68 Cal. 363, 9 Pac. 550; Civ. Code Cal. § 1965. One can search the contract in vain for a statement or admission that Stone was hired or to be employed by the History Company upon its incorporation, and was to be paid by the company for the services he rendered under his contract with Bancroft. On the contrary, a careful reading of the agreement leads to the conclusion that Stone was to be paid by Bancroft, with whom he entered into the contract.

It is claimed, however, that the contract was one of partnership, and that, by the terms of the contract, Stone was to get a one-tenth interest in the History Company, and that, therefore, the salary to Stone was intended to be paid by the partnership, and not by Bancroft personally. But the difficulty about this contention is that Stone was not given the one-tenth interest in consideration of the services called for under the contract. This one-tenth interest was for past services, which had nothing to do with those to be performed under the contract sued upon. It was:

"In consideration of the valuable services done by the said Stone in conducting the publication and sale of the historical works of the said Bancroft, the business formerly being conducted as the Bancroft Works Department of A. L. Bancroft & Co., but now being done and shortly to be incorporated under the laws of California as the History Company."

This transfer of a one-tenth interest was, however, qualified by a stipulation in the agreement that:

"Should the said Stone fail in any wise to carry out this agreement, or any part thereof, in its full letter and spirit, then the said one-tenth interest in the said History Company shall be forfeited, and revert to the said H. H. Bancroft."

There was a further stipulation in the agreement that, should Stone die before the expiration of five years from the date of the agreement, his heirs would only get one-half of the one-tenth interest referred to. Outside of this transfer of a one-tenth interest for past services, there is nothing in the language or terms of the contract sued upon which would justify the interpretation that it was ever intended to be, and is, in legal effect, a contract of partnership. The word "partners" is not once used, nor, in fact, does the instrument contain any expressions from which it could be reasonably and fairly deduced that the parties considered that they were entering into partnership relations. Indeed, the recital in the instrument that the History Company, so-called, was shortly to be incorporated, would seem to be inconsistent with the idea that Stone and Bancroft considered that they were entering into a partner-

ship. The supreme court of this state, in the case before referred to, involving this agreement, took the view, as stated, that the contract was one of employment, and not of partnership. While it is true that this decision, under the authorities heretofore cited, is not binding on this court, involving, as it does, merely the interpretation of an instrument, still it is entitled to great respect. Swift v. Tyson, supra. The interpretation of the contract in question arose, as in the case at bar, upon a general demurrer to the complaint. The supreme court, in affirming the decision of the trial court overruling the demurrer, used the following language:

"We think the only fair interpretation to be given this contract is that Bancroft was to pay Stone three hundred and fifty dollars per month for his services. There is but a single theory that can be advanced looking to a contrary construction, and that is to the effect that this contract between Bancroft and Stone constituted them partners (Stone possessing a one-tenth interest in the partnership), and that consequently the salary of said Stone was to be paid by the partnership. Upon a mere cursory examination of the contract, it is plainly evident that it does not, and was never intended to, create a partnership between these two parties. This is patent from the fact that it was contemplated in the writing itself that in the near future the History Company was to be incorporated. It is doubly apparent when we consider that the one-tenth interest in the property given by Bancroft to Stone failed to vest any absolute title in him, but was dependent upon conditions, and liable to be forfeited and revert to Bancroft at any moment. That Stone had no such interest in this business as to constitute him a partner is further made plain when we look at the provision of the contract wherein it is expressly stipulated that, if Stone should die within five years from its date, then only one-half of the one-tenth interest should pass to his heirs. To hold these parties partners under the agreement would make Stone's salary dependent upon the profits of the business. There is nothing contained herein to indicate any such intention, and it is certainly not so provided. We conclude that the contract should be construed as a contract of hiring of Stone by Bancroft at an agreed price of three hundred and fifty dollars per month." Stone v. Bancroft, 112 Cal. 652, 655, 44 Pac. 1069.

The view taken, and thus expressed, by the supreme court of this state, accords with the view I take of the legal effect of the contract in question. In my opinion, the plaintiff's cause of action is legally and properly based upon the contract as one of employment; and the complaint, in my judgment, states facts sufficient to constitute a cause of action. The demurrer will be overruled, with leave to the defendant to answer within 10 days, if he shall be so advised.

STUFFLEBEAM v. DE LASHMUTT.

(Circuit Court, D. Oregon. November 18, 1897.)

No. 2,409.

1. NATIONAL BANKS—LIABILITY OF STOCKHOLDER—PURCHASE INDUCED BY FRAUD.

   One who is induced by fraud to purchase stock of an insolvent national bank, and have it transferred to him on the books of the bank, and who, upon discovery of the fraud, takes prompt action to rescind the contract, is not liable to assessment on such stock, except on behalf of persons who extended credit to the bank, after the transfer, without knowledge of the fraud.

2. APPARENT STOCKHOLDER—GROUND OF LIABILITY—ESTOPPEL.

   The binding character of the obligation of one whose name appears as a stockholder on the books of a corporation is on the principle of estoppel,

which precludes him from denying a relation he has assumed, and upon the strength of which others have acted.

W. H. Effinger, for plaintiff.
E. B. Williams, for defendant.

BELLINGER, District Judge. This is a demurrer to the separate answer of De Lashmutt to the complaint in an action brought to recover an assessment upon national bank stock held by defendant, on the ground that the facts alleged do not constitute a defense to the cause of action set out in the complaint. The separate answer alleges, in effect: That defendant was induced by false representations, fraudulently made, as to the condition of the National Bank of Moscow, by Brown, the president of the bank, and Brune, its cashier, to convey land of the value of $15,000 to Brown in consideration of the transfer to defendant of stock in the bank of the par value of $12,500. That about 20 days thereafter said bank was closed by the officers of the United States government, and the bank taken in charge by them. That then, for the first time, the defendant became apprised of the condition of the affairs of such bank, and of the fraud practiced upon him. That he then learned that said bank was insolvent at the time the stock was assigned to defendant. That the stock at that time was valueless, and the holders thereof were, moreover, liable to be called upon for assessments to pay creditors. That, as soon as this condition of the affairs was made known to defendant, he rescinded the contract he had made with Brown, and called upon him to reconvey the land taken by him; and defendant tendered the stock, duly assigned, to Brown. That Brown refused to accept such tender, or make reconveyance, as demanded. That immediately thereupon, and prior to the assessment sued on, defendant brought a suit against Brown to rescind such contract, and reconvey the land so fraudulently, as alleged, procured to be conveyed by Brown and Brune. The plaintiff contends that the liability of defendant is absolute; that it follows the legal ownership of the stock in his hands, regardless of any right in defendant to have the contract by which he took such title canceled.

It is held in numerous cases—and there is nothing to the contrary—that a subscriber who is induced to subscribe for stock in a corporation by fraudulent representations may set up such fraudulent representations by way of defense in an action to recover the purchase price of the stock so taken. Bank v. Peck, 29 Conn. 384. And a receiver has only the right existing in the corporation at the time of his appointment. The case mainly relied upon in support of the demurrer is that of Pauly v. Trust Co., 165 U. S. 606, 17 Sup. Ct. 465. This case holds that if the owner of stock transfers his shares to another as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder, within the meaning of section 5151 of the Revised Statutes of the United States, and therefore liable, upon the basis prescribed by that section, for the con-

tracts, debts, and engagements of the association. The court, in its opinion, says:

"It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as true owner, may be treated as the owner, and therefore liable to assessment, when the association becomes insolvent and goes into the hands of a receiver. But this is upon the ground that, by allowing his name to appear upon the stock list as owner, he represents that he is such owner; and he will not be permitted, after the bank fails, and when an assessment is made, to assume any other position, as against creditors. If, as between creditors and the person assessed, the latter is not held bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value."

And the court, in its opinion, further says:

"But this rule can have no just application when, as in this case, the creditors were informed by that list that the party to whom certificates were issued was not in fact, and did not assume to be, the owner of the shares represented by them, but was, and assumed to be, only a pledgee, having no general property in the thing pledged, but only a right, upon default, to sell in satisfaction of the pledgor's obligation. * * * As already indicated, those may be treated as shareholders, within the meaning of section 5151, who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not in fact owners."

The liability thus held to exist is, as will be seen, upon the principle of an estoppel, by which a person who has held himself out as a stockholder of a corporation will not be allowed to escape the liability that attaches to him in that relation, as against persons who dealt with the corporation upon the strength of his relation to it as a shareholder.

In Waite v. Dowley, 94 U. S. 527, the court says that the act of congress "was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to dealing with the bank." Many of the cases use the expression, with reference to the conduct of persons sought to be held as stockholders, "holding themselves out" as stockholders. If in this case any creditor for the payment of whose debt the assessment sued on was levied, had become a creditor after the transfer to De Lashmutt of the shares of stock upon which he is sought to be held, the principles of the case of Pauly v. Trust Co. would apply. In such case it must be said that the creditor acted upon the representation that De Lashmutt was a stockholder, in extending his credit to the corporation; and in that case, whatever equities there might be as between De Lashmutt and the persons from whom he took the stock, these would not avail the defendant as against the innocent creditor, who dealt with the corporation without knowledge of these equities. Consider the reason for the liability that attaches to the stockholder whose name appears upon the books of the company as such. What efficacy is there in the fact of the name of the stockholder being upon the books of the company to bind him? The reason of the obligation is apparent. It is in the fact that this appearance of the books of the corporation operates as an inducement to

persons to deal with the corporation. There is no mystery in the binding character of the obligation which the stockholder assumes whose name appears upon the books of the company. The obligation is because of the principle of estoppel, by which one is precluded from denying a relation which he has assumed, and upon the strength of which others have acted. If no one has acted upon this representation; if the contract is repudiated with promptness, and before an assessment or other attempt to enforce the liability is made, —there is no reason in law or in morals why the party should be bound as a stockholder. In this case the facts, as disclosed by the separate defense, show that De Lashmutt acted with promptness upon discovering the fraud that had been perpetrated on him, in proceeding to disaffirm the contract under which he took the stock, and he brought his suit to cancel that contract and recover back the consideration paid by him before this assessment was made; and it is not claimed that any debt of the corporation was created between the time of the transfer and the levying of the assessment, so that, so far as the creditors of the bank are concerned, they have not been affected by the transfer to the defendant. No one has been prejudiced by what has been done. The rights of all persons interested in the assessment made are precisely what they would have been had there been no transfer of stock by Brown to the defendant. Under these circumstances, upon what principle of justice, or of law, which is the embodiment of justice, can De Lashmutt be held to a liability on account of the fraud by which he was induced to give up a valuable property for certificates of stock, which were not only worthless at the time, but which carried with them a large liability in favor of existing creditors? The case is not different from those cases where the action has been brought to recover the consideration agreed to be paid by the transferee for the stock taken by him. In those cases the action has been brought either by the corporation itself, or by the receiver acting for the creditors of the corporation. In this case the receiver has no greater right than the corporation would have, suing in its own right. The demurrer is overruled.

TEXAS & P. RY. CO. v. HOLLIDAY et al.

(Circuit Court of Appeals, Fifth Circuit. June 7, 1897.)

TRIAL—INSTRUCTIONS.

Where the whole charge, taken together, does not present such misdirection as could have misled the jury in their application of the charge to the entire proof, there is no ground of reversal, though some parts of the charge may be subject to criticism as separate propositions.

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

This was an action at law to recover damages for negligently causing death. At the trial in the circuit court a verdict was given for the plaintiff, judgment was entered accordingly, and the defendant has brought the case to this court on writ of error. The facts are sufficiently stated in the charge of the court to the jury, which was in full as follows:

"This is an action brought by Maggie A. Holliday for the benefit of herself and children, named in the petition, against the Texas & Pacific Railway Company, in which the plaintiffs allege that on the 31st day of August, 1894, in the city of Texarkana, Bowie county, Tex., the defendant, through its agents and employés, in the operation of its train and cars at Texarkana, negligently ran an engine of defendant over the person of De Witt C. Holliday, by which he was killed. Suit was brought by Mrs. Holliday as the surviving wife of De Witt C. Holliday, for the benefit of herself and children, alleging that the children were the issue of marriage between herself and the deceased. This action is brought under the state statute which reads as follows, in so far as it relates to this case: 'When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steamboat, stage coach or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence or carelessness of their servants or agents;' and then state that an action may be brought therefor. This is not the exact language of the petition, but it is substantially the issue made by the plaintiffs. The defendant answers by a general denial, which places the burden of proof upon the plaintiffs to establish the charge as alleged by a preponderance of the evidence. Defendant further answers specially that De Witt C. Holliday was killed without any fault or negligence upon the part of the defendant, but that said Holliday was guilty of negligence himself, which contributed to his death. In this action there is no dispute that if said Holliday was killed by the defendant through its negligence, uncontributed to by said Holliday, that the plaintiffs could recover, and there is no contention that if said Holliday was guilty of contributory negligence upon his own part, which was the direct cause or contributed to his death, that no recovery could be had. There is no question made that said Holliday was the husband of the plaintiff Maggie A. Holliday, and was the father of the children mentioned in the petition, nor is it disputed that he was killed at the time and place charged, and by being run over by an engine of the defendant. The questions to be decided by you are as follows:

"Was the defendant negligent in the operation of the engine that killed De Witt C. Holliday? Was De Witt C. Holliday himself guilty of negligence that contributed to his death? You are further to decide whether or not both the defendant and De Witt C. Holliday were guilty of negligence which resulted in said Holliday's death. In determining these questions that it was the duty of the defendant to either ring the bell or blow the whistle in approaching Oak street crossing, in order to avoid injury to any one crossing said street. Being in the corporate limits of a city, and where one or more streets should be crossed, and the evidence showing that said defendant was moving its engine from its depot to its roundhouse, a distance less than eighty rods, the state statute would not make it incumbent upon the defendant to ring the bell or blow the whistle continuously, but it would be incumbent upon the defendant to use ordinary care to avoid injury to any one crossing Oak street, which might be by keeping lights at said crossing, ringing the bell or blowing the whistle, as it approached said street; and also, if said Oak street was a place where many people were in the habit of crossing, and might reasonably be expected to be crossing, said street, it might also be necessary to keep a watchman in addition to the other precautions above mentioned. There is no exact definition of the words 'ordinary care.' Its legal meaning is that all reasonable precautions shall be taken to avoid injury, the means to be used, or necessary to be used, depending upon the danger to be apprehended from negligence, and this varies owing to each particular situation. The diligence that might be used at a country crossing, where but few people pass, would be less than that required in crossing a street in a city or town where people were in a habit of frequently passing. But the test, finally, is the taking of all reasonable precautions to avoid danger, that a reasonable prudent person would take under like circumstances. The duty of a person approaching a railroad crossing is that he shall look and listen, use his sense of hearing, and that he shall also use all watchfulness that a reasonable prudent person would use under like circumstances. A person approaching railway crossings has the right to expect that a railway company will give such signals of an approaching train as the law requires,

and if, relying upon this, he attempts to cross the tracks and is injured by reason of the failure of the employés of the railway company to give such signals, then he is entitled to recover, unless you find from the evidence that in attempting to cross the railroad track the person injured failed to exercise such care as an ordinary prudent person would have exercised under similar circumstances. Upon the issue of contributory negligence, the burden of proof is upon the defendant to show that De Witt C. Holliday was negligent, and that this negligence contributed to his injury; and it will not be presumed, without evidence, that deceased did not exercise proper care in attempting to cross defendant's track at the time of the injury, but you are instructed that such negligence need not be proven by any eyewitness, as to whether he was looking or not, or exercising proper care, but may be proven by all the circumstances surrounding the parties at the time of the accident. If the jury find that there is no evidence to show whether De Witt C. Holliday did or did not look and listen for approaching engines, cars, and trains when about to cross the defendant's track where he was killed, in that event the law would presume that he did so look and listen when about to cross said track. If you find from the evidence that an ordinance of the city of Texarkana, Tex., was in force at the time deceased, Holliday, was killed, requiring the defendant, in connection with the St. Louis, Arkansas & Texas Railway Company, to keep and maintain a watchman during all hours of the day and night, at the intersection of Oak street with said railways, within the limits of Texarkana, and that said ordinance further required said railways to maintain an electric arc light at the intersection of said Oak street with said railways, and you further find that said railway companies failed to keep a watchman, as required, or failed to erect and maintain such electric arc light, at the intersection of said Oak street with said railways, as provided by said ordinance, and that no watchman was kept, or that no electric light was maintained, as provided by said ordinance, at the time De Witt C. Holliday was killed, in that event the law authorizes you to infer negligence on the part of the defendant railway company. Therefore you are instructed that if from the evidence in this case you find that De Witt C. Holliday was killed by the defendant, and that such death was the result of negligence on the part of the defendant, and was not contributed to by the deceased, Holliday, you will find for the plaintiffs against the defendant damages as hereinafter instructed, not to exceed the amount claimed in the petition, to wit, $20,000; but if you find that said Holliday was killed by the defendant, and that said Holliday was negligent, as above defined, and that his negligence contributed to his death, in that event the plaintiffs cannot recover, even if the defendant was negligent, or if both were negligent and his death was the result of the concurring negligence; in that event, plaintiffs cannot recover, and you will find for defendant.

"In determining the question as to whether the defendant was negligent or not, you are to take into consideration all the evidence offered in this case. In determining the question as to whether De Witt C. Holliday was negligent, you are likewise to consider all the testimony offered in this case affecting his knowledge of the use of said yards, the passage of trains, and the dangers to be apprehended in crossing the same; also that it was dark, and to use reasonable care under the circumstances; or if you find from the evidence that De Witt C. Holliday was standing near the track upon which he was afterwards killed, and after the engine had approached him so closely that it could not be stopped, and he unthoughtedly or intentionally stepped upon the track, and was killed, in that case the plaintiffs could not recover. The measure of damages in this case, if you find for the plaintiffs, would be in such sums of money as a present payment in cash would fairly and reasonably compensate them for the loss of De Witt C. Holliday; but in that connection you are instructed that no recovery can be had for mental anguish or the loss of his association, but it is based purely upon the amount of money that he would have probably earned during the remainder of his life, taking into consideration his age, and you will not consider any other element of damages."

The first assignment of error was to the refusal of the court to direct a verdict for defendant. The other assignments were as follows:

"Second assignment of error: The court erred in its main charge in giving the following: 'If the jury find that there is no evidence to show whether De Witt C. Holliday did or did not look and listen for approaching engines, cars, and trains when about to cross the defendant's track, where he was killed, in that event the law would presume that he did so look and listen when about to cross the track,'—because the same is not applicable to the evidence, and the law presumes nothing, and the charge was misleading to the jury, as there were eyewitnesses to the killing, as shown by the evidence, and it was the duty of the court to charge the law on the evidence, and not to instruct the jury to inquire if there was or was not any evidence on any particular issue or phase of the case.

"Third assignment of error: The court erred in its main charge to the jury, as follows: 'If you find from the evidence that an ordinance of the city of Texarkana, Tex., was in force at the time deceased, Holliday, was killed, required the defendant, in connection with the St. Louis, Arkansas & Texas Railway Company, to keep and maintain a watchman, during all hours of the day and night, at the intersection of Oak street with said railways, within the limits of Texarkana, and that said ordinance further required said railways to maintain an electric arc light at the intersection of the said Oak street with said railways, and you further find that said railway company failed to keep a watchman as required, or failed to erect and maintain such electric arc light at the intersection of said Oak street with said railways, as provided by said ordinance, and that no watchman was kept, or that no electric light was maintained, as provided by said ordinance, at the time De Witt C. Holliday was killed, in that event the law authorizes you to infer negligence on the part of the defendant railway company,'—because such failures, upon which there was a conflict in the evidence, were only circumstances from which, on the whole case, the jury might infer negligence, and the same was too broad and misleading to the jury.

"Fourth assignment of error: The court erred in refusing to give the following special instructions to the jury: (2) 'If you believe from the evidence that the deceased, De Witt C. Holliday, stopped north of track No. 24, in the yards at Texarkana, and waited for the train to back up said track with cars, and that as the engine passed or cleared Oak street crossing pushing said cars, that then the deceased walked to track No. 23 or 21, on which he was killed, and that just as he stepped on said track the tender of the engine No. 48 was in close proximity to him, and almost instantly killed him, you will find for the defendant company, even though there was no electric arc light burning, and no bell was being rung on the engine, and no whistle had been sounded by it, and no watchman was on duty at the time of night when Mr. Holliday was killed,'—because this is the law applicable to this case, and should have been given by the court.

"Fifth assignment of error: The court erred in refusing to give the following special charge: (3) 'If you believe from the evidence that the deceased, De Witt C. Holliday, was well acquainted with the yards, and the operations of trains therein, and that it was dark at the time of the accident in which he lost his life, then a higher degree of care than ordinary devolved on him to look out for his safety, and the plaintiffs have the burden to establish, by proof, that he was exercising such high degree of care when he stepped upon the track just before he was killed,'—because the deceased's knowledge of the yards, operating of trains, and familiarity with the surroundings required him to be constantly on the lookout for danger, and, knowing the yards to be dangerous, should have exercised a higher degree of care for his own safety than would be required of a stranger, or one not so well acquainted therewith.

"Sixth assignment of error: The court erred in refusing to give the following special charge: (4) 'If you find from the evidence that the deceased by his acts in stepping on the track in close proximity to the engine and tender which killed him, without looking or listening before he stepped on said track for approaching engines and trains, was guilty of contributory negligence,—that is, that his said act put in motion a train of causes which led to his death,—you will find for the defendant.' The refusal to give this special charge was error, because the act of the deceased in so stepping upon the track was contributory negligence, and the accident could not have been avoided if the engineer had

seen him, and the defendant owed him no duty until the engineer had knowledge of his perilous condition.

"Seventh assignment of error: The court erred in refusing to give the following special charge: (5) 'If you believe from the evidence that the deceased went upon the track at the Oak street crossing, the duties of the deceased and the defendant were mutual and reciprocal, and the deceased did not forfeit all right of protection by going on the track, yet the plaintiffs could not recover unless they prove that the operatives in charge of said engine could have stopped the engine, and avoided the accident after they had observed him on the track in a place of danger.' The refusal of the court to give this special charge was error, because the deceased was constantly at work in the yards, and familiar with the environment, and not expected by railway operatives to step directly in front of a moving tender, and the defendant owed him no duty until its operatives observed him in a place of danger, or knew him to be in peril.

"Eighth assignment of error: The court erred in refusing to give the following special charge: (6) 'If you find from the evidence that Orland Holliday is twenty-two years of age, you will find against him in your verdict, even if you should find for the rest of the plaintiffs.' The court erred in refusing to give this special charge, because the undisputed evidence showed that Orland Holliday was over twenty-one years of age at the time of the trial, and the suit being brought by his mother for herself and her minor children, he being then a minor."

T. J. Freeman and W. T. Armistead, for plaintiff in error.

Oscar D. Scott, Paul Jones, and Sam S. Solinski, for defendants in error.

Before WHITE, Circuit Justice, McCORMICK, Circuit Judge, and NEWMAN, District Judge.

PER CURIAM. The paragraphs of the general charge to which exceptions were taken and on which error is assigned, considered as separate propositions, may be somewhat subject to criticism and require qualification; but considered in their relation to the whole charge, and to all the proof in the case, they do not present such misdirection to the jury as did or could have misled them in their application of the whole charge to the whole proof. The charges requested and refused, as far as they were sound and not calculated to mislead by giving undue prominence to certain features of the proof, are sufficiently embraced in the general charge of the court. Upon a full consideration of the whole case, we are satisfied that it was fairly submitted to the jury under sufficient and proper instructions, and that the judgment of the circuit court should be, and it is, affirmed.

SMITH v. McINTIRE et al.

(Circuit Court, N. D. Ohio, W. D. July 15, 1897.)

1. WILL—CONSTRUCTION—TRUST IN LANDS—POWER TO SELL TO PAY DEBTS.

A will required that the debts of the testator should first be paid, and then proceeded: "I give, devise, and bequeath to my wife, in lieu of her dower, the plantation on which we now reside, * * * during her natural life, and all the live stock of every description; also all the household furniture and other items not particularly mentioned and otherwise disposed of in this will, during her natural life, as aforesaid; she, however, first disposing of a sufficiency thereof, to pay my just debts as aforesaid. And at the death of my wife all the property hereby devised or bequeathed to

her as aforesaid, or so much thereof as may then remain unexpended, to my children, and their heirs and assigns forever." The wife was then named as executor. *Held*, that the will conferred on the wife, independently of her office of executrix, a trust in the land, with power to sell it to pay debts, and that, she having sold it, after the lapse of 50 years, and in the absence of proof to the contrary, the presumption would be indulged that she exercised the power for that purpose.

2. SAME—MARRIAGE OF EXECUTRIX—VACATION OF OFFICE.

The Ohio statute in force in 1846, providing that, whenever a single woman appointed as executor should marry, the marriage should vacate her office of executor, was probably not applicable to a wife who was nominated as executor in her husband's will, and who becomes executor, and a single woman, by his death.

3. STATUTE OF LIMITATIONS—CLAIMS AGAINST ESTATE—PRESUMPTION.

After a lapse of nearly fifty years it will be conclusively presumed, in favor of bona fide purchasers for value of real estate sold to pay the debts of an estate, that such debts were not barred by the statute of limitations in force at the time, if it appears that they might have been within any of the exceptions in the statute.

4. ESTOPPEL—DEVISEES OF REMAINDER—DELAY.

Where a testator devised a life estate in real property to his wife, with remainder in fee to his children, all of whom were quite young, and the widow, in the exercise of a doubtful power to sell such real estate to pay debts, conveyed the same in fee simple, remarried, and with her husband and children moved to a distant state, where she remained about 40 years, neither the long delay, inaction, nor the fact that they participated in the distribution of their mother's estate, will estop them from claiming such real estate 10 years after their mother's death, the statute of limitations in such case allowing 21 years.

5. CONSTRUCTION OF WILL—PURCHASERS UNDER POWER—PRESUMPTIONS AFTER 50 YEARS.

Where the construction of a will and the existence of a power under it are brought in question, and found to be doubtful, if a challenge comes after 50 years, the benefit of every possible doubt will be given, and every reasonable presumption will be indulged, in favor of bona fide purchasers for value of lands sold and conveyed by the trustee in the exercise of such doubtful power; and, unless the right of the plaintiffs to recover, and that no such power existed, clearly appear from the language of the will, titles thus acquired will be upheld.

Action at law by A. Lee Smith against John H. McIntire and others to recover real estate. On motion to direct verdict for defendants.

Hurd, Brumback & Thatcher, for plaintiff.

Potter & Emery, for defendants.

HAMMOND, J. Lord Coke observed that "wills, and the construction of them, do more perplex a man than any other learning; and, to make a certain construction of them, this excedit jurisprudentum artem. But," he adds, "I have learned this good rule: always to judge in such cases as near as may be and according to the rules of law." 3 Jarm. Wills, 699; 2 Bulst. 130. Certainly no will could more perplex a man than that we have before us for construction. It is susceptible of at least three different interpretations. It is as follows:

"I, William L. Smith of Williams County, and State of Ohio, do make and publish this my last will and testament in manner and form following, that is to say: first, it is my will that my funeral expenses and all my just debts be fully paid. second, I give, devise and bequeath to my beloved wife, Margaret, in lieu of her dower, the plantation on which we now reside situated in

Town seven, North of Range four East in section eight, containing eighty acres more or less, during her natural life; and all the live stock of every description; also all the household furniture and other items not particularly mentioned and otherwise disposed of in this will during her natural life as aforesaid; she however first disposing of a sufficiency thereof, to pay my just debts as aforesaid.

"And at the death of my wife, all the property hereby devised or bequeathed to her as aforesaid, or so much thereof as may then remain unexpended, to my children and their heirs and assigns forever. And lastly, I hereby constitute and appoint my wife to be Executor for this my last will and testament, revoking and annulling all former wills by me made, and ratifying and confirming this and no other to be my last will and testament.

"William L. Smith [Seal].

"Signed and sealed this seventh day of December, eighteen hundred and forty-three, in presence of

"John Rings.

"Rachel C. Rings."

The will is neatly written, evidently by a man of education, grammatically expressed and punctuated, barring some indistinct and doubtful marks of punctuation. It was evidently written by the testator himself. Analyzing the document by its sentences, phrases, and paragraphs, the structural arrangement is quite clear. First. In the ordinary form, he directs his debts and funeral expenses to be paid. Second. He devises the 80 acres of land on which they lived, which is in controversy in this suit, to his wife for life. Then he disposes of his personal property, particularly mentioned, and in general words, all his other estate, by giving it to his wife, either for life or absolutely, as it may be interpreted; following which he writes the words of such great concern in this litigation, which again refer to the payment of his debts. Then, by a separate paragraph, he blends the real and personal property in a devise and bequest of the remainder in the whole to his children, and appoints his wife executor. It may be doubtful, on an inspection of the original will as to punctuation and capital letters and spaces, whether there are three paragraphs or only two; but it is certain that the disposition made of the real and personal property, so far as it relates to the interest of the wife, and her power over it, is made in a single paragraph and a single sentence, and it may be that the opening provision for the payment of his debts and funeral expenses is also embodied in the same paragraph, and even in the single sentence; and what might have been separate items, paragraphs, or sentences, and ordinarily would be for clear expression, are consolidated by the use of commas and semicolons, thereby very much confusing the meaning of the testator, when sought under the rule of noscitur a sociis, because it is difficult to tell just what association the words and phrases were intended by him to have. He very clearly gives his wife only a life estate in the land, and no larger estate whatever. Whether he gives the personal property to her absolutely, or only for life, or part of it absolutely and part of it for life, is very doubtful, when we look alone at the words by which he gives it to her. If, however, that personal property were in litigation, and it became important to resolve that doubt, it would be resolved, by the paragraph giving the remainder to his children, as giving her only a life estate. The importance of

the phraseology in respect of this is now confined to the association of these words with the great struggle over the other words, "she however first disposing of a sufficiency thereof, to pay my just debts as aforesaid." Whether she took a life estate in the personal property, or took it absolutely, whatever was left at her death "unexpended" goes to the children. But, inasmuch as the words relating to the disputed power are so intimately associated in juxtaposition to the bequest to her of the personal estate, the contention of the plaintiff is that the words, "not particularly mentioned and otherwise disposed of in this will during her natural life as aforesaid," are all to be taken together as an adverbial or descriptive expression of the meaning of the words immediately preceding them, namely, the words "and other items," thus resulting in an absolute bequest of the entire personal property to the wife, with the power of disposing of "a sufficiency thereof" to pay his just debts. It must be conceded that there is great force in this suggestion, particularly when we look at the condition of the family in 1843, when this will was written, and nearly three years afterwards, when the testator died, located almost in the wilderness, upon a farm in the woods, which they were opening and establishing, and under circumstances where one of the old people examined as a witness in this case, living a neighbor to them at that time, says that the chances of making much indebtedness did not exist; and when we consider that he was buried in a coffin made at home, and carried to his grave in the farm wagon, it is probable that neither funeral expenses nor debts, under such circumstances, could involve a very large sum of money, and it is not impossible that he considered his personal property sufficient to pay his debts, and had no thought of creating a power to sell his land for that purpose. Nevertheless, while the court will look at the circumstances under which the testator makes his will, such as the state of his property and of his family and the like, and will be guided by the principle of interpretation by which clauses that compose a complicated sentence are applied to the objects to which they properly belong, as ruled in Boyd v. Talbert, 12 Ohio, 212–214, this kind of parol testimony, even where the will is ambiguous, is not controlling, and will not be allowed to override a contrary intention, fairly manifested by the whole will itself. 3 Jarm. Wills, 705, rules 8–11; Smith v. Bell, 6 Pet. 68; Blake v. Hawkins, 98 U. S. 315–324. Why should we take the words, "she however first disposing of a sufficiency thereof, to pay my just debts as aforesaid," which is the final clause in the sentence and paragraph relating to the wife and her interest and power over the property, and which comes after the last semicolon in the sentence, and, going back, stop at the next preceding semicolon, thereby limiting her power of disposition to the household furniture, which ordinarily a testator does not desire to be applied to the payment of his debts, but rather wishes to keep in the continued use of the household, and such "other items" as are disposed of in that preceding clause? The proof here does not show what these "other items" may be, and it is altogether conjecture to say that there was anything more than a farm wagon, plows, drags, a small library, and such like. Besides, this narrowest construction that is possible under this will

would leave out of her power of disposition "all the live stock of every description," which is the next immediately preceding clause of the sentence between two semicolons. And if we may pass the semicolon, and take that into the power of disposition, why may we not pass the next semicolon, and take in the clause giving her a life estate in the land, thereby extending the power of disposition to pay debts at least to her life estate in the land and the live stock, which, it is suggested, she had absolutely, and not as a life estate? But is it a fair and reasonable construction of this will that there should flow from the husband's pen a provision for his wife's comfort and sustenance during her life, and from the same penful of ink a direction that she should sell that, and nothing more, to pay his debts? It is true that there is much force, as said before, in the suggestion of the conditions surrounding the family, that the debts were small. But, great or small, would a husband, providing for the sustenance and comfort of his wife, so cut down her allowance, and particularly when that which he gives is expressed to be in lieu of her dower, which the law would exempt from any charge for these debts, great or small? Besides, the proof is not wholly wanting that the debts may have been considerable in relation to the value of this whole property. In the first place, there is what I will call the "freak" bond, which no one seems to be able to satisfactorily explain, that she gave on the 17th of August, 1848, about a month before she commenced the sales of this property. That bond is in the sum of $1,600, and is in the form required by a statute then existing in Ohio, allowing a residuary legatee to take the property and give a bond to pay the debts, yet it is absurd to suppose, on the face of this will, that she was in any sense a "residuary legatee." There was also another statute of Ohio, cited from Curwen, allowing heirs, devisees, and distributees to give a bond, and take the property, and pay the outstanding debts. It seems to be conceded that the bond was not given under this statute, and nobody seems to have any explanation now, after nearly 50 years, of the presence of this bond in the administration record, beyond the barest conjectures of counsel. Yet, inasmuch as there are no specific legacies to pay under this will, and whatever gifts of personalty there are were to herself, it is a fair inference that this bond was given to quiet the clamors or apprehensions of creditors, to some considerable amount, in relation to the penalty in the bond of $1,600. More than this, we have the implication, arising out of the fact that there was a wife and an executrix, charged with the duty of paying the debts, engaged in the business, a month afterwards and subsequently, of selling off this property under the assumed powers of this will, or at least with no other title to convey except her own life estate in the same property, which, naturally, she would not desire to appropriate to the payment of her husband's debts, if otherwise she could avoid it. It is true that this implication that she was honestly discharging her duty as wife and executrix in carrying out her husband's intentions may be confronted with another implication,—that she was dishonestly scheming, in conspiracy with her second husband, to deprive her children of the benefit of their remainder interests, and appropriate the property to their own use, and that she was yielding to

the temptation to sell the property off in town lots, and get the money, and remove to another country, which she certainly did. But after 50 years, and the ravages of all that time upon the lives of witnesses and other evidence, would a court adopt the implication of the dishonest purpose rather than the implication of the honest adherence to fiduciary duty? Certainly not. From this anomalous bond and the fact of sales we have at least sufficient proof to counterbalance that of the circumstances of the family so forcibly insisted upon by the plaintiff's counsel, and we come at last to the cardinal rule of construction that in such a counterbalancing we shall adhere to what intention we may reasonably find within the four corners of the will.

There is a more reasonable construction of this will within the four corners of it, and that is to take the words, "she however first disposing of a sufficiency thereof, to pay my just debts as aforesaid," and carry them back over all the semicolons to the very beginning of the will, and then towards the other end of it, to the clause providing the remainder for his children, and the last item appointing his wife the executrix, and to so interpret it that it was his intention to charge his debts upon all his property, both real and personal, mentioned in the will. The words "a sufficiency thereof" will then comprehend all the real and personal property, and the words "to pay my just debts as aforesaid" will go back to the beginning clause, directing that, "first, it is my will that my funeral expenses and all my just debts be fully paid," and leave the devise to her and the bequest to her, whatever they be, and the devise to his children and the bequest to his children, whatever they be, to take effect in actual enjoyment only after she has "first" disposed of "a sufficiency" to pay the debts. Whether this power belongs to her as an individual to whom, as a wife and devisee, a special trust has been confided, or as a wife to whom the general trust of being the executor of the will has been confided, would ordinarily, in practical effect, at least, be unimportant. But we shall presently consider its special importance in this case, and for the present will pass that consideration. It would take days, if not weeks, of time, to go carefully over all the authorities that have been cited in this argument, and which have been sent to me in supplemental briefs since the argument closed, to justify this construction by the citation of authorities. I should like to do this, but the time is not at my command, nor is it necessary. One has only to read very superficially the text-books to see how much litigation has arisen, and what a contrariety of opinion has been expressed in litigation, about innumerable wills, almost as numberless as the sands of the sea, upon the construction whether or not any given words constitute a charge of the debts upon the real estate, or create a power in some donee to sell the real estate to pay the debts. In the case of Fenwick v. Chapman, 9 Pet. 461, the words of the will were these: "And after my debts and funeral charges are paid, I devise and bequeath as follows,"—and they were held by the supreme court of the United States to create a charge upon the real estate in exoneration of a manumitted slave. And this upon the authority of cases cited with such phrases as "after paying debts," "my debts and legacies being first deducted, I devise all my real and personal estate to

J. S.," and the like; and the court quotes approvingly from one of the cases that "very little is sufficient to amount to a charge upon real estate." Moreover, it cites approvingly Trot v. Vernon, 2 Vern. 708, where a testator willed and devised that his debts, legacies, and funeral should be paid in the first place, and then devised his lands to his sister for life, with remainder to her issue, remainder over, and made the sister executrix, and it was decreed that the lands be charged with the debts. Yet, more, the court cites approvingly Earl of Godolphin v. Pennock, 2 Ves. Sr. 270, where it was held that real estate was charged for the payment of debts under a general clause in a will that debts should be first paid and satisfied, and it disapproves of the contrary doctrine in Davis v. Gardiner, 2 P. Wms. 189, and adverts to the fact that many cases, both before and after these decisions, could be found either way. There can scarcely be a doubt upon such a decision as this by the highest court in the land that it is conclusive that this will should be construed to charge the testator's debts upon this real estate. Almost as conclusive is the case of Potter v. Gardner, 12 Wheat. 498, where the opinion was by Chief Justice Marshall, and the language of the will was this: "I give and devise to my beloved son, Ezekiel W. Gardner, and his heirs forever, two-thirds of my Ferry farm, he paying all my just debts out of my said estate,"—in which case it was also held that purchasers, who pay the purchase money to the person authorized to sell are not bound to look to its application, as to which counsel in this case for the defendants cite abundant authority, to which I need not here refer. It is also thoroughly well settled by the cases and authorities cited by the defendants' counsel that this rule that the purchaser is not bound to look to the application of the proceeds extends to and comprehends a presumption that there are debts existing to support the exercise of the power, even where none in fact exist, upon the plain ground that the action of the trustee or executor, whichever the case may be, is conclusive in favor of bona fide purchasers for full value, who are not in any manner engaged in a fraudulent conspiracy with the trustee or executor charged with such a duty, to defraud the remainder-men, the ultimate owners, whose estates are subjected under the power to the charge of the testator for the payment of his debts in the first instance. Elliot v. Merriman, 2 Atk. 41, 1 White & T. Lead. Cas. Eq. 109, note; Hill, Trustees, 506, and note; Story, Eq. Jur. §§ 1129–1131, and cases there cited.

That the power contained in the will was sufficiently executed by the deeds which she made without reference to the will on the face of the deeds is abundantly established by the authorities, and conclusively by the supreme court in the case of Warner v. Insurance Co., 109 U. S. 357, 3 Sup. Ct. 221, in which the ancient English rule to the contrary is disapproved, as it also is in the case of South v. South, 91 Ind. 221, where the authorities are carefully reviewed. See, also, Lee v. Simpson, 134 U. S. 572, 590, 10 Sup. Ct. 631; Batchelor v. Brereton, 112 U. S. 396, 5 Sup. Ct. 180. Here we have in the proof outside of the deeds the facts established by the evidence that the prices paid for the lots were the values of the entire fee, and not alone of the life estate, which was much less; and we have the further fact that the

parties at the time acted consistently with a conveyance of the whole fee, and somewhat inconsistently with the idea of a conveyance only of a life estate. The grantors moved entirely away, and gave no attention to the property such as their fiduciary relation would have required if they had left behind only life tenants; and the grantees proceeded to improve and hold the property as if they owned the entire fee, and not for the life estate of a woman growing old. There cannot be the least doubt that the grantor intended to convey the entire fee under the supposed authority she had under the will. Besides all this, the language of the deeds and their warranties are not the language used in the conveyance of a life estate, but such as is always used in the conveyance of a fee. Under such circumstances the authorities we have just cited preclude the idea that the conveyances should attach to and convey only the life estate which she held.

Many very perplexing and interesting questions raised in the progress of this case on the pleadings, on the evidence, and upon the technical distinctions that have been taken in the law for the construction of wills and the execution of powers have been ably argued by counsel, and I only wish I had the time to carefully review and advert to them in their bearing upon the soundness of this judgment; but that is impossible, and the rulings that have been made during the trial must suffice for the present. It is necessary, however, that we should revert to the distinctions that were taken between a power conferred upon an executor qua executor and one acting as a trustee beyond the office of executor. As before remarked, there would be, ordinarily, for the purpose of this judgment, no practical difference between the two. I have been inclined to think that possibly the technical construction of this will would be that it was the intention of the testator to confer on his wife no other power than that ordinarily conferred on executors in the payment of debts by specific directions to apply property to their payment, the title to which has descended to the heir, or been devised to the heir, and has not been devised to the executor, as this was not, so far as relates to the fee, after the termination of her life estate. But, having reached the conclusion that this will was not the bare and naked devise of a power to sell the land to pay the debts, but was a direct charge upon the land itself, it has seemed to me that, without the words used, the power of the executor to sell it for that purpose might possibly be implied from the language and circumstances of this will. There are many nice technical distinctions upon this subject, arising out of the difference between the devise of the power and the devise of a title and the creation of trusts, that are very perplexing and complicated. But, notwithstanding these, I am satisfied that under the laws of Ohio any executor qua executor might have exercised a power to sell this land to pay the debts. Possibly it could not have been done without the aid of a court of equity or a court of probate decreeing the execution of the trust and the subjection of the property to the lien created by the will. But if any executor, without such aid, should assume to sell the land for the payment of the debts, by direct conveyance, after the lapse of 50 years, it is my belief that neither a court of equity nor a court of law would disturb a title acquired under such defective

execution of the trust, where it appeared that the purchasers were acting bona fide, and not in fraud of the remainder-men, and have paid a fair consideration for the property. However this may be, upon considerations of public policy to be presently adverted to, in a case of even doubtful construction as to the lodgment of the power, a court of law as well as a court of equity would construe it to exist aliunde the office of executor, and to reside in the donee independently as a trustee. The language of this will is broad enough to create such a trust outside of the office of executor, when you have once reached the conclusion, as we have, that the will charges the debts upon the land; and therefore I am prepared to hold, for the purposes of this case, that the wife and life tenant here appointed as executor also was invested in her own right with the power of sale to pay debts, and not by virtue of her office of executor.

There was a statute in existence at the time of these transactions, cited from Curwen, which declared that, whenever a single woman appointed as executor should marry, the marriage should vacate her office as executor; and the decisions under that statute show that such a marriage annuls her power as executor. It may be suggested whether this is applicable to a testator's wife, appointed executor by his will, who becomes executor and a single woman by the very death of the testator himself. It may be that the reason of the statute as shown in the decisions would apply only to a woman who was single at the time she was selected as executor, it being presumed that the testator, having selected a single woman to be his executor, did not intend that she should be executor when that condition was changed. But, if this testator had intended such a result, he could have expressed it in the will, and not relied on the statute at the moment when he selected his wife, a married woman, to be his executor when she became his widow. I am not satisfied that the statute at all applies to a wife who is nominated as executor in her husband's will, and therefore that the office of executor in this instance was vacated when the widow married Miller, her second husband, which she did before the most of these lots were sold. But it is sufficient to say that, if we have properly treated her as a trustee in her own right to exercise this power, then this statute would not apply. 1 Curw. St. p. 714, § 28; Weyer v. Watt, 48 Ohio St. 545-549, 28 N. E. 670; In re Fagin, 19 Wkly. Law Bull. 149; Pollock v. Hooley (Sup.) 22 N. Y. Supp. 215; Veazie v. McGugin, 40 Ohio St. 365; Mott v. Ackerman, 92 N. Y. 539.

It is also necessary to refer to the question made upon the statute of limitations of four years, in existence at the time of these transactions, whereby claims against an estate were barred if not presented to the executor or administrator and allowed within four years from due notice published. It is argued that, inasmuch as no sales of this property to pay debts were made for two years after the death of the testator, and the largest part of the property was not sold for more than four years after the death of the testator, the power to sell land to pay debts no longer existed after that statute had barred the claims. It seems to be conceded by counsel for the defendants that if, as a matter of fact, all debts had been barred

by the statute of limitations, the power to sell would no longer exist; but they say that the exceptions to the statute and the law of Ohio in relation to this subject was such that, if a claim was presented to the administrator or executor within the four years, and was allowed, or was by him rejected, or if the claim did not accrue and fall due within the four years, it is not affected by the bar of the four-years statute, and may be, if presented or allowed or sued for at any time before the final exhaustion of the assets; and therefore it is argued, that the presumptions in favor of bona fide purchasers for value, without any participation in fraudulent conspiracies, attach in this case, and in their favor, and it will be conclusively presumed either that the debts, if they existed, were presented to the administrator, and acknowledged or allowed, or that they were not due within the four years, or that they were sued for and put in judgment, and that under the authorities before cited, whether these be facts or not, they would be conclusively presumed in favor of any such purchasers as are above described, everybody being bound by the exercise of the discretion and determination of the trustee that the conditions did exist requiring an exercise of the power, unless it shall appear that there is some fraud between the trustee and those who have purchased the property. We think this is a complete answer to the statute of limitations of four years against the claims against executors.

The defendants have relied with great eagerness and earnestness upon an estoppel upon this plaintiff to recover this possession by reason of the fact that he and his ancestor and the co-heirs of his ancestor have stood by for so many years without complaint, and acquiesced in the sales that had been made by their mother. This great lapse of time is accounted for by two noticeable conditions. In the first place, the life tenant lived for 40 years, nearly, after the death of the testator; but while the life tenant was alive the possession was not adverse to the remainder-men, and they need not sue. Then, again, the remarkable fact is that the law of Ohio gives as much as 21 years to the rightful owner to bring an action to recover his possession of real estate. This plaintiff, and those interested with him, waited for more than 10 years after the life tenant died before this suit was brought. But, if we are to pay any attention to the statute of limitations of Ohio in that behalf, and not to paralyze it by this doctrine of standing by and acquiescence, I cannot see why one having the right to bring an action cannot bring it at any time within the 21 years; and it does not seem to me that the statute can be shortened by any misapplication of the doctrine of estoppel, although a great many of the words and phrases of the text writers and the cases in dealing with the doctrine of estoppel might be broad enough to hold that such a result would ensue. In this case, when the sales first commenced, the children of the testator were all under age, and at the first sales were very much under age; and, being infants, the doctrine of estoppel could not apply to them, at least until after they became of age, and began to look out for themselves. When these children became of age, the mother had removed away from this property to another

farm in the state of Michigan, quite distant from the property, and there is no proof here to show that they ever had any satisfactory knowledge of the existence of their right to sue. And, if they had, what should they do? Should they come down to West Unity, to the purchasers, and solemnly warn them that they had bought their remainder interest without authority, and that they would be held responsible for it? To hold them estopped for not doing this is to simply say that they would be bound to bring some suit during the life of their mother, the life tenant, or immediately after she died, within a less time than the 21 years allowed by the statute of limitations of the state of Ohio. The essential element of an estoppel in pais, that these purchasers and defendants acted upon and were prejudiced by, or in some way injured by, that which their heirs at law did, is wholly wanting in this case; and I see nothing in the proof even tending to show that they are estopped by any silence that they have indulged in, with reference to the sale of their interest by their mother. The proof is too vague and indefinite to raise any such estoppel on that ground.

It is also urged that they are estopped by reason of the fact that when their mother died her property in the Michigan farm, or whatever she had, was divided between these heirs at law and their half-sister, the child of the Miller marriage. The argument is that the Michigan farm and the property held by the mother at the time of her death were purchased with the proceeds of the West Unity lands, which had been sold by her under this will, and that by taking under this division of her estate these heirs at law have acquired or come into possession of the proceeds of the original sales, and have thereby estopped themselves to deny the title of these purchasers by acquiescence in the sale, and receiving a part of the purchase money in this indirect way. In the first place, there is no proof that the property which she held at the time of her death was purchased with the proceeds of the West Unity farm. It may be an inference to be drawn from the condition of the family and the relation of the times to each other. But, at least, it is only conjecture. If a bill were filed to establish a resulting trust in the Michigan property held by the mother at the time of her death, it would utterly fail on the proof we have here, because of the fact that it would not show clearly and definitely that the original purchase money did go into that identical property. Again, it is suggested that, if this be true, yet, inasmuch as the mother had made a warranty deed to these purchasers, guarantying the title which she had conveyed to them, the purchasers would have a debt against the mother, upon eviction, for a breach of the warranty; and that, these heirs at law having taken the property which the purchasers might have subjected for a breach of their warranties, therefore there is an estoppel. This appears to me, with all due deference, far-fetched, and, like the other suggestion just referred to, must fail for the want of any sufficient proof to show that there was anything already liable to any breach of warranty. In fact, there could be no debt until after there was an eviction, and there had never been any eviction; and to say that these heirs at law were to then and

there determine beforehand that their mother's estate would be liable for a breach of her warranty if they recovered their West Unity lands, and that they must, therefore, repudiate and reject all share that there was in her estate, would seem unreasonable. It may be that these Michigan lands were largely the result of their own industry and work during their minority and afterwards, and there is some proof that one of them gave his bounty money to the part payment of the Michigan farm; and the most that can be said is that there are ingenious suggestions of the existence of conditions that might work an estoppel if they were true. There is no sufficient proof of the facts upon which the estoppel is based. Therefore I lay out of the case the defense of estoppel; and, even if it were necessary to submit it to the jury, I should feel constrained to say to the jury that there is nothing in the case even tending to show that there was any act or conduct of these parties to which the purchasers could take exception, by way of acquiescence or sharing in the proceeds, and certainly no proof to show that any of these purchasers had ever been injured by a reliance upon the conduct of any of these heirs at law prior to the time that they brought this suit.

But, while this is true so far as it related to the defense of estoppel, there is a broad principle of public policy, upon which both courts of law and courts of equity proceed, which gives to this delay some effect in spite of the long time allowed by the statute of limitations for the bringing of a suit, and the great lapse of time which has taken place between these transactions and the bringing of this suit,—a period of nearly 50 years. This principle finds illustration in the case of Carver v. Jackson, 4 Pet. 1, 83, and in another case depending upon the same title, and which is substantially the same, the case of Crane v. Morris, 6 Pet. 597–610, where, in aid of a title like these defendants have, it was held as part of the law of evidence that after the lapse of 70 years the bare recital of a lease in a deed, or, as Mr. Justice Story says, without any such recital, the original existence of a lease would be presumed in favor of the defendants, conclusively presumed, and neither its loss, nor its original existence, nor its contents need be proved; somewhat like the old common-law presumption of a grant after 20 years. It also finds illustration in the case of Clarke v. Boorman's Ex'rs, 18 Wall. 493, where Mr. Justice Miller held that, outside of a bar of the statute of limitations, a delay of 40 years before suit is commenced to redress a wrong done to the plaintiff's father, during 22 years of which time the right of his child to bring the suit was without obstruction or hindrance, a court of equity would not tolerate a suit to redress the wrong. Now, it is to be remembered that a court of equity, not being bound by the statute of limitations, but proceeding upon doctrines of its own in regard to laches and the lapse of time, has a larger scope for the exercise of this rule of public policy than a court of law could have, and expressions will be found in many of the cases which say that, notwithstanding the technical doctrine of laches does not apply, the court will nevertheless give effect to the fact that the lapse of time has destroyed the evidence of title and of facts and circumstan-

ces which would protect it. And so I think that in a case like this, where the construction of a will and the existence of a power under it are brought in question, and found to be doubtful, if a challenge comes after 50 years, the court should be inclined to give the benefit of every possible doubt in favor of the defendants in possession, if it appears that they paid a fair price for the property, and were not themselves fraudulent co-conspirators against him who claims to be the rightful owner. Every doubt should be resolved in their favor, and such a possession and such a title will not be disturbed by any construction of the document which is in itself doubtful, but the right of the plaintiff to recover upon the language of the will must be beyond all question clearly established by the language itself. Such is not this case. Now, it is true that this doctrine may result in depriving heirs at law of their title, who in their tender years were deserted by their trustees, and were wronged by the action of those who should have protected them and their title. But when all is said that can be said in this direction, the fact remains in this case that the father of these children trusted their mother with this power. He trusted her in their behalf as well as his own, and he had a right to trust her. He had the right of selection of some one to do what he desired to have done under this will; and, if she has broken her trust, and deserted their interests, there is no reason, either in a court of law or a court of equity, why they should not suffer from the breach rather than these defendants, who, like their father, relied upon her fidelity and her honest action, and paid her a fair price for the property they got, and which they have held unquestioned for 50 years; and in a choice between the two as to which shall suffer, there is no reason why the plaintiffs here should not rather suffer than the defendants. If it were entirely clear upon the language of this will that there never was any trust created by the father, and never any power given by the testator, this reasoning would not apply, and these defendants would suffer, because the will itself would indicate to them that they were buying a worthless title; but where, when they go to the will itself, there is language written by the father in his own words and in his own hand upon which a doubt arises,—such a doubt as that we have dealt with in the decision of this case,—and they, along with the trustee, resolve the doubt in favor of the existence of the power, and proceed to act, if they have not engaged in a fraudulent design and conspiracy to injure the remaindermen, and pay a fair price, and remain in possession unchallenged for 50 years, it does seem to me the doubt about the will, in pursuance of the public policy referred to, should be determined in their favor.

As somewhat pertinent to this observation and the possible usefulness in this case, I may refer to the fact that this principle, as in the cases just cited from the supreme court of the United States, finds illustration in the law of evidence as applicable to the old records which have been introduced here. I think, in pursuance of that principle, it will be, after 50 years, conclusively presumed that the executor under this will qualified, although her oath of qualification is not to be found; that she gave a bond, although the bond

is not to be found; that she received letters testamentary, although the letters are not to be found; and that she had all the authority to pursue in a rightful and regular way, and did pursue, all the necessary requirements of the law to enable her as executor to administer whatever trust devolved upon her under this will qua executor. The old docket entries and journal entries commencing in 1846, at the time Smith died, and all the ancient entries in the dockets and the records associated with these pertaining to Smith's estate, are sufficient recitals, like that of the recital of the lease in the cases just cited, upon which to found the presumption of the existence of these documents, which have been lost by the ravages of 50 years; and, without these entries, I do not know but what it would be conclusively presumed in favor of the defendants that she was executor, and pursued in a regular way the requirements of the law in the administration of that trust. Taking all these things together, notwithstanding the perplexities and complications and technicalities of this case, I have reached the conclusion that on the grounds of public policy, if not otherwise, this will should be construed in favor of the title of the defendants, and this is the ground of my judgment. Of course, I recognize the fact that such a course of reasoning might be misapplied to the injury of those who ought to recover that which has been taken from them; but courts and juries exist for the purpose of administering the law in such cases as best they can, and the intelligence and justice of the courts and juries must be relied upon to avoid any misapplication of these rules of construction.

I have found one case of which I have not any note where it was held that, if it should appear that the plaintiff's suit was a speculative one, the will would not be construed in his favor. It appears here that this plaintiff has acquired the rights of his co-heirs by alleged purchases, which turn out to be without any consideration paid on his part, but only an understanding between him and his co-heirs that, if he recovered anything, they should get something; and on all of the proof as to the method by which he has acquired the right to sue for them there seems to me to be a good deal of speculation on his part, justified, as they say, by the fact that they were themselves too poor to incur the expense of bringing a suit, and the claims were transferred to him because he was willing to assume the burden of the cost. How far these facts should have any influence in rejecting his construction of the will in a doubtful case need not be decided, because, whatever doubt there may be about the construction of this will, there is abundant authority for construing it in the way that we have considered it. And, again, I say that after the lapse of 50 years even a court of law will not incline a ready ear to any construction in the plaintiff's favor of words and phrases that are doubtful in themselves.

For these reasons I have directed a verdict for the defendants.

OSGOOD v. A. S. ALOE INSTRUMENT CO.

(Circuit Court, E. D. Missouri, E. D. November 4, 1897.)

No. 3,839.

1. COPYRIGHT—INFRINGEMENT SUITS—BURDEN OF PROOF.
An author suing for infringement of a copyright has the burden of showing a literal compliance with each and every statutory requirement in the nature of conditions precedent to the acquisition of a valid copyright.

2. SAME—ACQUISITION OF COPYRIGHT—DEPOSIT OF COPIES OF WORK.
Under the act of March 3, 1891, two copies of the book must be delivered to the librarian of congress not later than the day of publication thereof; and one who, without knowledge of the passage of this act, deposited copies of his work within 10 days after publication, as required by the act of 1870, acquired no rights whatever.

3. SAME—NOTICE OF COPYRIGHT.
A notice of copyright, in the following words: "Copyright, 1891. All rights reserved,"—is not a sufficient notice, under the act of June 18, 1874 (18 Stat. 78), since it omits the name of the person by whom the copyright is taken out. Nor can this omission be supplied by reference to the title page, where the name of the publisher appears, for there is no presumption that the publisher is the author.

This was a suit in equity by Adelaide H. Osgood against the A. S. Aloe Instrument Company for alleged infringement of a copyright.

Paul Bakewell, for complainant.

M. B. Jonas and A. C. Fowler, for defendant.

ADAMS, District Judge. This is a suit for relief against an alleged infringement of a copyright. Complainant avers that she was, in 1891, the author of a book entitled "How to Apply Matt, Bronze, La Croix, and Dresden Colors to China;" that, in order to secure copyright thereof, she fully conformed to the requirements of the act of congress approved March 3, 1891, and in so doing deposited a printed copy of the title of said book, and also two copies of the book itself, not later than the day of its publication, with the librarian of congress. She further avers that she gave due notice of her copyright, by inserting in the several copies of said book, on the page immediately following the title page, the words as follows: "Copyright, 1891, by Adelaide H. Osgood, New York. All rights reserved." The bill further avers that the defendant, in a catalogue or price list published by it, infringed her copyright, by pirating and embodying therein substantial and material parts of her book. The defendant denies that complainant had any legal copyright in or to said book; avers that the complainant did not, later than the day of publication, deliver at the office of the librarian of congress at Washington, District of Columbia, or deposit in the mail within the United States, addressed to the librarian of congress at Washington, District of Columbia, two copies of her said book; and further avers that she did not give due notice thereof as required by law; and denies that it has in any manner made unfair or unlawful use of any of the contents thereof. On the issues so made the cause is submitted for judgment on the proof.

The act of March 3, 1891, above referred to, gives to every author, designer, or proprietor of any book the sole liberty of printing, reprint-

ing, publishing, and vending the same, upon complying with the provisions of the act, which require that the author shall do two things: First, deliver at the office of the librarian of congress, or deposit in the mail within the United States, addressed to the librarian of congress at Washington, District of Columbia, a printed copy of the title o. the book; second, deliver, not later than the day of publication of the book, at the office of the librarian of congress at Washington, District of Columbia, or deposit in the mail within the United States, addressed to the librarian of congress at Washington, District of Columbia, two copies of such copyright book. And by the provisions of section 4962, Rev. St., such author can maintain no action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page, or on the page immediately following, if it be a book, the following words, viz.: "Entered according to the act of congress in the year ———, by A. B. in the office of the librarian of congress at Washington," or, at the option of the author, the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 18—, by A. B." By the provisions of this act an author may secure a copyright entitling him to an exclusive monopoly, for the period of 28 years, to the sale of his own productions, provided he conforms to the requirements of the act already particularized. These requirements are in the nature of conditions precedent to the right, and must be strictly complied with. Unlike the laws governing the issue of patents to inventors, no certificate is made by the government conferring a copyright upon authors. They therefore have no grant conferring upon them, in terms, a monopoly in or to their productions, and therefore have nothing to show a prima facie case, like that which arises in a suit for the infringement of letters patent, upon the production of the patent itself. Authors take their rights under and subject to the law, and, when assailed, the burden is upon them to show literal compliance with each and every statutory requirement in the nature of conditions precedent. Wheaton v. Peters, 8 Pet. 591; Merrell v. Tice, 104 U. S. 557; Thompson v. Hubbard, 131 U. S. 123, 9 Sup. Ct. 710.

I shall first consider the issue presented as to whether the complainant, prior to the date of publication of her work, delivered to the librarian of congress two copies of her book. With a disposition much in favor of upholding copyrights, and thus securing to authors what seems to be a natural right to the rewards of their own literary labors, I have studiously examined all the evidence bearing on this question, and am constrained to find that the complainant's book was offered for sale, sold, and given away, and therefore, within the meaning of the law, "published" (see Drone, Copyr. p. 291; Gottisberger v. Publishing Co., 33 Fed. 381), prior to the 20th day of November 1891, the date of the delivery of the two copies to the librarian of congress. I do not believe that an analysis of the evidence which conduces to this conclusion will be of any service to counsel. They have carefully and critically done this in their respective briefs and arguments. I will, however, state that in my opinion the testimony of the complainant and her main witness, Mr. Cash, her publisher, are very vague and

uncertain, somewhat contradictory, and, on the whole, unsatisfactory. I do not believe that they intentionally misrepresent anything. The fact that there had been a recent change in the laws of congress, requiring the delivery of two copies of the book to the librarian of congress not later than the day of publication thereof, was not known to them. They, according to the proof, did not, at the time of the publication of complainant's book (November, 1891), know of the existence of the act of March 3, 1891. They believed complainant had, under the provisions of the act of July 8, 1870, with which they were familiar, any time within 10 days from the publication of her work to deliver two copies thereof to the librarian of congress, and thus perfect her copyright. Acting on this belief, I think, they innocently, but unfortunately, permitted publication of complainant's book before the day they delivered the required copies to the librarian of congress. This finding renders complainant's copyright void.

Again, I am constrained to find from the proof before me that complainant failed to insert in the several copies of her book, on the title page, or on the page immediately following the same, notice of her copyright, as required by the provisions of the act of March 3, 1891. She caused to be inserted on the page immediately following the title page the following words: "Copyright, 1891. All rights reserved." This is clearly not sufficient. She should have added by whom the book was copyrighted. The argument of complainant's counsel is that inasmuch as there appears on the title page the words, "Published by Osgood Art School, 1891," these words should be read into the copyright notice appearing on the next page, and, inasmuch as the Osgood Art School was the trade-name of Adelaide H. Osgood, the whole, taken together, is equivalent to the notice required by the act of congress. I cannot agree to this view. The statute requires that the notice must at least contain the word "Copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 1891, by A. B." Giving the most favorable construction to the language found on both pages, and conceding, for the sake of argument only, that we may look to both these pages, and not one only, for the notice of copyright, it cannot be held that they together give any information whatever as to the party by whom the copyright was taken out. The book may have been published by the "Osgood Art School," and this may have been the trade-name of Adelaide H. Osgood; but the statement that it was so published is not a statement, or the equivalent of a statement, that Adelaide H. Osgood took out the copyright. It is a matter of common knowledge that the publisher of a book is not necessarily or usually the author, or the person securing the copyright. The proof in the case tends to show that complainant, after delivering two of her books containing the defective copyright notice to the librarian of congress, was informed of the defect apparent in the notice; that she thereafter attempted to correct the same by "tipping in" a title page containing on its other side a corrected notice. The edition of her book so claimed to be corrected consisted of 522 copies. When this change took place, or whether it was made to perfect the notice, or as a preliminary to a supposed second valid copyright for the same book, is

left by the evidence, at best, uncertain. However this may be, I am constrained to find from the evidence that before any change was made, and before November 20, 1891, the date of the delivery of the copies to the librarian of congress, a substantial number of complainant's books containing the defective copyright notice were sold and distributed to the public. Such copies certainly contained no copyright notice, within the meaning of the law; a defective notice being, in contemplation of law, no notice whatsoever. I am also constrained to find, from practically undisputed evidence, that at least three copies of the fourth edition of complainant's book, containing such defective copyright notice, found their way into the public use without ever having had any change made in the copyright notice. In addition to this, a fair inference could be drawn from the facts of the case that many more copies might have been so published. The evidence satisfying me of these last conclusions of fact consists of statements of witnesses, exhibits in the case, original invoices of sale made by complainant's publishers, and other facts and circumstances attending the first introduction of the book to the public. Such being the facts, there was a clear failure to conform to the requirement of the law to give notice of the copyright "by inserting in the several copies of every edition published" such notice. For this reason it must be held that complainant could maintain no action for the infringement of her copyright, if she were otherwise entitled to it. The foregoing conclusions render unnecessary any consideration of the issue raised as to whether the defendant made unfair or unlawful use of complainant's book. The bill must be dismissed.

EDISON ELECTRIC LIGHT CO. v. ELECTRIC ENGINEERING & SUPPLY CO.

(Circuit Court of Appeals, Second Circuit. December 1, 1897.)

PATENTS—INTERPRETATION OF CLAIMS—INFRINGEMENT—ELECTRIC LAMP SOCKETS.

The Bergman patent, No. 311,110, for improvements in sockets for electric lamps, is limited to improvements in details of construction and arrangement of parts, and is, therefore, to be narrowly construed; and, as the fundamental idea of the patent is that all the parts except the sleeve for engaging the base of the lamp are to be located below the disk of insulating material, which is to be interposed between them and the lamp terminals, there is no infringement in a socket having all these parts located above the disk so as to involve a reorganization in detail of all the parts. 72 Fed. 274, affirmed.

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

This was a bill in equity by the Edison Electric Light Company against the Electric Engineering & Supply Company for alleged infringement of a patent for improvements in sockets for electric lamps. In the circuit court the bill was dismissed after final hearing (72 Fed. 274), and the complainant has appealed.

Richard N. Dyer, for appellant.

Alfred Wilkinson, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is an appeal from a decree dismissing the bill of the complainant in a suit to restrain infringement of letters patent No. 311,110, dated January 20, 1885, granted to Sigman Bergman, assignor, for "improvements in sockets for electric lamps." The patent relates to "sockets for use with those incandescent electric lamps whose terminals are a screw-threaded ring and a plate on the base of the lamp, the lamp being screwed into the socket, and making contact with corresponding terminals within the same." The advantages effected are stated to be as follows:

"The socket, constructed as described, is of a neat appearance, is very compact, has no useless mass of insulating material, being merely a metal skeleton with just enough insulation to support the terminals, all the circuit connections being carried by the single insulating disk, instead of being divided among two or more insulating portions as heretofore. The circuit controller, for making and breaking the circuit upon the lamp tip, employs fewer parts, and is simpler in construction, than any heretofore used. While it is very efficient in operation, the whole may be put together or taken apart with great readiness, the parts being easily separated."

It is insisted for the appellant that the circuit court erred in the conclusion that claims 1, 3, and 4 of the patent were not infringed by the incandescent electric lamp socket manufactured by the defendant. The appellee has not appeared or filed a brief in the cause, and the discussion of the patent in the opinion of Judge Coxe, who decided the cause in the court below, is devoted almost exclusively to those features which are the subjects of claims 9 and 13, and which were obviously regarded by him as the important claims of the patent. It is apparent upon the face of the patent that it is for improvements in details of construction and arrangement of parts, which, broadly considered, were old in themselves, and old in combination in electric lamp sockets. There were two forms of sockets in common use for connecting the lamp terminals with the circuit terminals. In one the socket was provided with a screw-threaded sleeve to engage a screw-threaded band on the lamp plate, and in the other was provided with a screw-threaded stud to engage with a screw-threaded sleeve in the lamp base. In each form the socket was a metallic case containing a disk of insulating material, the circuit terminals, and parts constituting the circuit controller, adapted to unite the circuit terminals electrically with the lamp terminals when the socket and lamp were screwed together. The area of invention occupied by the patent is exhibited by the following observations in the opinion of Judge Coxe:

"When it is remembered that in 1884 and 1885 all experiments along this line had to deal with a well-known lamp, and an almost equally well-known form of socket, which of necessity was required to conform to the changes made from time to time in the lamp base, it is plain that the area of action was necessarily circumscribed. For years both lamp and socket had been of a conventional type. Admitting that the material of the disk and the details of construction were new, is it not manifest that the assembling of these well-known elements in an old form of socket to receive an old form of lamp did not involve any high order of inventive skill, and that the combinations thus formed must be restricted to the mechanism shown? * * * If the broad construction contended for by the complainant were permissible, the defendant would unquestionably infringe, but with the limited construction made necessary by the prior art, and by the language of the patent, it is equally manifest that the defendant does not infringe."

Omitting various details of construction set forth in the specification, the patent describes a socket in which all the circuit controlling parts are located below the insulating disk. The disk has a central aperture, with walls extending about the upper surface. Mounted upon the disk, and rigidly attached to it, is a screw-threaded metal sleeve for mechanically holding the lamp, and forming one of the circuit terminals. The insulating disk is mounted upon a metal post sufficiently above the bottom of the metallic case to give space for the circuit controlling parts. To the under side of the disk is attached a plate, having a binding screw for one of the line wires, which plate is connected with the screw-threaded sleeve on the upper side of the disk by screws passing from the flange of the sleeve through to this plate. The other terminal socket is composed of an S-shaped spring, which is secured at one end to a metal piece depending from the under side of the insulating disk, and projects at its other end up through the aperture in the center of the disk to its upper side. The controlling key turns in the sleeve carried by the upright metal post which supports the insulating disk. At its inner end the key has an insulating tip, which presses against the center of the spring, and a cam on the end of the sleeve, engaging with a pin on the key, gives the key an inward movement as it is turned by the hand. This cam has a notch at its end, which holds the key at the limit of its inward movement; but when the key is turned backward, and released from the notch, the spring snaps back with a quick motion. The spring thus forming the bottom terminal of the circuit is the movable element of the circuit controller. Its range of movement is controlled by the aperture in the disk through which it operates to break and make contact with the plate terminal of the lamp. A binding screw attached to the metal piece which holds the spring serves for the connection of the line wire with it.

The three claims now in controversy are as follows:

"(1) In a socket for an electric lamp, the combination of two circuit terminals, —one a sleeve adapted to make contact with the band or ring terminal, the other a spring movable into and out of contact with the bottom terminal of the lamp, —substantially as set forth."

"(3) In a socket for an electric lamp, the combination, with a disk of insulating material, of a contact sleeve for making contact with the band or ring terminal of the lamp, a contact piece for making contact with the bottom terminal of the lamp, and two terminals for the circuit wires leading to the socket, all said socket contacts and terminals being carried by the said insulating disk, substantially as set forth.

"(4) In a socket for an electric lamp, having two terminals for making connection with corresponding lamp terminals, the combination of a metal supporting portion and a disk of insulating material carried thereby and carrying all the terminals and contacts of the socket, substantially as set forth."

The question of infringement upon the present appeal is confined to sockets similar to the exhibit, "Thomson-Houston Key Socket."

An element of both the first and the third claims is the sleeve adapted to make contact with the band or ring terminal of the lamp. We have no hesitation in concluding that the screw-threaded stud engaging the screw-threaded sleeve in the defendant's socket is practically the same thing as the screw-threaded sleeve engaging

the screw-threaded lamp base of the patent. As regards this feature of difference, it seems obvious that the one socket is merely a reversal of the other, and that there is only a colorable variation in the operative parts of the structures.

The first claim is for a combination of the contact sleeve with the movable spring. In view of the prior state of the art, and of the description in the specification, the claim cannot be read broadly to cover any kind of a spring movable into and out of contact with the bottom terminal of the lamp. The prior art shows various arrangements of springs for bringing socket and lamp contacts into electrical connection, and it was old to employ a movable spring as a switch connection between circuits. The specification describes the spring as follows:

"The two bent springs, m, m^1, are attached by rivets to the piece E. [E being a metal piece secured by screws to the under side of the insulating disk.] One of these, m, passes through the central aperture in the disk, A, and has its end, m^2, bent horizontally, passing through a slot or opening, n, in the lower portion of sleeve, B, and resting, when the circuit is open, upon the upper side of disk, A. Spring m^1 is a re-enforcing spring, to assist the action of the spring m. Through the sleeve, f, passes the circuit controlling key, which is a metal rod, o, having a thumb piece, F, outside the socket, and an insulating tip, p, which presses against the spring m. The insulating tip removes the key from the circuit. The key has a pin, r, which passes through the oblique slot, s, in sleeve, f, so that when the key is turned it presses against spring m, and throws its bent end, m^2, up against the plate terminal, m^3, of the lamp, which, when the lamp is screwed in, rests upon the central elevation, b, b [raised walls surrounding the aperture of the disk on the upper side], which prevents the terminal from touching the flange, c. The connection formed when the circuit is closed is a reliable spring contact, and one which allows the lamp to be turned in the socket without breaking connections. To close circuit, the key is turned until pin, r, rests in notch, t, and to open circuit the key is turned back from said notch, when m, m^1, spring back, bringing m^2 down upon the disk, A, again."

In the defendant's socket there is no re-enforcing spring. The spring is not conformed to do its work in the disk aperture, or pass through any aperture in the disk. It has no end passing through a slot or opening in the lower portion of the sleeve. It does not rest, and is not brought down when the circuit is open, upon the upper side of the disk. Its range of movement is not controlled by anything which is the equivalent of a disk aperture.

One of the elements of claim 3 is the movable spring of claim 1, but termed "a contact piece for making contact with the bottom terminal of the lamp." The defendant's socket does not have this device of the patent for the same reason that it does not have the movable spring of claim 1.

An element of the fourth claim is "the combination of a metal supporting portion and a disk of insulating material carried thereby, and carrying all the terminals and contacts of the socket." The "metal supporting portion" is described in the specification as follows:

"The disk, A, is supported from below by means of the flat metal ring, C, from which a part, D, extends up, having horizontal projections, e, e, to which disk, A, is screwed. The sleeve, f, for the circuit controlling key, extends inwardly from the part D. The ring or plate, C, upwardly extending part, D, and sleeve, f, are preferably all made in one piece."

The defendant's socket does not have this metal supporting portion.

It is apparent from the description that the basic idea of the patent, as regards the arrangement of the parts, is that all of them, except the sleeve for engaging the base of the lamp, are to be located below the disk, and the disk is to be interposed between them and the lamp terminals. It is this arrangement which necessitated the metal supporting parts of the disk, the aperture in the disk, and the construction and arrangement of the spring so that it would do its work in the aperture. All the details of construction necessary to the co-operation of the parts, as they are described, are adapted with a view to this arrangement. In the defendant's socket all these parts are located above the disk. The new location involved a reorganization in detail of all the parts, and permitted a simpler arrangement and construction generally. The disk itself was simplified by dispensing with the wall aperture. The metal supporting portion was dispensed with. The spring was not required to conform to the necessity of doing its work through the disk aperture. Doubtless, the socket of the patent was an advance upon the preceding structures, because of its compactness and comparative simplicity of construction. So, also, was the defendant's socket. Both were improvements only in matters of detail. We conclude that none of the claims are infringed, and that the decree should be affirmed.

WALDER v. ULRICH.

(Circuit Court, D. New Jersey. October 27, 1897.)

PATENTS—ANTICIPATION—LOOM FOR MAKING FRENCH HARNESS.

The Urbahn patent, No. 289,872, for an improved loom for making French harness, is void, because of anticipation.

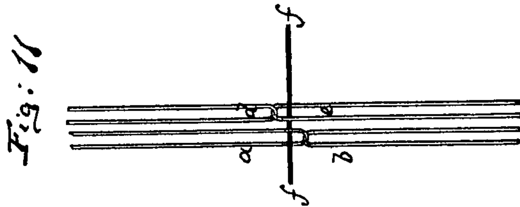
This was a suit in equity by Jacob Walder against Franz Ulrich for alleged infringement of a patent for an improved loom for making French harness.

A. v. Briesen, for complainant.

A. G. N. Vermilya, for defendant.

KIRKPATRICK, District Judge. This is a bill in equity, filed to obtain an injunction restraining the infringement of letters patent No. 289,872, granted December 11, 1883, to A. Urbahn, and by him assigned to Jacob Walder, the complainant, for an improved loom for making French harness. French harness has been long known and most extensively used in the art of weaving. It consists of a large number of heddles, each of which is composed of two interlooping threads, looped alternately equidistant above and below the plane of the center of the harness. A reference to Fig. 11 of the drawings of the patent shows a double thread suspended from the upper part of the heddle frame, through which a similar doubled thread that connects with the lower part of the heddle frame passes, the two doubled threads so interlocking and holding one another taut and secure. Every warp thread of the loom in which said harness is to be em-

ployed is first passed through the loop of one of these double-headed threads, where the point of interlocking is above the center line, and then through the loop of another, where the interlocking is below the center line; being thereby prevented, beyond certain limited play, from moving up or down, except as the two heddles which are raised or lowered simultaneously are moved. The necessity of bringing the supporting loops of the warp threads into exact alignment rendered the making of French harness by hand exceedingly difficult, and, from the requirement that each doubled thread be tied over and around the heddle frame or to a rig band of tape, there arose a liability to an irregularity in the plane of the loops and a variable tension on the heddle frames. The complainant's claim of invention relates to looms for making the kind of harness above described, and it consists more particularly in the combination of two shuttles traveling in circular interlocking tracks, with certain reciprocating pins; the shuttles being arranged to lay their respective threads around said pins, and thereby interlock the threads. "For example, one shuttle carries the thread, a, and the other the thread, b. The thread, b, will be carried through the track described by the shuttle laying the thread, a, and thus the two threads will be caused to interlock."



To accomplish satisfactory results, a machine for making French harness must be able to interloop the threads alternately above and below the center line of the heddle, to give them equal tension, and provide the means for uniting the threads firmly and uniformly at the ends. It was desirable that the heddles, instead of being fastened independently of each other to the heddle frame, should be woven into a selvage, which should take the place of the heddle frames. For this purpose, the complainant's machine provided warp threads extended along both sides, shuttles to carry the heddle threads and lay them around the reciprocating pins in the center, and which on their way back and forth should pass between the side warp threads in such manner as, when beaten up by two reeds on opposite sides moving together, they would be fastened so as to incorporate them into the fabric which has been called the "selvage." In laying their threads around the pins, the shuttles travel in eccentric tracks, and the amount of thread paid out by each is regulated by a light spring pressing against the bobbin, which is that part of the shuttle on which the thread is wound. The patentee states that "the main feature of my invention in my estimation, so far as I am acquainted with looms, is the use of the two shuttles traveling in interlocking paths, in combination with the inner abutting or loop-forming pins or needles, a^2 and b^2. How the motion of these parts is obtained seems immaterial."

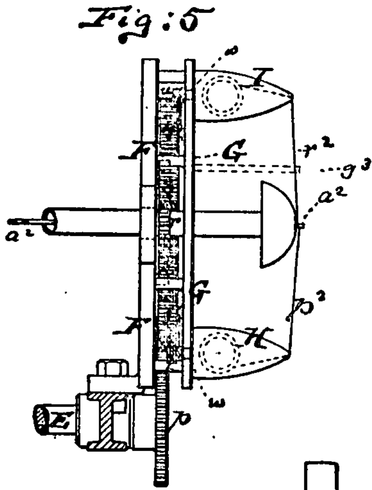


Fig: 5

The claims of the patent which are said to be infringed are as follows:

Claim 1: "The combination of the two shuttles, H and I, and mechanism, substantially as described, for moving them on tracks that cross each other in the same plane, with the pins or needles, a^2 and b^2, and mechanism, substantially as described, for moving said pins, and for moving the warp threads around which said shuttles are carried, substantially as herein shown and described."

Claim 2: "The shuttles, H and I, combined with mechanism, substantially as described, for moving them on tracks that cross each other in the same plane, in combination with the pins or needles, a^2 and b^2, and mechanism, substantially as described, for moving said pins or needles, mechanism for moving the warp threads, j^2, substantially as described, stretchers, N, N, and reeds, S^2, and means for operating the same substantially as specified."

The elements which are in combination in claim 1 are these: The two shuttles, H and I; the mechanism for moving them on the tracks that cross each other in the same plane; the pins or needles; mechanism for moving said pins; mechanism for moving the warp threads around which said shuttles are carried. The function of these several elements I find from the specification of the patent to be as follows: That of the shuttles to carry the bobbins from which the thread forming the heddles is unwound; that of the mechanism for the motion of the shuttles to move them on the tracks that cross each other in the same plane. The function of the pins is to form an abutment around which the thread carried by each shuttle is laid, and the mechanism for moving the pins is to cause them alternately to project in and be removed out of the path of the threads carried by the shuttles, H and I. A reference to the file wrapper shows that the original application for this patent was rejected at the patent office, because some of the claims were anticipated by the French patents issued to Tournier, No. 26,457, dated August 22, 1860, and No. 109,335, issued August 30, 1875, and another claim anticipated by United States patent No. 145,056, dated December 2, 1873; the patents issued to Tournier were for "improvements in the manufacture of heddles for weaving by means of looms modified for that purpose." Amendments were made upon the demand of the patent office. Claim 1, as originally filed, was amended so as to read as follows: "The two shuttles, H and I, combined with each other, with mechanism substantially as described for revolving them in tracks that cross each other in the same plane, and with means substantially as described for supporting and moving two sets of warp threads substantially as specified,"—and finally rejected; and claim 2a, for the combination of the shuttles, H and I, with mechanism substantially as described for moving them on tracks that cross each other with the pins or needles, a^2 and b^2, and with mechanism substantially as described for moving said pins or needles, was erased. The other claims were changed in form, and made more limited, so as to meet the requirements of the patent office, and avoid infringements upon machines of which the office had knowledge. It also appears that the separate claim for the combination of two shuttles traveling in circular interlocking tracks was abandoned. Among the erased claims we find the shuttles, H and I, combined with each other, mechanism for moving them on tracks that cross each other, the pins or needles and the mechanism for alternately producing them to form

the abutment around which the shuttles laid their thread. By the erasure of his claims to these combinations, the patentee has admitted that they were not his invention, and he cannot now claim them as his own. Lane v. Park, 49 Fed. 454; Railroad Co. v. Kearney, 15 Sup. Ct. 871; Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81. Hence it appears that all of the elements of claim 1 of the patent were old. Shuttles H and I, with suitable mechanism for moving them on tracks that crossed each other, had been combined with two sets of warp threads, and also with pins or needles and mechanism for moving them. The only additional requirement made by claim 1 of the patent is that the shuttles shall be moved on tracks that cross each other in the same plane.

There has been much difference of opinion expressed by the experts in the case, and discussion in briefs of counsel, in regard to the true meaning and interpretation of the phrase "in the same plane," as used in this connection. After a careful reading of the patent and specifications, and the testimony of the witnesses, as disclosed in the record, I am unable to come to any other conclusion than that it refers to the plane in which the shuttles are when their tracks cross each other. The record in this case discloses the prior existence, not only of two French devices for manufacturing harness of the kind made by the complainant's patented machine, but also another machine made by Urbahn for the complainant, Walder, in 1879, a working model of which has been produced, and called the "Urbahn 1881 Model." This machine was intended for the manufacture of French harness. Under the agreement for its construction, Walder was to pay for all work and material necessary to build the machine; Urbahn was to furnish the design and give his superintendence. If the machine turned out to the satisfaction of Walder, he agreed to pay Urbahn $500 for the same. When the machine was completed and in working order, Walder not only paid the agreed price of $500, but added $10 extra, "to show his entire satisfaction" with it. This machine was not patented, but remained in use in Walder's shop for two or more years; and Walder had another machine made after its pattern, and Walder says he showed it with pride. That it was a complete operating machine is not denied. That harness that was made on it was sold and used. Walder and Urbahn now say that complaints were made of the defective character of the harness, but no witness is produced who had bought the harness and says that he was not able to use it, while Eckerman swears that the harness turned out was as good as that made on the patented machine.

Upon an examination of the model of this anticipating machine, it will be found that it has in combination the two shuttles, H and I, in no way differing from those in the patented machine; that it has pins like those of the patent, and mechanism for moving them in substantially the same way. The shuttles are moved by mechanism on circular tracks, in the same plane, in such a way that the threads will be laid around the pins so as to interlock. It also has mechanism for moving the warp threads substantially as shown in the patent. The difference between the "1881 Model" and the patented machine is stated by the complainant's expert to be this:

"The one distinctive difference between the first Urbahn machine and the machine of the patent in suit is that in the early machine the shuttles did not move in interlocking tracks or paths, but moved in the one identical track or path."

In this opinion the defendant's expert is found to be in accord. He says:

"The first Urbahn machine differed from the machine of the patent in suit in the arrangement of the tracks or races in which the shuttles move, and in the mechanism by which they are caused to move; * * * the rest of the mechanism being in all substantial respects * * * identical with the machine of the patent in suit."

In both machines the shuttles moved in the same plane. To form the heddle in the old machine as well as the machine of the patent, it was necessary that the threads should be interlooped, and this could only be effected by the shuttles crossing each other's tracks or paths. Both the mechanisms of the old machine and the machine of the patent accomplish the same result, substantially the same way. The old "1881 Model" carries the weft or heddle threads through the warp on the sides, to and around the pins interlooping the threads as they go, and then brings them back to their own warp, and carries them through again. The patented machine does no more.

It is insisted on the part of the complainant that the produce of the 1881 model was an unsalable fabric, and that this was due to the faulty construction of the machine in the use of the single track on which the shuttles moved. Both of these propositions are denied by the defendant; but, if they be granted, I am of the opinion that with the knowledge of the mechanism of the 1881 model, which was free to the world, it required no more than mechanical skill to make the changes which would result in the patented machine in suit. All the elements of the patented machine were in combination in the 1881 model, and it did not require invention to substitute two shuttles moved on tracks that cross each other in the same plane, for the purpose of interlooping the threads which they carry, for two similar shuttles moving in the same plane on one track, in such manner as that the threads which they carry shall, by the crossing of each other's tracks, be similarly interlooped. Having come to the conclusion that the "Urbahn 1881 model" machine, which was free, was in anticipation of the one described in the complainant's patent, and contained in combination all the elements of complainant's claims, it is needless to consider what relation the Huber machine or the French machines bear to the patented machine in suit. For the reasons given, the bill must be dismissed.

J. L. OWENS CO. v. BRADLEY et al.

(Circuit Court, D. Minnesota, Fourth Division. November 10, 1897.)

PATENTS—INTERPRETATION AND INFRINGEMENT—COCKLE MACHINES.

The Lucas patent, No. 274,797, for an improvement in machines for separating cockle from grain, consisting in an endless belt carrying parallel slats downward over an inclined screen, so as to hold back the grain and cause it to roll in slight banks above the slats, and thereby allow the small seeds

to pass through the screen more certainly, construed in the light of the prior art, and *held* not infringed.

This was a suit in equity by the J. L. Owens Company against Bradley, Clark & Co. for alleged infringement of a patent for an improvement in machines for separating cockle from grain.

Chas. S. Cairns, for complainant.
A. C. Paul, for defendants.

LOCHREN, District Judge. This suit was brought by the complainant as sole owner of letters patent 274,797, issued March 27, 1883, to John Lucas, of Hastings, Minn., for a new and useful apparatus named in said patent an "Improvement in Cockle Machines," against the defendant, for an alleged infringement of said patent since February 1, 1897, asking for an injunction against the defendant, and for an accounting by defendant of profits obtained through such infringement, and for damages.

The device in the Lucas patent which the complainant insists has been infringed by the defendant is described in the second specification of said Lucas patent as follows:

"(2) In a cockle separator, the combination of the inclined screen, c, and the endless belt, a, arranged above and parallel with the screen, and the cross slats, d, fixed upon the belt, a, and having their outer edges in contact with or in very close proximity to the screen, whereby the grain in its descent is held in banks against the edges of said slats and upon the surface of the screen as set forth."

The evidence as to the state of the art at the date of this patent shows not only that the use of an inclined screen to separate cockle and other seeds from grain by allowing the mass to run by its own gravity upon and down such inclined screen was then old and well known, but that also the use of an endless belt to pass over and parallel with such screen, and in contact with it, so as to hold the grain upon the netting, and retard the motion of the mass, that smaller seeds might be more likely to pass through the meshes of the screen than if the mass passed rapidly over it by gravitation, was also well known. The only novelty in the Lucas patent is the cross slats attached to the belt, and which, when the machine is in operation, pass over the under side of the belt down the incline of the screen, and in contact or close proximity with it, so that grain coming upon the top of the screen is held back against the slat, and forming a small bank against it passes down the screen less rapidly than unobstructed gravitation would carry it, and moving only with the slower motion of the belt such slight bank of grain rolls in its descent so as to allow all small seeds to come against the meshes of the screen and pass through them more certainly than if not retarded by the slats in passing over such meshes. The machine of defendant has the same inclined screen and revolving belt with cross slats as the Lucas patent, except that the belt is raised from the screen, so that the cross slats do not come in contact with, nor in near proximity to, the screen in passing over it, but pass one-half inch above the screen; and that along each of said slats, and distant two inches from each other, are set in holes one-fourth of an inch in diameter little brushes or tufts of fibrous material, one-half inch in length, and so set that

the brushes upon one slat do not follow the brushes upon the preceding slats, and thus in the revolutions of the belt the face of the screen is swept by these small brushes, and cleared of chaff, dirt, and material liable to adhere to the screen, and hinder the passage of seeds through its meshes. While the small brushes have a tendency to retard the flow of the grain down the inclined screen, and deflect to one side or the other such grains as strike against the small brushes, they cannot and do not hold the grain in banks as do the slats in the Lucas patent. For the separation of wheat from oats or the separation of other grains of differing lengths the defendant's machine has a wide belt or apron of canvas, one end of which is hooked to the side of a slat, and then by the rotary motion of the endless belt running over the screen downwards the apron covers it over the ends of the small brushes, and is drawn tight by the movement, and brought and kept in contact with the screen, holding the kernels of grain flat upon the screen, and permitting the shorter kernels to pass through the holes or meshes while the longer kernels are held flat, and not allowed to pass endwise through the same holes or meshes, but are carried to the bottom of the screen. The complainant claims that with this apron the grain in passing down the inclined screen forms into pockets or banks where the brushes under the slats press the apron against the screen, making the device the equivalent of that of the Lucas patent. A practical working of the machine of defendant satisfies me that such is not the case. The slats with brushes are but four or five inches apart, and press the canvas against the screen. The motion of the endless belt, always in one direction, draws this canvas tight between these slats, so that the canvas runs in contact with the face, or upper side, of the inclined screen from near the top to near the bottom of the screen, and the grain cannot and does not slide under the canvas faster than the motion of the canvas allows it to pass along, until, as a slat is raised by the turn at the bottom of the machine, the canvas between it and the next following slat is raised from the screen, and the grain under that part of the canvas, being released, drops together over the bottom of the screen. The contact of the canvas resting on the grain prevents any chance for the rolling of the grain such as may occur as it follows the slats in the Lucas patent.

My conclusion is that the defendant's machine does not infringe the Lucas patent, assuming that the Lucas patent is valid as to its second specification. But the device of an endless belt with a slat or slats having on each a continuous brush to sweep and cleanse an inclined screen was old, and free to the public, before the Lucas invention or patent. If, in that state of the art, the defendant had upon all its slats placed continuous brushes to cleanse its inclined screen, it would be only using a device which it was free to use for that purpose, even though the effect in that case would be that the grain would form in banks against such continuous brushes, and be retarded by them, and roll freely in passing down the screen, following such brushes, just as it rolls in following the slats in the Lucas patent. Decree may be entered dismissing the bill upon the merits, with costs.

UNITED INDURATED FIBRE CO. OF NEW JERSEY et al. v. WHIPPANY MANUF'G CO. et al.

(Circuit Court, D. New Jersey. November 17, 1897.)

1. PATENTS—PRELIMINARY INJUNCTION—PRIOR DECISIONS.
On an application for preliminary injunction, a prior adjudication in a suit against another party, sustaining the patent, after full and fair contest, on final hearing, is conclusive of the validity of the patent, unless a new defense is interposed, so forceful as to satisfy the court that, if presented in the former case, a different result would have been reached. Hence the only question open is that of infringement.

2. SAME—INFRINGEMENT.
Reissue No. 10,282 (original No. 267,492), for a process of rendering paper or pulp articles hard, tough, and impervious, and the Keyes patent, No. 342,609, for a pail, or other similar article, made of wood pulp, or similar fibrous material, *held* valid and infringed, on motion for preliminary injunction.

3. SAME—PRELIMINARY INJUNCTION—HARDSHIP TO DEFENDANT.
An injunction will not be denied on the ground of hardship to defendant company, where it appears that the organizers and managers thereof were both prominently connected with another company at a time when it was adjudged an infringer of the same patent in an earlier suit.

This was a suit in equity by the United Indurated Fibre Company of Jersey City and others against the Whippany Manufacturing Company and others for alleged infringement of certain patents. The cause was heard on a motion for preliminary injunction.

Fred P. Fish and Charles Neave, for the motion.
M. B. Philipp, M. H. Phelps, and David Kay, Jr., opposed.

KIRKPATRICK, District Judge. The bill filed in this case asks for an injunction against the Whippany Company and others, the defendants therein, prohibiting the manufacture by them of indurated fibre ware, because the method used by them infringes upon the rights of the complainants, as protected by patent No. 267,492 (reissue No. 10,282), and also because in the forming of the articles the defendants infringe claim 7 of another patent issued to Martin L. Keyes (No. 342,609), both of which patents are held by the complainants under valid assignments. The claims said to be infringed are as follows:

Patent No. 267,492 (reissue No. 10,282): "Claim 1. The process of rendering paper or paper-pulp articles hard, tough, and impervious; consisting in first saturating the said article in thickened drying oil, or oil and gums, at substantially the temperature specified, in such manner that the surface will be free from an oil film, and then exposing said article to air and like temperature, as set forth. Claim 2. The process of rendering paper or paper-pulp articles hard, tough, and impervious; consisting of saturating said articles in a hot bath of oil, and freeing the surface from films of oil, and subsequently indurating the saturated articles. Claim 3. The described article of paper or paper pulp, having its pores filled with hardened linseed oil, or linseed oil with a proportion of gums, substantially as set forth."

Patent No. 342,609: "Claim 7. As a new article of manufacture, a pail, or other similar article, formed from wood pulp, or other similar fibrous material, having an annular projection or chine around its bottom, said chine being formed with a uniformly laminated structure, substantially as described."

The defenses interposed are invalidity of patent, prior use, and noninfringement.

It appears from the record that in 1892 the complainants herein brought suit in this court against the New York Wood-Fibre Company for an infringement of the same claims of the patents charged to be infringed in this case. Some of the parties hereto were interested in the management of the business of the defendants in said suit. The case was fully and fairly presented to the court by able counsel. In it reference was made to many of the patents now relied upon as being anticipatory. There is no suggestion on the record of fraud or collusion. Upon a final hearing the validity of both of the above patents was adjudged. Under these circumstances, upon an application for a preliminary injunction the question of the validity of the patent is not at issue (American Paper Pail & Box Co. v. National Folding-Box & Paper Co., 2 C. C. A. 165, 51 Fed. 229), unless a new defense is interposed, so forceful as to satisfy the court that, if presented in the former case, a different result would have been obtained. The reason for this rule is stated in Electric Manuf'g Co. v. Edison Electric Light Co., 10 C. C. A. 106, 61 Fed. 834, to be "that an adjudication in the case of a patent is not only a judgment inter partes, but is a judicial construction of a grant by the government, and, in a broad sense, deals with and determines the rights of the public." I have carefully considered the patents, which were not then considered, and fail to find in them anything which satisfies me that, if they had been urged in the former suit, it would have induced the court to reach a contrary conclusion. Giving that weight to the prior adjudication to which it is entitled (Purifier Co. v. Christian, 3 Ban. & A. 42, Fed. Cas. No. 307; Patent Co. v. Adams, 77 Fed. 191), I regard as established, for the purposes of this motion, the validity of the claims of the complainants' patents which are said to be infringed, and that the only question to be determined by the court at this time is the one of infringement (Manufactŭring Co. v. Hickok, 20 Fed. 116).

The invention of the complainants' patent No. 267,492 relates to an improvement in articles made of paper stock. Such articles were not new in the art. They had been made with indifferent success for many years. The object of the inventor was to improve such articles in respect to hardness and strength, and render them impermeable to all that class of liquids to contact with which they are subjected. To this end, he adopted a new step by step process, which is clearly set out in the specification of his patent. It consisted: (1) Of heating the article made of paper pulp to the highest degree of heat to which it might safely be subjected. (2) The immersion of the article into prepared linseed oil, reduced by boiling or by agitation to a thick, semiliquid mass, which oil has been kept at high temperature, and allowing the article to remain in the oil until it has absorbed so much and no more oil than by subsequent treatment may be converted into a hard, resinous substance, cementing the fibres of the pulp. Care must be taken that no film of oil, which is the effect of oversaturation, remains on the surface of the article. (3) Submission of the article in free contact with a heat sufficient to con-

vert the oil which has been absorbed in the pores into a solid throughout the article. The patent having been declared valid, we must assume that the process was new, and the result attained an improved article, which was an advance in the art. The record discloses the fact that many persons engaged in the manufacture of paper pulp articles abandoned old processes, and accepted licenses to operate under that described in complainants' patent. The defendants are engaged in the manufacture of paper pails, or pails formed from paper pulp. Their process consists in (1) thoroughly drying the formed pail in an oven. the temperature of which varies from about 125 to 170 deg. Fahrenheit; (2) the pails are then immersed in an oil bath, heated to a temperature of 168 deg. Fahrenheit, for from three-quarters of a minute to one minute and one-half; (3) then baked at a temperature of 162 to 168 deg. Fahrenheit. The temperature used appears from the testimony to be the maximum degree of heat which can be used without injury to the defendants' article. The novelty of the complainants' process consisted of the orderly arrangement of the steps which contributed to the desired result. The process of the defendants is, in a modified form, that of the complainants' patent. It differs from that of complainants in the degree of heat to which the articles are subjected before immersion in the oil bath, the temperature of the bath, and the degree of heat to which they are afterwards subjected. The complainants' patent is not limited to any specified degree of heat. It recommends that, to produce the best result, the article shall be heated to the highest degree to which it may be safely subjected. The object of the preliminary heating of the article in its pulpy state is to drive out the air and water with which it is saturated, and prepare it to receive the oil in which it is afterwards immersed. To accomplish the same result by changing the thickness of the pulpy article, and using a lower temperature for a longer time, is not to alter the first steps of the process. So, too, with the other differences which have been alluded to. I regard them as mere evasions of the patent, upon which the court now looks favorably. Palmer v. Patterson, 70 Fed. 490. The testimony of one of defendants' witnesses discloses the fact that "any greater temperature than that used by the defendants would be injurious to the goods," and so they come within the specifications of the patent, and use "the highest amount of heat to which the article may be safely subjected." The question is not merely one of temperature. The process may be the same, though the temperatures differ. Tilghman v. Proctor, 102 U. S. 707. Another point of difference is in the oil used for the bath. That specified in the complainants' patent is "boiled linseed oil, or linseed oil thickened by the known process of agitation in the presence of light and air"; and in the claim of the patent it is described as "thickened drying oil, or oil and gums." The oil used by the defendants is what is known to the trade as "London Oil." This oil is a drying oil, yielding resin upon oxidation, and is a well-known member of the class of which linseed oil is the type. The object to be obtained by the immersion in the bath is to saturate the pores of the article with an oil which, uniting with the vegetable fibre of which the pulp is composed, converts the whole, by

oxidation, into a tough, elastic, resinous substance. In the case against the New York Wood-Fibre Company, to which reference has been made, the oil bath consisted of a mixture of London oil and fish oil, the proportions of each not being given. The results attained in all the cases are similar, the means of attainment being chemical equivalents. I am therefore of the opinion that by the adoption of the process of complainants' patent, and the use of its equivalents, the defendants have infringed claims 1 and 2 of patent No. 267,492 (reissue No. 10,282), and by so doing have produced the same "article of paper or paper pulp, having its pores filled with hardened linseed oil, or linseed oil with a proportion of gums, substantially as set forth," thereby infringing the third claim of said patent.

It remains but to consider the seventh claim of the Keyes patent, No. 342,609, relative to the "pail formed of wood pulp having an annular projection or chine around the bottom, formed with a uniformly laminated structure." For the same reasons given in regard to the Carmichael patent, I will, for the purposes of this motion, consider the seventh claim of the Keyes patent, No. 342,609, established. In the suit of these complainants against the New York Wood-Fibre Company, claim 7 of the Keyes patent, No. 342,609, was held to be infringed by the article manufactured by that company. The process used and the article manufactured by the defendants in this case are admittedly similar to those used and manufactured by the New York Wood-Fibre Company in the former suit. The pail made by the New York Wood-Fibre Company having been adjudged to be an infringement of the claim of the patent under consideration, I therefore hold that the similar pail made by similar process likewise infringes.

It has been urged upon the court that a great hardship will be imposed upon the defendants if a preliminary injunction be issued against them. The record discloses that W. W. McEwan, who was one of the incorporators of the defendant company, and Caleb H. Valentine, the superintendent of defendants' factory, were both prominently connected with the New York Wood-Fibre Company at the time injunction issued against it at complainants' suit. The organizer and manager of defendant corporation entered upon their present enterprise with a full knowledge of complainants' rights, and they are not in a position to ask the court to stay its hand in affording to the complainants the full measure of relief to which they are entitled. The preliminary injunction prayed for in the bill should be granted.

JOHN CROSSLEY & SONS, Limited, v. HOGG.

(Circuit Court, D. Massachusetts. May 15, 1897.)

No. 664.

DESIGN PATENTS—ANTICIPATION.

The Marchetti patent, No. 23,362, for a design for a carpet, is void because of anticipation as to claim 1, which covers a body having a series of diamond-shaped figures, the size of which are formed by a curving stemwork bearing small flower forms, and the interior of the diamond-shaped figures having conventional flower forms at their centers, around which are concentric rows of flower and leaf forms, etc.

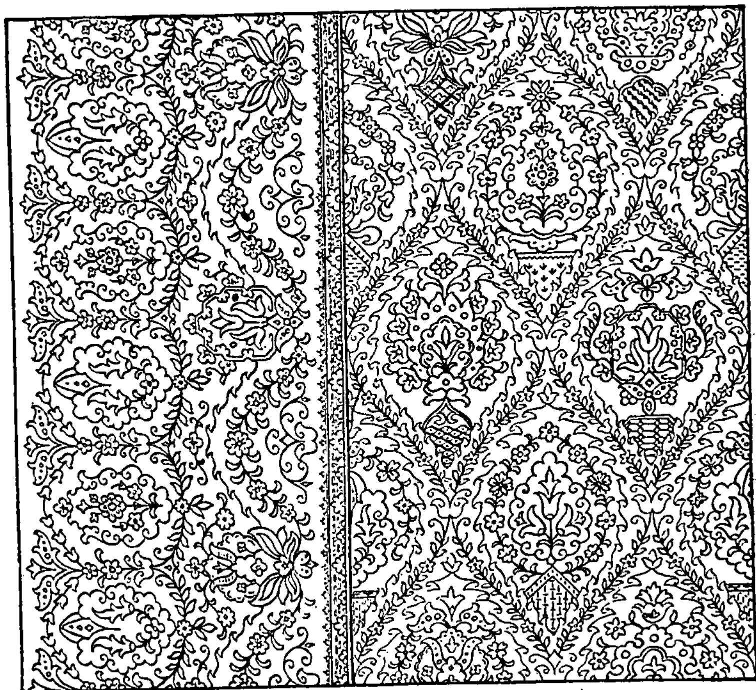
This was a suit in equity by John Crossley & Sons, Limited, against William J. Hogg, for alleged infringement of a patent for a design for carpets.

Witter & Kenyon, for complainant.

Louis W. Southgate, for defendant.

COLT, Circuit Judge. This is a bill in equity, brought for the infringement of letters patent No. 23,362, granted June 12, 1894, to Giulio Marchetti, for a design for a carpet. The specification says:

"The body, A, comprises a series of diamond-shaped figures, the sides of which are formed by a curving stem-work bearing small flower forms. These diamond-shaped figures have conventional flower forms at their centers, around which are arranged concentric rows of flower and leaf forms, each row or series having the same general outline as the main figure. At the bottom of each figure is an ornament somewhat resembling a shield or pendant. The border, B, consists of an inner portion and an outer portion. The inner portion consists of a double line of wavy stem-work, one line bearing small flower forms, and the other bearing leaf-like serrations. In the depressions of these wavy lines are bunches or sprays of flower forms surrounded by ornamental stem-work. The outer portion of the border consists of a wavy stem-work bearing small leaf and flower forms, the crests of the contiguous wave portions being joined by bands of flowery stem-work, each of which is curved so as to form, with its corresponding wave-portion, a circular figure. In the center of each of these circular figures is a bunch or spray of small flower forms surrounded by an ornamental stem-work."



Claims 1 and 2 are as follows:

"(1) In a design for a carpet, the body substantially as shown and described. (2) In a design for a carpet, the border substantially as shown and described."

The main defense in this case is anticipation. Upon careful comparison of the patented design with defendant's exhibit lithographic plate representing an old French plate of the fifteenth century, which is contained in a book entitled "L'Ornement Des Tissues," published in Paris in 1877, and received by the Astor Library in 1886, I am of opinion that there is nothing new or original in the Marchetti patent. The main outlines of the patented design are identical with those of the old French plate, and the differences between the two designs are limited to mere changes in detail. The first claim of the patent is therefore void for want of invention. The second claim, which relates to the border, is subordinate to the main design, and as to this claim I find that the defendant does not infringe. Bill dismissed, with costs.

SIMONDS ROLLING-MACH. CO. v. HATHORN MANUF'G CO.

(Circuit Court, D. Maine. November 20, 1897.)

No. 487.

1. PATENTS—INFRINGEMENT SUITS—EQUITY PROCEDURE—EXPERIMENTS.
   In an infringement suit an alleged anticipating patent was set up, which did not, on its face, expressly show anticipatory matter, but respondent claimed that it was capable of an anticipatory use. The complainant, by a motion, represented to the court that it had experimented with such patent, but was unable to produce any practical, anticipatory results, and had taken proofs to that effect; that the respondent had introduced evidence tending to show that its own experiments were successful; further, that respondent was invited to witness complainant's experiments, but respondent's experiments were made aside from complainant. Complainant therefore moved the court for an order requiring respondent to repeat its experiments in the presence of complainant's witnesses. *Held* that, while the court might, perhaps, have authority to make such an order, the relief was so extraordinary as not to be granted except when plainly necessary; and, as the court would doubtless have power, at the proper time, to send the matter to a master to have experiments made under proper directions, the motion should be denied.

2. CROSS-EXAMINATION OF WITNESSES.
   Where a cross-examination has been closed after notice to the complainant, the court will not, on his motion, require the respondent to produce the witness for further cross-examination.

This was a suit in equity by the Simonds Rolling-Machine Company against the Hathorn Manufacturing Company for alleged infringement of a patent. The cause was heard on the complainant's motion to require the respondent to repeat certain experiments in the presence of plaintiff's witnesses, and also to require defendant to produce a certain witness for further cross-examination.

Fish, Richardson & Storrow, for complainant.
Phillips & Anderson and Charles P. Stetson, for defendant.

PUTNAM, Circuit Judge. The present matter is an interlocutory motion by the complainant pending a bill in equity to restrain al-

leged infringement of letters patent. The respondent sets up a certain English patent as containing anticipatory matter, and the issue with reference to it is, so far as the court understands, one of that class ordinarily represented by the expression "double use." The court understands that the English patent does not, on its face, expressly point out matter which is anticipatory, but that it is claimed to be capable of a use of that character. The complainant represents that it has experimented with the English patent referred to, but was unable to produce any practical result therefrom anticipatory of its own patent, and that it has duly taken proofs to that effect, while the respondent has introduced evidence tending to show that its own experiments have been successful. The complainant represents that the respondent was invited to witness its experiments, but that the respondent's experiments were made aside from the complainant; and the practical object of the motion is to compel the respondent to repeat its experiments in the presence of the complainant's witnesses. The experiments on either side were not conducted by persons of merely ordinary skill in the art, but by experts. The complainant produces to the court no precedent sustaining its motion, the authorities cited by it going only to the matter of inspection, which is a well-known branch of incidental equitable proceedings. It is not, however, safe to undertake to set a limit to what can be worked out by the equity courts in the direction of just and proper investigation with reference to any topics concerned in legal or equitable proceedings; but it is entirely clear that such extraordinary relief as the complainant asks should not be granted except when it is plainly necessary. As is usual with motions of an interlocutory character touching the progress of a complicated suit in equity in advance of a final hearing, it is impracticable for the court, without very elaborate investigation, to understand clearly the current condition of the litigation, so as to be reasonably certain that it can adjudicate correctly. It appears to us that the probable results of the experiments which the complainant desires the court to order would not be of such a character as to justify unusual, and perhaps unprecedented, proceedings. Moreover, it may well be doubted whether the issue to which the motion relates is a relevant one, and whether, in accordance with the general rule that the law applicable to patents is practical in its nature, the questions of anticipation developed by the uses to which prior inventions may be applied extend to all which can be worked out by the ingenuity of experts, and are not limited to uses apparent to persons of ordinary skill in the art. To make these matters certain would require an examination of the pleadings and proofs in the case, which cannot be expected of the court on an interlocutory matter of this nature.

Under the circumstances of this application, the complainant cannot be charged with laches in the matter; so that if, on opening the record on final hearing on bill, answer, and proofs, it should appear that the court needs the assistance of such experiments as are now desired by the complainant, the court has no doubt that it can do complete justice by sending to a master so much of the case as is now brought to its attention, to report on the issue underlying the pres-

ent motion, and for that purpose to make experiments under proper directions. While it is well settled in the federal practice that the chancellor cannot abnegate his duty to hear the fundamental issue in a cause without the same being clouded or prejudiced by a master's report (Kimberly v. Arms, 129 U. S. 512, 524, 9 Sup. Ct. 355; Davis v. Schwartz, 155 U. S. 631, 637, 15 Sup. Ct. 237), yet it is a common practice to permit inquiries by a master incidental to the principal labor which rests on the court (Field v. Holland, 6 Cranch, 8, 22; Lawrence v. Dana, 4 Cliff. 1, 87, Fed. Cas. No. 8,136; Daniell, Ch. Prac. [6th Am. Ed.] 1203, 1646). Indeed, on bills for specific performance it has been the settled course in England to direct a preliminary inquiry as to title by a master. Having no doubt of our power to obviate in this way the difficulty which the complainant thinks now meets it, if it becomes necessary to do so, we deny complainant's motions, without prejudice to its right to apply for a master, as we have indicated, in connection with the final hearing.

The complainant also moves that we require the respondent to produce a certain witness for further cross-examination. The cross-examination having been closed after notice to the complainant, there is no propriety in our exercising this power if we could. The circumstances stated by the complainant suggest that on an application to the court the court might be justified in entering an order authorizing it to summon and examine the witness referred to as its own witness; and, if the circumstances are as stated by the complainant, the rule stated in U. S. v. Budd, 144 U. S. 154, 165, 15 Sup. Ct. 575, will probably give it practically all the same opportunities as though the witness still continued subject to nominal cross-examination. The motion of complainant, filed October 29, 1897, is denied.

ELECTRIC SMELTING & ALUMINIUM CO. v. CARBORUNDUM CO.

(Circuit Court, W. D. Pennsylvania. July 26, 1897.)

1. PATENTS—INFRINGEMENT—ELECTRIC SMELTING PROCESS.
   The Cowles patent, No. 319,795, for a process of smelting ores by an electric current, contemplates a process in which the fundamental idea is the diffusion or distribution of heat, as contrasted with its localization,—this effect being secured by mixing with the ore a body of granular material of high resistance, such as electric light carbon; and the patent is not infringed by the Acheson method for the manufacture of carbide of silicon, or "carborundum," in which the electric current furnishing the fusing heat is localized along a central core, from which the heat is radiated into the surrounding charge so as to fuse and unite into a new chemical product the atoms of carbon and silicon contained therein.
2. SAME—ELECTRIC SMELTING FURNACE.
   The Cowles patent, No. 319,945, for an electric smelting furnace, construed, and *held* not infringed by the form of furnace used in the Acheson method of producing carbide of silicon, or "carborundum."

This was a suit in equity for the alleged infringement of two patents relating to the art of smelting by electricity.

E. N. Dickerson and C. M. Vorce, for complainant.
Geo. H. Christy and Thomas W. Bakewell, for defendant.

BUFFINGTON, District Judge. The Electric Smelting & Aluminium Company filed this bill against the Carborundum Company, alleging infringement of three patents owned by the complainant company. At the hearing the infringement of patent No. 335,058, granted January 26, 1886, to Alfred H. Cowles, was not pressed, but was of all the claims of patent No. 319,795, issued June 9, 1885, to Eugene H. Cowles et al., for a process of smelting ores by the electric current, and of patent No. 319,945, issued June 9, 1885, to Eugene H. Cowles et al., for an electric smelting furnace. The large mass of testimony presented in this record, the conflicting views of skilled experts, the elaborate and protracted oral arguments of able counsel, and the multiplicity of their briefs, present such a vast field for examination and study that confusion might result if sight were lost of the comparatively simple statutory enactments regulating the grant of patents, and determining the rights vested by such grants. Turning to such provisions, we find a chart by which we can steer the way through the sea of facts, theories, and arguments which characterize the case. In a general way, a patent may be said to consist of two parts: First, the specification, which discloses the invention or discovery; and secondly, the claims allowed, by which the invention disclosed may be secured to the patentee. The specification is the foundation on which the claim rests.

Section 4888 of the Revised Statutes provides that:

Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor in writing to the commissioner of patents, and shall file in the patent office, a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound and use the same * * * and he shall particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery.

It will thus be seen that the statutory requirement embraces certain elements, viz. a description of the discovery, and of the process, etc., of using, etc., the same, in full, clear, concise, and exact terms, and a particular pointing out and claiming of what is claimed. "The leading purposes of the whole of the statute directions," says Curtis' Law of Patents (page 256), "are two: First, to inform the public what the thing is of which the patentee claims to be the inventor, and therefore the exclusive proprietor during the existence of the patent; second, to enable the public, from the specification itself, to practice the invention thus described, after the expiration of the patent." Patents being wholly a right of statutory creation, the statutory requirements and limitations, respectively, are the foundation and limit of the rights thereby created. Upon a compliance with such requirements depends the existence and validity of the patents issued by virtue of their provisions. The validity of a patent is therefore dependent, among other things, upon the patentee having given such a description of his invention or discovery, and the manner and process of using it, as the statute requires.

Assuming for present purposes the validity of the process patent in question, No. 319,795, and that the patentee has complied with these

statutory requirements, we turn to an examination of its contents, to ascertain what was the invention or discovery which Messrs. Cowles disclosed to the public, and what they claimed when they were awarded the rights which they now assert are infringed. In these respects the patent is exceptionally explicit and clear. While it pertains to a general subject, in which a vast deal of learning is requisite to constitute one, in the words of the statute, "a person skilled in the art or science to which it appertains," yet its teachings and disclosures are so plain and void of uncertainty that a person who is not versed to that extent can quite clearly comprehend them. While the superior skill and learning of those versed in the art is of value in amplifying and more thoroughly discussing its terms, yet the explicit and fundamental teachings of the patent may be quite thoroughly understood and appreciated by the lay mind. The patent recites that it consists in "improvements in processes for smelting ores by the electric current," an art which, by the subsequent statements of the patent, was concededly not new. The improvements relate to that "class of smelting furnaces which employ an electric current solely as a source of heat." Heretofore, the patentees state, it had been attempted to reduce ores and perform metallurgical operations by means of an electric arc, and the material to be treated was brought within the field of the arc, or passed or fed through it; that objections exist to the arc system, viz. that it is not adapted to long operations on a large scale; that there are very great difficulties in the regulation of the arc and the preservation of a constant resistance, and "the heat generated, though intense, is localized, and difficult to control." After reciting these conditions, which have been found objectionable in practice, the patentees recite that the object of their invention is to provide a process where they will "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 a manner that a high temperature can be sustained for a long time, and controlled." It will thus be seen that the primary and fundamental idea—the basis and the dominating purpose of the disclosed process—was the diffusion or distribution of heat, as contrasted with localization. Localization had been weighed in the balance and found wanting. They turned away from this faulty and supposed objectionable practice, and sought its opposite,—diffusion and distribution. The ingredients and process for securing such diffusion of heat are then described. A body of granular material, of high resistance or low conductivity, is interposed within the current so as to form a continuous and unbroken part of the same. This granular body, by reason of its resistance, is made incandescent, and generates the heat required. The ore or substance to be reduced has been 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 patentees then suggest the possible use of several resistance materials,—preferably, electric light carbon, which is to be pulverized or granulated to a degree to

suit the size of the furnaces. As evidencing the general trend of the patentees' disclosures, we note the suggestion of the preferable use of coarse granules, rather than finely-pulverized carbon, as working better, and giving more even results. The better working conditions are, positively, "the electrical energy is more evenly distributed" (a distribution desired, and in consonance with the patentees' object), and, negatively, "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" (a localization not desired, and not in furtherance of the patentees' desired object).

In our study of this patent, we have not ignored the fact that in describing the composition of the charge the patentees stated that the ore "is usually mixed with body of granular resistance material." If, by the use of the word "usually" (upon which great stress has been laid by the complainants), is meant there are other ways of preparing the charge than by mixture of the ingredients, such ways are neither stated nor even hinted at elsewhere; nor is any other practice or method of bringing the heat to bear on the ore suggested than the one wherein ore is mixed with the carbon, "and is thus brought directly in contact with the heat at the points of generation." It would therefore seem that in face of the statutory requirement, requiring a full, clear, and exact description of the discovery and the process of using it, no controlling influence should be drawn from the use of the word in its present connection and relation to this particular patent, or that its use should avail to give this patent a broader scope than its teachings and disclosures warrant. While we are perhaps not called upon to solve what the patentees themselves have not made clear and explicit, yet we think what the draftsman had in mind is reasonably clear. If, instead of qualifying the verb "mixed" by the adverb "usually," implying there was another method than mixing within the range of the suggested process, we apply the phrase "usually mixed" to the "granular" resistance material, we have a reading in consonance with the entire patent, for we note that further on it is stated that the size of the carbon particles used "may pass beyond what is ordinarily understood by the term 'granular,' and be in fact pieces of carbon of considerable size." Thus construed, the patentees would say that the ore is usually mixed with a body of granular resistance material, implying that it might be mixed with a body of "pieces of carbon of considerable size," and "beyond what is ordinarily understood by the term 'granular.'" The patent states the operation must necessarily be conducted in an air-tight chamber, or a nonoxidizing atmosphere, after which it describes a zinc furnace, which is stated to embody the invention, and from which the application of the same to the reduction and smelting of other kinds of ores will be understood. In this furnace we find a cylinder of silica, or other nonconducting material, imbedded in powdered charcoal, mineral wool, or some poor heat-conducting substance. The rear end of the retort is closed by a carbon plate which forms the positive electrode, and is connected with the positive wire of the electric current. The other end is closed by a graphite crucible, which forms the nega-

tive electrode, and serves as a condensing chamber for zinc furnaces. Touching the preparation of the charge, the patent says:

The zinc ore is mixed with the pulverized or granular carbon and the retort is charged nearly full through the front end with the mixture.

And the operation of the current is thus described:

The circuit between the electrodes, so called, is continuous; being established by means of, and through, the body of broken carbon. * * * 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.

Not only is the intermixture of carbon and ore explicitly shown, but the result of such contact is emphasized:

It will be observed (says the patent) that the intimate mixture of incandescent carbon and ore affords the most effectual utilization of all the heat evolved. None of it is lost by transmission through any intervening bodies or spaces.

From this detail study of the patent, it is quite clear that the two substantial disclosures thereof were the diffusion of the current, and a mixture of the carbon resistance material with the subject of reduction, as the method of securing the diffusion and utilization of heat and current. Nothing else than what is consonant with these two dominant disclosures is stated or even suggested in the patent. This construction accords with that reached by the circuit court for the Northern district of Ohio in the case of Lowry v. Aluminum Co., 56 Fed. 495, where the patent was considered by that court. It was there said:

The gist of the Cowles invention is the use of the granular carbon, distributed through the mass of granulated ore, to carry the current from one electrode to another, and, by its low conductivity and resistance to produce intense heat, not at a single point, or in a single line, but throughout the ore, and to maintain it constant.

This same view was emphasized on final hearing of the same case (68 Fed. 354), where the court said:

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 another, 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.

An analysis of the several claims shows that these two fundamental disclosures—viz. diffusion of the current, and the mixture of carbon resistance material with the subject of reduction—characterize the claims. The first one, viz.:

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,

—Is for a method of generating heat for metallurgical operations. What are the constituent elements of the method? They are, first, "in passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric current." Now, what this body is, what its form, its purpose, and functional work, are all disclosed in the specification, for the claims are founded and based upon the discovery disclosed therein. The patentees say, "The material best adapted for this purpose is electric light carbon." It "is ordinarily composed of grains or pieces proximately equal in size." These grains are preferably coarse, because "coarse granulated carbon works better than finely-pulverized carbon, and gives more even results." And it is "interposed within the circuit in such a manner as to form a continuous and unbroken part of the same." Their use, and the manner of their use, are "in order to secure an even distribution of the electrical energy"; and such distribution is defined as where "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." So much for the current and resistance material. The next element of the process is, "The ore to be treated by the process being brought into contact with the broken or pulverized resistance material." What is meant by the ore "being brought into contact" with the resistance material? The instruction of the specification in that regard is plain, unequivocal, unmistakable. In illustrating the process of zinc smelting, where the resistance element is carbon, and which process, it is stated in the specification, embodies the invention, and from which the application of the process to the reduction of other ores will be easily understood, the patentees say, "The zinc ore is mixed with the pulverized or granulated carbon;" and the condition of being mixed is defined as one where "the carbon constituents of the mass" are "in direct contact with the ore." We think, therefore, that by the teaching of the patent the element under consideration clearly means, and must be construed as meaning, "The ore to be treated by the process being mixed with the broken or pulverized resistance material," and that contact is a physical intermixing of the two ingredients is shown by the statement we have quoted above:

It will be observed that the intimate mixture of incandescent carbon and ore affords the most effectual utilization of all the heat evolved. None of it is lost by transmission through any intervening bodies or spaces.

No more thorough and effective intermixture of ingredients could be stated. To give the element in question any other meaning is to broaden its scope, so as to cover by it what was not even hinted at, much less clearly disclosed, in the specification; and to do this would pervert the beneficent provisions of the patent laws. The next element of the claim is that this relation of the two elements is one "whereby the heat is generated by the resistance of the broken or pulverized body throughout its mass." The teachings of the patent in that regard are that "the heat is generated by the resistance of all the granules, and is not localized at one point, or along a single line."

The second claim, viz.:

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,

—Is for a method of smelting or reducing ores or metalliferous compounds. It 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," and is for a method of smelting or reducing ores or metalliferous compounds. It consists in subjecting ore, in the presence of carbon, to heat generated in the method specified in the preceding claim, "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."

The third claim:

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,

—Consists in the method of smelting or reducing ores or metalliferous compounds wherein pulverized ore is mixed with pulverized broken carbon, and subjected to an electric current operating as in the two preceding claims, and "the operation can be performed entirely by means of the carbon reagent and the electrical energy."

The fourth claim, viz.:

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,

—Is identical with the second, save that for the carbon of that claim it substitutes a "reducing agent."

From this detail study of the specification and claims, it is quite clear to the unbiased mind that the entire teaching and disclosure of the patent is a reduction or smelting process in which diffusion or distribution of the current is studiously sought, and localization as studiously avoided; that the resistance material used, the mode of its preparation, and the position in which it is placed, unite to secure the

most marked diffusion of the current and of the heat-generating points, and the material to be reduced is also so relatively placed to, and intermixed with, the resistance material particles, as to be subjected to the heat at the relatively separated points of heat generation. These two elements of an intermixture of the resistance material and the substance to be reduced, and the diffusion of the current through the resistance material of the mass, are either expressly or by necessary implication embodied in the claims. If, as we stated before, the patentees had any idea of the possible successful use of a localized path of current circulation, it was neither described in their specification nor asserted in their claims. Indeed, it seems to us that the construction we place on the claims is the only one that is in harmony with the disclosures of the patent. In the light of those disclosures, the claims are quite clear and void of uncertainty; and, thus construed, they give to the patentees the full measure of protection for the discovery which they revealed to the public. To give them such a broadened, unnatural construction as would make them cover subsequent advance in the art in lines which the patentees never disclosed, and in directions which they deprecated and sought to avoid, is to shear the claims of that certainty and fixedness which are desirable to both patentee and public, and should be their distinguishing feature. In our view, the construction we have placed upon them was the just one, in the state of art as it existed when they were granted. If such be the case, it is manifest that such construction should not be modified to meet the subsequent shifting and development of the art; and, moreover, it is significant to note that the Cowles specification would seem by implication to teach that, when the current once found a path of least resistance and highest temperature through the charge mixture, it continued to retain it. Such teaching would seem remarkable, if the present contention of the complainants is correct, that the continued passage of the localized current increased the conductivity of the surrounding mass to the extent of substantially disintegrating the localized current, and diffusing it through the mass; for, if such be the case, then it was needless for the patentees to warn and provide against localization of the current, when such localization was self-adjusting, and could only end in the patentees' desired method of nonlocalization, and a diffusion of the current through the mass.

We next turn to the question whether the respondents infringe. They are the owners of letters patent No. 492,767, issued February 28, 1893, to Edward G. Acheson, and are engaged in the manufacture of carborundum in pursuance thereof. What are the terms and scope of that patent are not questions pertinent to the present case, and upon them we express no opinion. The simple question here is, do the respondents infringe complainants' patent, and not what is the scope of their own? We simply allude to it here as a fact in connection with the respondents' operations. From the proofs it would seem that, some years after the Cowles patent in suit, Mr. Acheson, who was an electrician of experience, discovered the possibility of uniting a single atom, each, of carbon and silicon, and producing a new chemical product. It is chemically known as "carbide of silicon," and com-

mercially as "carborundum." While extremely cheap to manufacture, it has proved to be an abrasive harder than emery, and, indeed, than any abrasive material except the diamond; and the dust of the latter is so expensive that its use is restricted to the cutting of gems. The uses to which carborundum has been applied are varied, its adoption rapid, and its sale extensive. Prior to January 1, 1892, there were manufactured about 50 pounds; during 1892, 2,145 pounds; during 1893, 15,200; and during the first nine months of 1894, 32,085 pounds. It has been used as an abrasive for the cutting and polishing of gems by lapidaries, for grinding and seating of valves, for cutting and grinding glass, in the form of wheels for general metal grinding, as in cutlery manufacture, saw manufacturing, and sharpening of saws, watch manufacturing, optical work of all kinds, and, indeed, has been applied to all the varied uses to which emery wheels have been adapted. In dentistry, small wheels or points of it are extensively used for operations on natural and artificial teeth. It has been adapted to these and various other uses, and the proofs show that it has attracted the attention and favorable notice of the scientific world. The respondents' method, ingredients, their mode of treatment, and the results obtained, are substantially these: The apparatus used consists of the ordinary engine, dynamo, transformers, and other appurtenances belonging to the generating and regulating of an electric current, and what might be termed an "electrically heated furnace." Upon an ordinary pedestal of brick is constructed a box of fire brick 9 feet 8 inches in length, 1 foot 11 inches wide, and 1 foot 9 inches deep. No cement or mortar is used in the construction of the side walls of the furnace, nor in its ends. In the construction of the pedestal or base on which the furnace proper is built, cement is grouted into the brickwork for the purpose of excluding the gases; but in the walls the joints are quite open, to prevent escape of such gases. Through the center of the box, extending lengthwise, is a core or conductor for the conveying of the electric current. This conductor is formed of granular coke, and has relatively a large cross section. Its terminals are contracted to nine solid carbon rods. These carbon rods extend through the ends of the furnace, and connect with two metallic plates, through which electrical connection is made to an alternating current dynamo. The materials used in forming the mixture of the charge, and from which the carborundum is produced, are coke and anthracite coal, in the form of fine powder, salt, sand, and sawdust. These materials are taken in the proportions, by weight, of 31 parts sand, 29 parts coke or coal, 2 parts salt, and 4 parts sawdust. They are all thoroughly mixed together, and then form what is called the "charge mixture." A sufficient quantity of the prepared mixture is placed in the furnace to fill it half full. A trough or trench is then dug along the center line of the furnace in the mixture, this trough forming a bed for the conductor of coke. Being thus prepared, 100 pounds of granular coke are placed uniformly throughout the length of the trough, and rounded up to form, as nearly as practicable a cylinder. When complete, the core measures from 8 to 9 inches in diameter, and extends through the length of the furnace for a distance of about 8 feet, leav-

ing a small space between its ends and the carbon rods. A good connection is made between the granular core and the carbon rods by introducing finely-powdered carbon, thus completing the electrical conductor through the furnace chamber and the walls. The remainder of the furnace is filled with another portion of the prepared mixture, reserving at the ends a small space which is filled with the fine carbon, and on top of this bricks are placed to improve the contact by pressing the fine carbon against the terminal rods. When the current is first turned on, it usually has a volume of 150 amperes. As a result of the passage of the current through the core, its resistance is reduced, and the current is proportionately increased, until eventually the resistance of the carbon core has become sufficiently low to permit of the passage of 1,000 amperes. The volume of the current is maintained at 1,000 amperes until the operation of the furnace is completed. During the period of the increasing volume of the current the temperature of the core has been raised, by reason of its resistance to the passage of the current, to a very intense heat, sufficient to effect a direct conversion of the amorphous form of carbon, as represented in coke, into the graphitic form. The temperature required for this transformation is, approximately, 7,000° Fahrenheit. The sample of a run exhibited shows that surrounding the core is a well-defined zone of crystals, of brilliant luster. This zone is compact, separate from the core, and, after removal, retains its circular shape, corresponding to the contour of the core. These crystals are the carborundum, or carbide of silicon. There is an appreciable diminution in the size of the outer crystals, as compared with the inner ones, and further out they are not found at all. The outer portion of the charge mixture, save that the salt is melted and the sawdust charred, does not seem to be affected. Between this outer portion and the crystal zone already described there is a zone of about an inch thick, which seems to indicate an intermediate state between the original charge and the crystallized carborundum, and between the core and the carborundum crystals is sometimes found a layer of graphitic carbon and silicon in mechanical mixture. The purpose of the several charge ingredients, and the operations they undergo, are stated by respondents' witness Acheson thus:

> The fine coke or anthracite coal is introduced for the purpose of providing carbon; the sand is introduced for the purpose of providing silicon. These two materials have sufficient within themselves for the making of carborundum, as it is a product resulting from the simple union in chemical combination of one atom of carbon and one atom of silicon. In the furnace, when the carbon and the sand or oxide of silicon are exposed to the high heat there produced, a portion of the carbon unites with the oxygen in the sand, together forming carbon monoxide, while another portion of the carbon unites with the free silicon to form carbide of silicon. The salt, which is the ordinary chloride of sodium, is introduced into the mixture for the purpose of cementing the black mass together, that it may the more easily be removed from the furnace after the operation is complete. It also has the effect of decreasing the possible oxidation or burning away of the carbon in the mixture, which would naturally occur by reason of the contact of the oxygen of the air with the carbon at a high heat. The sawdust is introduced for the double purpose of increasing the resistance of the mixture to the passage of the electric current, and to afford a greater looseness or porosity to the mass, so that the gases which are produced during the operation of the furnace may more readily escape.

The contention of the respondents is that in the commercial manufacture of carborundum, as thus carried on by them, the electric current passes wholly through the core; that any portion of it that might wander off and pass through the charge mixture is a leakage or loss, and plays no part in producing carborundum; that the heat is generated wholly in the core, and reaches the charge by radiation, and is not generated in the charge mixture by the passage through it of the electric current; that their purpose, means, practice, and result are on wholly different lines from, and at variance with, the suggestions and disclosures of the Cowles patent, and that their method is one based on localization of the current, heat generation along such localized central line; and that the heat reaches the substances to be affected only by radiation. In considering this question of infringement, it is quite clear to our mind that in the use of a core composed wholly of resistance material, in the selection of such resistance material, in the relative size of such resistance material as compared with the resistance material necessarily used in the charge mixture, and in the location of the core with reference to the electrodes, the respondents have chosen the most effective agencies for localizing the current. So far as means and method go, they have designedly followed a course the reverse of that advised and disclosed by Cowles, —actions not usually characteristic of a copyist and infringer. The granular coke of the respondents' core, being of a larger cross section, relatively, than the powdered coke of the surrounding charge mixture, and being in the direct line of the electrodes, attracts and localizes the current initially, and, as generation of heat continues, its conductivity and current-carrying capacity also increase. It would therefore seem clear, and indeed it is conceded, that initially the Acheson core is the current's chosen path of least resistance and highest temperature; and it cannot be gainsaid that no such practice was taught, suggested, much less disclosed, in the Cowles patent. Nor is such a central core embodied in the elements of any of the claims. Indeed, instead of following the lines of Cowles' teaching, the central-core method would seem—at least, so far as localizing the current goes—more in the line of a return to the arc notion of a localized current, which Cowles was seeking to avoid. Nor is the mere presence of carbon in the charge mixture proof that its purpose is to afford a current path. It is a necessary ingredient to unite with silicon in producing carborundum, and in the respondents' working the quantity of carbon in the charge mixture is limited to the amount necessary for that purpose only. While the carbon of the core mixture remains intact at the close of the operation, the carbon of the charge mixture does not. It is clear, too, that the other ingredients of the charge are not relatively good conductors, and the silicon, which is the largest ingredient, is lacking in a marked degree in that regard. Moreover, the clear weight of the testimony satisfies us that in the practical commercial making of carborundum by the respondents (and it is in this the respondents must be held to infringe, if at all) the core is not used as a mere choice of different methods, a thing indifferent in itself, or one which could be omitted. The proof is that its use is an absolute necessity, that its very pro-

portions are considerations of extreme importance, and that the absence of such nicely-adjusted proportions results disastrously. Its preparation constitutes one-half the expense of building the furnace. Its resistance and surface area are adjusted to the length of the furnace, potential, and quantity of current employed. Its surface area controls the thickness of the resultant carborundum shell, for the proofs show that, when the core is too small in cross section, its mass becomes so highly heated that the carborundum crystals formed in immediate proximity to its surface are destroyed, and when too large the heat conveyed from the surface to the charge mixture is, owing to its increased area, not sufficient to produce the usual thickness of carborundum shell. "It has been determined," says the witness Acheson, "purely by experimental work prolonged over many months, that the size of the core should be adjusted to the point where it will be brought to, or slightly under, the temperature at which the crystals of carborundum are decomposed into free carbon and free silicon." The central core being an indispensable factor in the process employed by the respondents, being concededly the initial path of the current, and the very decided weight of proof and reasoning being that it continues to carry the substantial bulk of the current in this localized path, and that the resultant product is the result of such localization, the case might well be disposed of on that ground; for the use of such current-localizing central core is wholly without the discovery disclosed by the patent in question, and an element not found in its claims. Waiving, however, this point, for the present, let us pass on to the inquiry whether the weight of the evidence satisfies the court that the current, or any part of it, ceases to pass through the core, and is established through the carbon constituents of the charge,—a burden which rests upon the complainants to show by a fair preponderance of proof, if infringement is to be decreed. From the nature of things,—the impossibility of observing the inner working of the furnace, and the subtle character of the electrical agents,—absolute demonstration or certainty is impossible. Any conclusion reached is at best a mere deduction from certain observed phenomena. The interior workings can only be surmised by a consideration of the structure, ingredients, operation, and results. When Mr. Cowles was asked how he would determine the relative quantities of the current flowing through respondents' core at any given zone of the outer mass, he frankly stated:

I know of no way of exactly determining it. Judgments and inferences might be drawn as to the current density in different parts of the cross section of that apparatus, and possibly some measurements, but I do not think reliable ones could be secured as to the fall of potential between different portions; but, to my mind, the conditions inside of that furnace are so varied in different parts, and so subject to the actions of gases evolved, variations in temperature, and various other conditions, that exact statements could not be made.

The divergent conclusions or views deduced may be seen in the evidence of Messrs. Cowles and Acheson. Mr. Cowles says:

Electrical tests I have made have given me conclusive evidence that with a core present, similar to that described in the descriptions of the defendant's furnaces, that all the current does not pass through the core. These experiments were made during the process of the run of December 15th, which I have al-

ready described. * * * A large proportion undoubtedly follows the core, when it is operated as I have read the description of the operation. It is impossible to say, in my judgment, exactly what portion follows the core.

He then stated that, comparing his experiments and the respondents' operation, there would not be much difference in the manner in which the current would follow the central core in the two cases. He had already expressed the opinion that, in such experiments "probably over seventy per cent., and possibly ninety-five per cent.," of the current, passed through the central core. Mr. Acheson gives his views as follows:

The working current is confined to, and passes through, the core. Any current that may wander off from the core and pass through the mixture can only be considered in the light of leakage, precisely as we consider the current that escapes from the ordinary telegraph line as leakage. A leakage must always be looked upon as a source of loss, and it is in this sense that I look upon the current that by any chance may be deviated from the core to the mixture. It is not, however, a quantity of any particular value, and plays no part in the manufacture of carborundum.

While, as we have said, absolute certainty is impossible, we are, by a most patient and detailed study of the case, led to two conclusions: First, the weight of the proof and the reasons advanced fail to show that a substantial, effective part of the current passes through the charge mixture in respondents' process; and, secondly, the clear weight of the evidence tends strongly to show that the working, effective current is confined to the central core in respondents' workings. In reaching such conclusions we are strongly impressed with the fact that the physical indicia at the close of a run of respondents' furnace all point to the idea that, whatever be the concealed working of the current, the core is the center of heat, energy, and effectiveness. The relative effects of such centrally located energy, and the central localization of the energy as well, are shown in the existence in equidistant surrounding series of zones of similarly affected ingredients, and by the fact that these rings of zones exhibit different conditions of the material acted upon, and such conditions varying according to the relative distances of such zones from the central core. Then, too, the atoms of the charge zones nearest the core, and on all sides of it, have been shifted into radial lines uniformly converging from the core, and at right angles to its axis; thus showing that the influence or energy which fixed their position emanated from a common, central source. That such is the case is also evidenced by the fact that the crystal particles varied in size according to their relative distance from the core, diminishing the further they are located from it. If the electric current is the basis of energy, the formative cause of these crystals, and of the changed condition of the charge mixture when subjected to it,—and such must be the case if infringement exists,—it would seem to follow that the diffusion of the current, in effective, appreciable quantity, through the body of the charge mixture, would result in varying and irregular conditions throughout the mass, and that there would be an absence of those regular, graduated, and systematic conditions which we find in symmetrical order at the close of run of a core furnace, and all of which seem in relative relation to the central core. Nor would we

find the production of crystals confined to any particular portion of the charge. The indisputable phenomena found at the end of a core-furnace run are, to our mind, consistent with the theory that the seat of the thermoelectric energy which causes such phenomena is in a common, central current, and are not consistent with the theory of a number of effective working currents following numerous diverging paths through the mixture, and each constituting an individual radiating center of effective thermoelectric energy. Assuming that a number of fugitive, shunt, subsidiary currents do branch off from the central-current path, yet it must be apparent, if the evidence of the senses can be relied on, that their relative size and influence, as compared with the dominating and masterful effect of the central-core current, is unappreciable. No traces of their path, or even of their existence, are found at the close of the run. They have left no carborundum in their vicinage. Assuming that such currents exist, it may be assumed, if they are judged by their fruits, that they are noneffective, and a matter of indifference in the production of carborundum in respondents' process. If we assume that carborundum is produced by thermal radiation from a localized line or current, and that such localized current is the dominant and efficient cause of the production, then the mere presence of fugitive, inefficient currents, which leave no traces of their path, or evidence no result from their passage, cannot well be urged as an infringement of a process whose gist, substance, and effectiveness are based upon the diffusion of working and effective currents which produces the desired effect along their several paths throughout the mass. And in this connection we might say that if the escape of fugitive side currents from the main-current path, in obedience to the shunt law, and their passage through the charge mixture, were in themselves, and without reference to their effectiveness, to be deemed infringements of the Cowles patent, then the arc method of smelting to which Cowles refers in his specification, and in which there must have been shunt currents in certain conditions, might be urged as a substantial anticipation of Cowles' patent, since, in its practical operation, there were diffusive currents as well as localized ones. That the heat is generated in the core, and reaches the charge mixture by radiation, and not by currents diffused through the mass and generating heat in their passage, is also shown by the fact that within an hour after respondents' run begins the heat generated within the core is sufficient to drive off vapors, while the outside of the charge does not become red hot for five hours, and even this is hastened by the burning of the gases at the surface. It is also significant, as emphasizing the same view, that when powdered anthracite coal, which is well known to be of higher resistance material to an electric current than powdered coke, was substituted for the latter, it produced no effect upon the operation or the output of the furnace; thus showing that, if side currents were diffused through the charge mixture, they were of such trifling character that their increase or decrease in volume was a matter of no relative importance. The wide variation between the heat extremes at the exterior and interior of the charge mixture is shown by the fact that the exterior zone of the charge undergoes

no appreciable change, further than the fusion of the salt and the charring of the sawdust,—changes which take place at moderate temperature,—while the inner zone shows a thin layer of graphite, indicating the most intense heat at that point. Such wide variations of results point to equally widely separated causes, and, as the current is the heat-generating source, would indubitably, we might almost venture to say, point to a localized central location for it. The fact that graphite, and not carborundum, forms where the charge mixture abuts against the core, indicates that if the charge mixture was intermixed with the core ingredients, and, in the words of the Cowles patent, were "thus brought directly in contact with the heat at the points of generation," the respondents' process would be a failure. The conceded results of respondents' operations would therefore seem to show that the desired effect was reached, not by contact of the to be treated substance with the heat at its point of generation, and where, as in Cowles' process, none of it is lost by "transmission through intervening bodies or spaces," but where the heat radiates from its point of generation in order to reach such substance, and where some of such heat is lost by transmission through both intervening bodies and intervening spaces. Indeed, the process, preparation of ingredients, and means employed, in the two methods now under consideration, are diverse, and the desired objects unlike. The like thermoelectric agent is employed in both, but with it the substantial likeness ends. Cowles' object was reduction, while Acheson's was composition. One reduced a substance already in existence; the other, by composition, produced a new product. With Acheson, the new product consumed the carbon constituent of the charge; with Cowles, an excess of the carbon constituents remained at the close of the process. In Cowles, the charge for functional purposes occupied the central space between the electrodes; in Acheson, for functional purposes it was removed from such central space, and from electrode contact. In Cowles, an excess of carbon was required in the charge mixture as a current-conductor; in Acheson, no such excess was required or used, but the carbon for that purpose was isolated in the central core. Their methods are so radically unlike, and are carried out on such diverse lines, that we are firmly convinced that the charge of infringement has not been sustained.

After what we have stated in reference to the Cowles process patent, we do not deem it necessary to protract this opinion by a detailed description of the apparatus patent, No. 319,945. It has been strongly assailed as void for lack of patentable novelty; but, as we are of opinion that respondents' apparatus does not infringe its claims, a discussion of its patentability is needless. Two species of furnace are illustrated in the drawings and described in the specification. One is for the reduction of zinc ores; the other, for nonvolatilizable metals, which require a very high temperature for their reduction. Though different in construction, these two furnaces are substantially similar in principle; the broad or basis idea being, in both, that the material under treatment, mixed with pulverized carbon or other resistance material, is isolated in such a manner that the electric current may pass through the mixture, and spends its entire

energy within the mixture. After a discriminating analysis of the patent, the respondents' witness Laureau well says (and we agree with his conclusions):

A comparison with the apparatus used by the defendant company, and the general mode of procedure in the manufacture of carborundum, would show that there are radical differences between them and the furnace and methods described and claimed by the Cowles patent in suit, No. 319,945. The furnace used by defendant is built loosely, without any attempt at making it airtight; the bricks being simply piled up, without any binding material whatever, and the top is left entirely open. The gases have no one particular means of escape, but in fact issue from sides and top with equal facility, the flames on the side being quite as large as those at the top. The material outside of the core is not packed so that it may exclude the heat produced by the electric current going through a core of resistance material. The core which was used is of pure carbon, unmixed with any material upon which the current might have a decomposing action; and the mixture from which the product sought for is obtained is not placed, as in the Cowles furnace, in the direct path of the current, but in the very place from which he specifically states that he wishes to exclude it. The material to be acted upon in the defendant's furnace is placed where the charcoal packing which confines the heat within the core is in the Cowles furnace. * * * The core of the defendant is inert and unproductive, so far as final results are concerned. The core of the Cowles patent in suit is the active and productive portion of the furnace.

A detailed examination of the claims shows that all the several elements embodied in the claims are not found in the respondents' furnace. The first claim is:

In an electric smelting or reducing apparatus, a chamber or casing having its longest dimension in a horizontal direction, and adapted to contain a charge of ore and electrical resistance material previously pulverized and mixed together, the oppositely located electrodes in conductive relation to the charge, but otherwise insulated from one another, and an exit for the escape of the gases and vapors evolved from the charge during the process of reduction, substantially as herein set forth.

When respondents' furnace is in use, it is not "adapted to contain a charge of ore and electrical resistance material previously pulverized and mixed together, the oppositely located electrodes in conductive relation to the charge." The electrodes of respondents are in conductive relation, not to the charge, but to a central core, through which, and not through the charge, the working current passes. In the second claim we find among the elements, "the smelting chamber, formed of side and bottom walls of closely-packed pulverized or granular material, and the permeable top wall, formed of a layer of granular non heat conducting material"; in the third claim, "the combination of a chamber or casing, the side and bottom layers of closely-packed pulverized or granular material, and the top covering of similar material, made permeable for the escape of gases and vapors"; in the fourth claim, "a smelting-chamber formed of closely-packed granular or pulverized material, of a non heat conducting nature, and of lesser electrical conductivity than the charge to be smelted in the furnace"; and in the seventh claim, "a smelting chamber formed of closely-packed pulverized material, of non heat conducting nature, and of lesser electrical conductivity than the charge to be smelted within it, a layer of similar material, permeable for the escape of gas, for closing the said chamber."

As bearing on these elements, the specification states:

The space between the carbon plates constitutes the working part of the furnace. This is lined on the bottom and sides with a packing of fine charcoal, O, or such other material as is both a poor conductor of heat and electricity (as, for example, in some cases, silica or pulverized corundum or well-burned lime); and the charge, P, of ore and broken, granular, or pulverized carbon, occupies the center of the box, extending between the carbon plates. A layer of granular charcoal, O′, also covers the charge on the top. The charge thus forms a core extending lengthwise of the box, in contact with the carbon plates, M, at the ends, and incased on all sides by the jacket of fine charcoal. Fine charcoal, as is well known, is a very poor conductor of heat, and the charcoal packing confines the heat within the core, protects the walls of the furnace, prevents them from fluxing down and mingling with the charge, thereby introducing deleterious matter, and it forms a deoxidizing shell for the charge. The protection of the charge from the introduction of deleterious matter by the fluxing down of the walls is a very important matter, and the protection afforded therefrom by the charcoal packing immediately surrounding the charge is complete. It is also a much inferior conductor of electricity than the carbon used in the core, and hence it operates as an insulating jacket for the charge, and confines the current to its path through the charge, besides confining the heat. The protection afforded by the charcoal jacket, as regards the heat, is so complete that, with the covering slab removed, the hand can be held within a few inches of the exposed charcoal jacket; but with the top covering of charcoal also removed, and the core exposed, the hand cannot be held within several feet.

It will thus be seen the charge is enveloped, and, as stated above, "forms a core extending lengthwise." In respondents' process these elements are not present. The charge mixture has nothing outside of it whatever,—neither chamber walls nor inclosing jacket. Nor does respondents' apparatus use the form of core specified in the fifth claim, viz. one "having a greater number of points of contact in a cross section of the body taken close to the plates than in a cross section of the same taken at intermediate parts thereof." Moreover, the body or core therein interposed, which the claim states "is substantially as described," is, by reference to the specification, found to be composed of the charge mixture. Thus, "the charge thus forms a core extending lengthwise of the box, in contact with the carbon plates, M, at the ends, and incased on all sides by the jacket of fine charcoal." In respondents' furnace the charge mixture forms no part of the core, and these same remarks are applicable to the sixth claim. After careful examination, being of opinion that infringement has not been shown, the complainants' bill will be dismissed. Let a decree be prepared and submitted.

CARROLL v. GOLDSCHMIDT et al.

(Circuit Court of Appeals, Second Circuit. December 1, 1897.)

1. JUDGMENTS—CONCLUSIVENESS—PRIVIES.
Judgments are binding upon privies as well as upon parties; but only those are privies, within the meaning of the rule, who acquire their interest in the subject-matter of the suit after the commencement of the suit.

2. PATENTS—LEGAL AND EQUITABLE TITLE.
Persons acquiring the legal title to a patent, with notice of the prior equitable right of another to the invention, take the legal title in subordination thereto, and cannot hold as infringers persons who purchase a patented machine from such equitable owner.

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

This was a suit in equity by Carroll, as trustee, against Goldschmidt and others, for alleged infringement of certain letters patent for warp knitting machines. The circuit court rendered a decree for the complainant (80 Fed. 520), and the defendants have appealed.

Edwin H. Brown and W. Laird Goldsborough, for appellants.
Arthur v. Briesen, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. In disposing of this cause we do not find it necessary to consider whether the conclusions of the court below as to the validity of the two patents in suit were correct or not. The record abundantly shows that the property in the inventions claimed in both patents belonged originally to Revis and Payne, jointly, as co-partners, by the style of H. B. Payne & Co.; that it then became part of the assets of the business carried on by them under the style of J. B. Whitehall & Co.; that it passed to Revis exclusively upon the purchase by him of the assets and good will of J. B. Whitehall & Co., and thence passed through him to the firm of Revis, Brewin & Marriott, and upon the retirement from that firm, in 1890, of Brewin, to Revis & Marriott.

The defendants bought the machines of which infringement of the patents is predicated, two of them in 1890 of Revis, Brewin & Marriott, and the other two prior to September, 1891, of Revis & Marriott. They were delivered to the defendants at Nottingham, England, and shortly after were brought to this country by the defendants, and used by them in their factory at New York City. The legal title to the patents at that time was in Henry B. Payne and the firm of A. G. Jennings & Sons, of which parties the present complainant is the trustee, and they had constructive notice of the equitable rights of the vendors of the defendants.

The learned judge who decided the cause in the court below was of the opinion that a decree in a suit brought in November, 1891, by Payne against Revis, was res adjudicata as to the title in favor of Payne and against Revis and these defendants. That decree undoubtedly determined that, as against Revis and his privies, the title to the patent was in Payne and Jennings & Sons, notwithstanding that decree was entered upon a rule pro confesso because of the default of Revis in answering the bill. But the learned judge fell into an error of fact in assuming that the rights of the defendants were acquireu subsequent to the commencement of that suit. They were acquired previously, and consequently the defendants were not in privity with Revis or concluded by the decree. Judgments are binding upon privies as well as upon parties, but only those are privies, within the meaning of the rule, who acquire their interest in the subject-matter of the suit subsequent to the suit. Ingersoll v. Jewett, 16 Blatchf. 378, Fed. Cas. No. 7,039. "No one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit." Freem.

Judgm. § 162. See, also, Campbell v. Hall, 16 N. Y. 575; Doe v. Earl of Derby, 1 Adol. & E. 783; Winslow v. Grindal, 2 Greenl. 64.

It will not be profitable to review extensively the evidence in the record which satisfies us that the equitable title to the inventions of the patents in suit was in Revis and Payne jointly at the time when Payne transferred a half interest therein to the firm of A. G. Jennings & Sons. They were originally patented in England; one patent having been granted to Payne, December 19, 1884, and the other to Payne and Campion, June 4, 1885. The inventions were made by Payne while he was a member of the firm of H. B. Payne & Co. Campion was a workman for the firm, and claims no interest, if he ever had any, in the inventions. That firm carried on business from 1883 to the spring of 1887 at the Boulevard Works, in Nottingham; its business consisting mainly in building warp knitting machines, and selling them to customers in England, the United States, and other countries. In April, 1885, the firm purchased the plant of Whitehall's factory in Nottingham, and subsequently carried on business at that place by the style of J. B. Whitehall & Co. The plant of the Boulevard Works was removed to Whitehall's factory in the spring of 1887, and the two concerns were consolidated, and thereafter the business of both was carried on at Whitehall's factory, under the name of J. B. Whitehall & Co. Payne was a machinist, without means, and Revis furnished the capital for H. B. Payne & Co. and also for J. B. Whitehall & Co. It is not disputed that the firm of J. B. Whitehall & Co. consisted of Payne and Revis, but Payne denies that Revis was his partner in the firm of H. B. Payne & Co., and insists that he was the sole proprietor of the business. On the other hand, Revis testifies that he was a partner with Payne not only in J. B. Whitehall & Co., but also in H. B. Payne & Co., and provided the capital upon the express agreement of Payne that he should have a half interest in the inventions which Payne contemplated and was perfecting in the machines to be built by the firm. Revis' version is corroborated by oral testimony, and seems more consistent with all the probabilities of the case than the version of Payne. That Revis was Payne's partner in the firm of H. B. Payne & Co. appears by documentary evidence, over the signature of Payne, of the most unequivocal character. That the inventions were to be the property of the firm, and after they were perfected were regarded as such by Payne, is convincingly shown by similar documentary evidence, and by the conduct and representations of Payne in the transactions attending the dissolution of the partnership relations. Before applications were made for letters patent in the United States, a license was granted to Julius Kayser, of New York, for the sole privilege of working the machines embodying the inventions in the United States, and the instrument gave him an option to buy the patents for the United States. H. B. Payne & Co. were the parties of the first part named in that instrument. Kayser subsequently concluded not to avail himself of the option, but, acting upon it, he proceeded to prosecute applications for the patents in suit, and the expenses were borne by H. B. Payne & Co. In September, 1887, Payne and Revis entered into a written

agreement for the termination of their co-partnership. It recited their co-partnership in the business of H. B. Payne & Co. as well as of J. B. Whitehall & Co., and provided that upon the payment by Payne to Revis of £3,000, on the 1st day of November next following, Revis should retire from the business, and assign all his share and interest, including "the patents or inventions belonging to or used" in the business. Payne endeavored to procure the firm of A. G. Jennings & Sons to advance the £3,000. The agreement was not carried out, Payne being unable to raise the money. Then Payne and Revis concluded to wind up their co-partnership business, and dispose of the assets and good will through a trustee, and November 23, 1887, they entered into a written agreement appointing Robert Mellors, of Nottingham, a trustee for that purpose. Mellors advertised the partnership estate for sale, but no purchasers were forthcoming. Then negotiations ensued looking to a sale by Mellors to either one of the two partners who should make the most advantageous offer. During this time Payne was in frequent consultation with A. G. Jennings & Sons, and went to New York to see them, contemplating a purchase of the partnership property from Mellors through their assistance. In a written offer made by Payne to Mellors to purchase a part of the assets, Payne specified, among other things, "all the patents or interests in the patents or inventions which Mr. Revis and myself may have as partners, either in the late firm of H. B. Payne & Co. or J. B. Whitehall & Co." Early in February, 1888, Mellors sold the assets and good will of the business to Revis. Up to this time neither Mellors nor Revis was led to suppose that Payne did not propose to recognize the inventions as partnership property, but, as subsequently appeared, he had already transferred to A. G. Jennings & Sons a half interest in the inventions for the United States, and made some arrangements with that firm, the nature of which does not fully appear, by which they were to be ostensibly the owners of the English patents. Throughout the transactions which culminated in the sale by Mellors to Revis the inventions were treated by Payne as appertaining to the partnership assets. The English patents were included in the inventory made by Mellors upon consultation with Payne. The United States patents had not then been granted, but the offer of Payne to Mellors, which has been referred to, mentioned as part of the assets the interest of the firm in the contract with Kayser. Payne's attitude throughout indicates persuasively that he had all along considered the inventions to be partnership property. If this was not his understanding, his conduct can only be explained upon the theory that he deliberately intended to mislead Mellors in exercising the power of sale which had been confided to him. The manufacture and sale of the machines embodying the inventions constituted the principal business of the partnership, and unless the right to make them, to sell them, and to license their use would accompany the sale of the assets and good will, the purchaser would get little of practical value. Payne was aware that Mellors supposed himself to be authorized to transfer this right to a purchaser, and proposed to do so. We cannot doubt that he intentionally gave both Mellors and Revis to understand, not

only that this right would pass to the purchaser, but that the inventions as an entirety were to be regarded as a part of the assets.

A. G. Jennings & Sons purchased their interests in the inventions December 10, 1887. At that time they acquired merely an equitable title, inasmuch as the applications for the patents were pending in the patent office. Their legal title was acquired at the date of the grants of the respective patents, one being granted December 25, 1888, and the other February 5, 1889. There is abundant evidence in the record to indicate that prior to December 10, 1887, A. G. Jennings & Sons were aware that the inventions used in the partnership business of Payne & Revis were claimed to be partnership property by Revis. Irrespective of this, however, they had explicit notice to that effect from Mellors in the letter to them of the date of February 14, 1888, several months before they became invested with the legal title. As purchasers of the equitable title, their rights were subordinate to those of Revis as a joint owner with Payne of the inventions, because his were prior in point of time; and their legal title was subordinate to those rights, because acquired with notice of them.

The defendants, having purchased their machines from vendors who had succeeded to the rights of Revis, occupy the position of their vendors in respect to liability to the complainant. As against those whose title is subordinate to their equities, the defendants acquired the right to use and sell the purchased machines. These conclusions lead to a reversal of the decree of the circuit court.

The decree is reversed, with costs to the appellants, and with instructions to the court below to dismiss the bill of the complainant, with costs.

NORTON et al. v. SAN JOSE FRUIT-PACKING CO.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 312.

JUDGMENT IN PATENT SUIT—CONCLUSIVENESS.

A judgment by a circuit court of appeals directing the dismissal, on the merits, of a bill for the infringement of a patent, will be followed by that court without any re-examination of the merits on a subsequent appeal in a suit brought against a purchaser of the identical machine which was alleged to infringe in the former litigation, though he had purchased it before the institution of that suit.

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

This was a suit by Edwin Norton and Oliver W. Norton against the San José Fruit-Packing Company for alleged infringement of a patent. The circuit court dismissed the bill, and the complainants have appealed.

This is an appeal from a decree dismissing a bill in equity brought by appellants to restrain the infringement by appellee of six letters patent heretofore granted by the government of the United States to the appellants, on mechanism that is alleged to be useful in machines that are constructed for use in the manufacture of can bodies. No testimony was taken upon the trial of the case

in the circuit court. The suit was tried and heard upon an agreed statement of facts, which is as follows: "That heretofore a suit in equity was brought by these complainants against one Mathias Jensen in the circuit court of the United States for the district of Oregon, upon the same patents which are involved in this suit; that the object of the said suit of these complainants against the said Jensen was to obtain an injunction and the usual accounting for damages and profits for the alleged infringement by the said Jensen upon the same identical patents involved in the present suit, and charged to be infringed by the respondent herein; that testimony was taken and evidence introduced in the said case of these complainants against the said Jensen, and the case was duly submitted to the judge of said court for the district of Oregon, and, after consideration of the same, an interlocutory decree was made and entered therein in favor of these complainants, and against the said Jensen, sustaining the validity of all of said patents, and adjudging that the said Jensen had infringed the same, and awarding the usual accounting for damages and profits; that thereafter the said Jensen duly prosecuted an appeal in the circuit court of appeals for the Ninth circuit from the said interlocutory decree, and, after consideration of the said appeal by the said circuit court of appeals, a decree was duly made and entered by said circuit court of appeals, whereby the said interlocutory decree was reversed, and the cause was remanded to the circuit court for the district of Oregon, with instructions to dismiss the bill, and enter a judgment in favor of the said Jensen for costs, and thereafter the mandate in said circuit court of appeals was duly filed in said circuit court for the district of Oregon, and, in accordance with the terms thereof, a decree was entered dismissing the said bill, and awarding costs to the said Jensen, against the complainants in that suit, the complainants herein; that the respondent herein, the San José Fruit-Packing Company, had used in its business, before the commencement of this suit, and at the time of the commencement thereof was then using, one machine known as a body-former machine, for making can bodies, which said machine was purchased by the respondent herein from said Mathias Jensen, and was one of the identical machines charged by these complainants in the said suit against Jensen to be an infringement of the patents sued on, and for the sale of which the said suit was brought against the said Jensen; that this respondent has not used any other body-former machine save and except the one hereinabove referred to, and has never made or sold any body-former machines of any kind, and it is solely on account of the use of the said body-former machine purchased by the respondent from said Jensen that this suit is brought, and it is the use of that machine which is charged by the complainants to be an infringement of the patents herein sued on; that this case may be submitted to this honorable court for consideration and decision upon the printed transcript of the record in the said circuit court of appeals in the said case, which was brought by these complainants against the said Mathias Jensen, and which is entitled in said circuit court of appeals 'Mathias Jensen, Appellant, vs. Edwin Norton and Oliver W. Norton,' and is numbered 134, together with the above agreed statement of facts and the exhibits that were offered in evidence in said suit against the said Jensen; and upon the submission of this case, as above provided, upon said record, testimony, and exhibits, this honorable court may at once proceed to render such decree herein as it may be advised is proper, the issues herein being identically the same issues that were involved in said case against the said Jensen, and this stipulation being made for the purpose of saving the necessity and expense of taking testimony which would be a mere repetition of the testimony taken in the said suit against the said Jensen. The parties herewith produce a printed copy of the transcript of the record in the said case in the said circuit court of appeals, entitled 'Mathias Jensen v. Edwin Norton and Oliver W. Norton,' and file the same with the papers in the case."

Munday, Evarts & Adcock, John H. Miller, and Crittenden Thornton, for appellants.

Wheaton, Kalloch & Kierce, for appellee.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts as above). Upon the agreed statement of facts it is argued by appellee that the decree entered by this court in the suit of Machine Co. v. Norton, 14 C. C. A. 383, 67 Fed. 236, is a bar to the relief sought by appellants in this suit; that said decree is a protection to the appellee herein, because it purchased from Jensen the machine which is alleged to be an infringement of appellants' patent, and is therefore in privity with him; and that appellants are estopped from further litigating the same question either against the parties to said suit or their privies.

The general proposition that a judgment or decree of a court of competent jurisdiction between the same parties, and all parties privy thereto, upon the same issues, is, as a plea, a bar, or as evidence conclusive, is well settled. Whenever a cause has been once fairly tried, fully heard, and finally decided, upon its merits, by a competent tribunal, the same questions, as between the same parties or their privies in interest, ought not to be tried over again. They should be considered as forever settled. This rule is necessary for the repose of society. It is in the interest of the public, as well as of the parties, that there should be an end of litigation. It is easy to understand and appreciate the beneficial results which flow from a strict observance of this principle, and to realize the injury which might arise by any relaxation of the rule. In a proper case for its application, courts of justice will not permit the rule to be called in question by any supposed hardship which might exist in any particular case, but will inflexibly adhere to it, regardless of consequences. Parrish's Lessee v. Ferris, 2 Black, 606, 608; Cromwell v. Sac Co., 94 U. S. 351; Stout v. Lye, 103 U. S. 66, 70; Johnson Steel Street Rail Co. v. William Wharton, Jr., & Co., 152 U. S. 252, 261, 14 Sup. Ct. 608; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733; Forsyth v. City of Hammond, 166 U. S. 506, 517, 17 Sup. Ct. 665; Norton v. Fruit-Packing Co., 25 C. C. A. 194, 79 Fed. 793; Mining Co. v. Dangberg, 81 Fed. 73, 116, and authorities there cited.

It is, however, claimed by appellants that the facts do not bring this case within the general rule, because it distinctly appears therefrom that the sale of the alleged infringing machine by Jensen to the appellee was prior to the commencement of the suit of Norton v. Jensen in the district of Oregon; that the decree rendered in this court in Machine Co. v. Norton, January 28, 1895, long after the commencement of this suit, is not a bar to this suit, and cannot be held to estop appellants from the consideration of their appeal upon its merits. In Freem. Judgm. § 162, the author, in discussing the question as to who are privies to a judgment or decree, said: "It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit." See, also, Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 314, 14 Sup. Ct. 592, and authorities there cited. But, if it be true that a technical bar or estoppel has not been shown, the facts are of such a character as to justify this court in affirming the judgment of the circuit court, without entering into any discussion

of the merits of the case. The appellee purchased its machine from Jensen. It is the same machine as was involved in Machine Co. v. Norton. This court held in that case that the machine in question did not infringe upon any of the Norton patents therein involved. 14 C. C. A. 383, 67 Fed. 236. If the manufacturer of the machine did not, by the making, use, or sale of it, infringe upon any of Norton's patents, it must necessarily follow that the party who purchased the machine, either before or after the suit in question, cannot be held guilty of an infringement by the use of the same identical machine.

Appellants' counsel assert with apparent confidence and great earnestness "that the former decision is wrong, and that equity, justice, and common fairness demand that a contrary decision shall be reached in this case," and that, "when it comes to fully understand the merits of this case, the court will feel itself bound, for the sake of justice and right, to correct and overrule its former decision." We believe counsel to be sincere in the expressions of their views. They have convinced themselves of the soundness of their position. This court, however, after an elaborate presentation of the case by counsel, and after a painstaking and careful consideration of all the questions involved, and the rules and principles announced in the authorities cited, came to a different conclusion. After the case was thus decided, a petition for rehearing was filed, and the court again carefully considered the whole case, and arrived at the conclusion that its former opinion was correct. All the judges participating therein gave to the consideration of the case their best thought, care, and attention, and were unanimous in the views expressed and conclusions reached therein. They are still of the same opinion. This court has never hesitated, when convinced that any views it has expressed upon the facts or conclusions reached upon the law are erroneous, to retrace its steps, and place itself in line with the justice, equity, fairness, and right of the case.

A full examination of all the cases decided in this court upon the Norton patents, which have furnished a wide field of investigation and fruitful source of litigation, will show that there has been more or less difference of opinion expressed by the various judges who have participated in the trials and decisions of the several cases. The writer of this opinion has not at all times been in entire accord with the conclusions reached by the court in some of the cases that have been decided; but, whatever differences of opinion there may have been as to the principles announced in any of the cases, there cannot be any question as to the duty of the court in this case to affirm the judgment of the circuit court herein upon the grounds hereinbefore stated. The judgment of the circuit court is affirmed, with costs.

PRATT v. THOMPSON & TAYLOR SPICE CO.

(Circuit Court, N. D. Illinois. November 8, 1897.)

PATENTS FOR INVENTIONS—PATENTABILITY—PROCESS INSTEAD OF MACHINE.

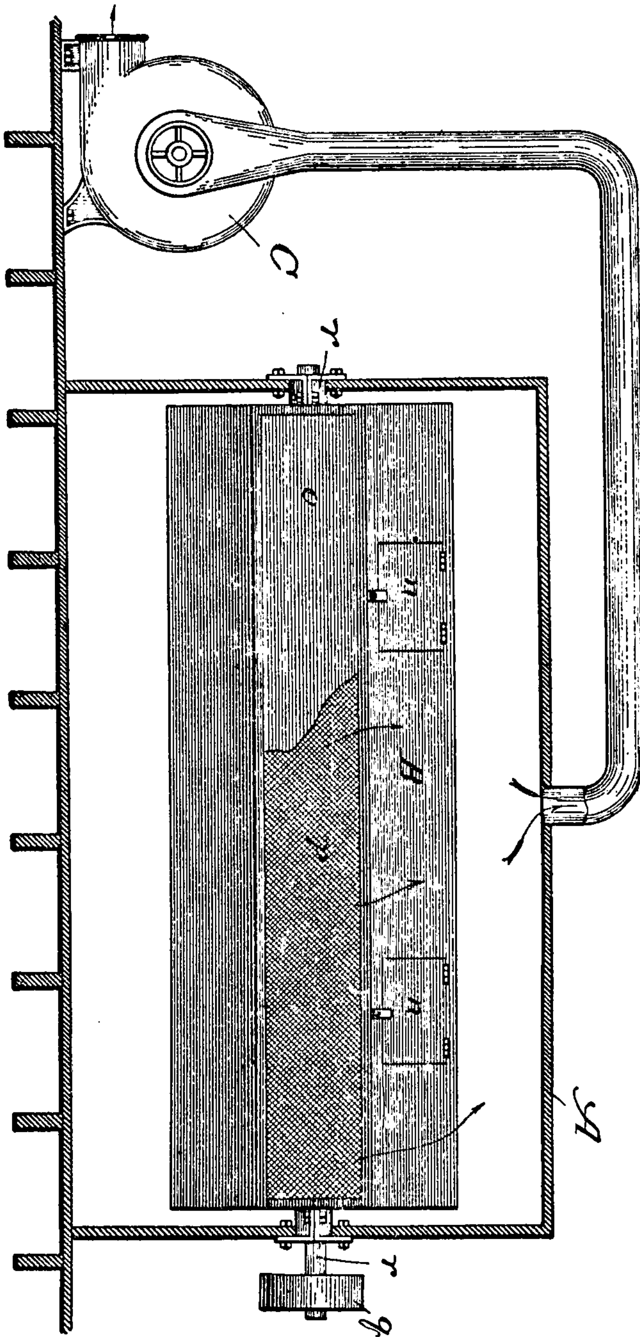
The Pratt patent, No. 407,684, for a process of cleaning, coloring, and polishing nuts, is void for want of patentability, since it consists of the application of old substances by a new machine, and no claim is made for invention of the machine.

This was an action at law by Adelaide F. Pratt against the Thompson & Taylor Spice Company for infringement of a patent. The case was heard on demurrer to the declaration.

Banning & Banning, for plaintiff.
Mr. Linthicum, for defendant.

GROSSCUP, District Judge. The action is at law, to recover damages for the infringement of letters patent No. 407,684, issued July 23, 1889. The present hearing is upon a demurrer to the declaration. It raises the question whether the patent under consideration discloses on its face a patentable invention. The purpose of the patentee is to disclose such a process of treating nuts as would clean the surface of their shells, and polish and color them to an appearance rendering them more marketable. The mechanism employed is described in the letters patent as follows:

"A denotes a housing adapted to be closed on all sides, and which should be provided with doors to permit access, when desired, to its interior, containing the tumbling barrel, B, supported in horizontal position on journals, r, at its opposite ends in the sides of the housing, one journal projecting beyond the housing, and being provided with a belt wheel, q, at which the power is applied to rotate the tumbling barrel. The housing communicates from its upper side with a suitable suction fan, C. The form of the tumbling barrel is preferably octagonal, and it is provided at intervals with inserted longitudinal screens, p, which are left uncovered while the tumbling operation is being performed, to clean the nuts by removing foreign matter (dirt) from their surfaces, but should be closed by sliding bars or boards, o, into grooves along their upper and lower edges while the coloring or coloring and polishing is taking place, as hereinafter described. To prepare the nuts to receive the coloring matter, they should be cleaned; and, to cleanse them, they are introduced through the doors, n, into the tumbling barrel, when the doors, n, and the housing, A, are closed. The tumbling barrel is then rotated, and the fan set in motion, whereby the dirt on the nuts is removed and drawn off by the action of the fan from the interior of the housing, into which it enters through the screens, p. After the cleaning has been thoroughly performed, the barrel is brought to a standstill, and the screens are covered by sliding the bars or boards, o, into place over them. Dry, pulverized coloring matter, such as Italian sienna of desired shade, or a mixture thereof of different shades of color, and, if desired, other suitable earthy coloring material or materials mixed with the sienna,—the mixture and ingredients depending upon the color to be produced,—is introduced in suitable quantity into the tumbling barrel, which is then again rotated. The result, which is obtained ordinarily in from twenty minutes to half an hour, when the motion of the barrel is stopped, is that the nuts are provided with a dull surface coloring. It is desirable that the nuts should then be polished, which I accomplish by introducing powdered soapstone upon them in the barrel, and again tumbling them therein for about fifteen minutes, when the nuts are removed and packed, and ready for the market. If preferred, the soapstone may be mixed and introduced with the pulverized coloring matter, whereby the coloring and polishing operations are performed simultaneously, and time saved. The color most desirable for pecan nuts ranges from light



mahogany or cherry to a dark mahogany, and may be attained by using a desired shade of pulverized Italian sienna, or mixing it with other dry, pulverized coloring matter, such as the substance known as 'curcuma,' or a chrome color. Other substances than those mentioned can be used for the coloring, depending upon the shade or color desired to be imparted to the nuts. Those stated, however, sufficiently explain the process, and will readily suggest others for use in producing shades that may be desired.

"The claims are as follows: (1) The process of treating nuts, which consists in tumbling them with dry, pulverized coloring material, substantially as described. (2) The process of treating nuts, which consists in tumbling them to cleanse them on their surfaces, and then coloring them by tumbling them with dry, pulverized coloring matter, substantially as described. (3) The process of treating nuts, which consists in tumbling them with dry, pulverized coloring material, substantially as described. (4) The process of treating nuts, which consists in tumbling them with dry, powdered Italian sienna, thereby imparting color to them, and with powdered soapstone, thereby polishing them, substantially as described."

In Corning v. Burden, 15 How. 252, referred to in Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, the court said:

"A process, eo nomine, is not made the subject of a patent in our act of congress. It is included under the general term 'useful art.' An art may require one or more processes or machines in order to produce a certain result or manufacture. The term 'machine' includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. But where the result is produced by some chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called 'processes.' A new process is usually the result of discovery; a machine, of invention. The arts of tanning, dyeing, making waterproof cloth, vulcanizing India rubber, smelting ores, and numerous others, are usually carried on by processes, as distinguished from machines. One may discover a new and useful improvement in the process of tanning, dyeing, etc., irrespective of any particular form of machinery or mechanical device. And another may invent a labor-saving machine by which this operation or process may be performed, and each may be entitled to his patent. * * * It is when the term 'process' is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not affected by the mechanism of mechanical combinations. But the term 'process' is often used in a more vague sense, in which it cannot be the subject of a patent. Thus, we say that a board is undergoing the process of being planed; grain, of being ground; iron, of being hammered or rolled. Here the term is used subjectively or passively, as applied to the material operated upon, and not to the method or mode producing that operation, which is by mechanical means, and the use of a machine, as distinguished from a process. In this use of the term, it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it."

The patent under consideration makes no pretension to the discovery that dry, pulverized coloring material, such as Italian sienna, or the like, will, if applied to clean and polished nuts, color them, or that powdered soapstone applied frictionally will polish them. The invention, if any is disclosed, resides in the mechanism whereby the soapstone and the pulverized coloring material are applied to the surface of the nut. The nut, in being painted or polished, undergoes no change or process, except passively or subjectively. The nuts thus powdered and colored may be a new commercial product, but their novelty in that respect is traceable solely to the application upon them, by a new machine, of old substances. The invention is prob-

ably highly meritorious, but should have been protected by a patent upon the machine, and not by a claim of a new art. For these reasons the demurrer must be sustained.

THE ELTON.

MARQUEST v. GRANT.

(Circuit Court of Appeals, Fourth Circuit. November 24, 1897.)

No. 235.

1. ADMIRALTY PROCEDURE — REFERENCE TO COMMISSIONER — EFFECT OF FINDINGS.
Where, by written consent of the parties, the cause is referred to a commissioner, his findings of fact are entitled to the same weight as the findings of a master in chancery, and will not be disturbed when based on conflicting testimony or the credibility of witnesses, or so far as there is any testimony consistent with the finding.

2. SHIPPING—INJURY TO STEVEDORE—DEFECTIVE APPLIANCES—CHARTER PARTY.
By a charter party, only the freight room was hired, and the vessel remained in the control of the owner, the master and crew continuing his servants. The loading was to be done by a stevedore employed by the charterers, but under the supervision of the master, and the vessel was to furnish the use of her tackle and appliances for loading. *Held*, that the vessel was liable for an injury to one of the stevedore's employés, resulting from the use of defective appliances.

3. SAME—ASSUMPTION OF RISKS.
A member of a stevedore's gang does not assume extraordinary risks which arise from the use of unsafe appliances in loading.

Appeal from the District Court of the United States for the Eastern District of South Carolina.

This was a libel in rem by George Grant against the steamship Elton to recover damages for personal injuries. In the circuit court a decree was rendered for the libelant, and the master of the steamship appealed.

J. P. Kirlin, for appellant.

W. Huger Fitzsimons, for appellee.

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

SIMONTON, Circuit Judge. This case comes up on appeal from the district court of the United States for the district of South Carolina, sitting in admiralty. The libel is filed by George Grant, one of a stevedore's gang, who was at work in the hold of the British steamship Elton, of which the appellant was master. The vessel was under charter party for a lump sum. The cargo furnished by the charterers consisted of cotton in bales, and of pig iron. The appliances furnished for loading the pig iron were at first large buckets, such as are used in loading coal. These were discontinued, and the pig iron was sent into the ship at the same time as the bales of cotton. The cotton bales were placed, three or four of them, in a sling, and from three to six pieces of pig iron were placed in the sling with the cotton. Naturally, if the contents of the sling struck

the side of the ship or the deck or the combing of the hatch as they were hoisted in, one or more of the pieces of pig iron were liable to fall out. The libelant charges that, while he was at work in the hold, he was struck by a bar of pig iron, which fell down the hatchway, as it was being put into the vessel; also, that this pig iron fell because of the negligence of the master of the ship in his failure to provide suitable and safe appliances for loading the iron, and also for failing to provide a safe place for him while engaged in the performance of his duties, and also in using unsafe, defective, and insecure appliances. The answer denies the allegation of negligence; sets up the defense of accident, negligence of fellow servants, and risks incident to the employment; and also, by way of reduction of damages, pleads contributory negligence on the part of libelant. The cause, being at issue, came before the court below, which granted an order, presented with written consent of counsel on both sides, referring the cause to C. J. C. Hutson, Esq., as commissioner, to take the testimony thereon, and to report all matters of law and fact arising in said case, with his conclusions thereon. The commissioner took all the testimony, and made his report thereof, and of the law relating thereto, giving his conclusions thereon. As conclusions of fact, he held that the use of improper and unsafe appliances was the proximate cause of the injury to the libelant, without any contributory negligence on his part; and, as a conclusion of law, he held the vessel responsible in damages. These conclusions of the commissioner, having been submitted to the court, met with its approval. They were adopted by the court below, and the report of the commissioner was ordered to stand as the judgment of the court. It comes here upon assignments of error.

The reference to a commissioner was authorized by rule 44 in admiralty. The commissioner, under that rule, had and possessed all the powers in the premises which are usually given to and exercised by masters in chancery in references to them. The reference was with the written consent of parties, and was presented to and made by the court as the result of such consent. The same regard must be had for the findings of the commissioner under these circumstances as would have been shown to the findings in a report of a master in chancery. The conclusions of a master on matters of fact are, under all circumstances, entitled to great respect. Medsker v. Bonebrake, 108 U. S. 71, 2 Sup. Ct. 351; Tilghman v. Proctor, 125 U. S. 149, 8 Sup. Ct. 894; Callaghan v. Myers, 128 U. S. 666, 9 Sup. Ct. 177. And when, as in this case, both parties present to the court a consent order providing for a report by the master of his conclusions upon the facts and the law, the court will not disturb his conclusions of fact, unless they are clearly in conflict with the weight of the evidence. Kimberly v. Arms, 129 U. S. 524, 9 Sup. Ct. 355.

The rule is clearly stated by Mr. Justice Brown in Davis v. Schwartz, 155 U. S. 636, 15 Sup. Ct. 237:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusion of law thereon, we think his finding, so far as it involves questions of fact, is attended by a presumption of correctness, similar to that in the case of finding by a referee, the special verdict of a jury, the findings of a circuit court under Rev. St. § 649, or in an ad-

miralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony to support it. But so far as it depends on conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with finding, it must be treated as unassailable."

Applying this rule to the case before us, we must consider as established the facts found by the commissioner, that the injury to the libelant was caused by defective appliances used in loading the ship, without any contributory negligence on his part. These facts being established, the question remains, is the ship responsible? This depends upon the construction of the charter party. The charter party was for a lump sum, and only the freight room was hired; so the ownership of the vessel remained in the original owner, and the master and crew continued to be his servants. Scrutton, Charter Parties, 3.

The charter party provides:

"Charterers are to pay for loading cargo and compressing cotton in presses at loading point, but no other charges, and the stevedore to be appointed by them, who is to load steamer under captain's directions. Charterers are not to be held responsible for improper stowage."

So, although the cost of loading cargo and the selection of the stevedore are in the charterers, the work of loading and the stevedore himself are to be under the captain's directions. In other words, at no time does the master lose his proper place in control of his ship and everything connected therewith. The stevedore is not an independent contractor doing the work, which, when completed, is to be turned over to the master for his approval or disapproval; but he must load the steamer at all times under the direction of, and so subject to, the control of the master. See The Alejandro, 6 C. C. A. 54, 56 Fed. 621. And see, also, George W. Bush & Sons Co. v. Thompson, 13 C. C. A. 148, 65 Fed. 812.

The next provision in the charter party bearing on this question is:

"Steamer to furnish use of her tackle and engine drivers in loading cargo and trim or discharge her ballast, as charterers may wish, at her expense, and to work night and day if required."

It will be observed in the first extract from the charter party that all that is required from the charterers is that they pay for loading cargo, and also that they pay the stevedore, whom they can appoint; but, nevertheless, the loading shall always be under direction of the captain. Nowhere else but in the clause last quoted is there any mention of the appliances to be used. Nor does the record disclose any evidence on this point. The conclusion follows that these appliances were to be furnished by the ship. As the use of the appliances was for the loading of the ship, and as this loading was under the direction of the master, notice of their condition and imperfection was brought home to him. The case before us is not in any respect like that of The Persian Monarch, 5 C. C. A. 117, 55 Fed. 333, decided by circuit court of appeals of the Second circuit. In that case the ship had furnished safe appliances for loading, but the stevedores, instead of using them, used others on the ship, which were defective. For this the ship was not responsible. In the case at bar the only appliances for loading pig iron furnished by the ship were buckets

and the slings which were used. The stevedore, who was called by and who gave evidence for the claimant, testified that the buckets were more dangerous than the slings, and the use of them had been discontinued. Under the circumstances stated, the vessel is responsible for the unsafe appliances. The Rheola, 19 Fed. 926; The Kate Cann, 2 Fed. 241.

It is earnestly contended, however, that the libelant was engaged in an employment whose dangers he knew, and whose risk he assumed. This is true. But he assumed dangers arising from the employment itself; not extraordinary risks, least of all the risk of unsafe appliances. Gardner v. Railroad Co., 150 U. S. 359, 14 Sup. Ct. 140, and cases quoted; Mather v. Rillston, 156 U. S. 391, 15 Sup. Ct. 464. Considering the whole case. we see no error in the court below. The decree appealed from is affirmed, with costs to appellee.

THE NEWPORT NEWS.

GOODWYN v. THE NEWPORT NEWS.

(District Court, E. D. Virginia. August 20, 1897.)

1. COLLISION—TUG AND STEAMER IN CHANNEL—FOG—SIGNALS—ERROR IN EXTREMIS.

   A tug navigating in a channel in the edge of a fog bank, on perceiving a steamer approaching at a distance estimated by the tug's master at 400 yards, gave the proper signal for passing starboard to starboard. The steamer answered by two blasts of her whistle, signifying her assent. Those on board the tug testified that the answering signal was heard only as one blast, and thereupon the tug changed her course, and was run down while attempting to cross the steamer's bows. *Held*, that this error was not one committed in extremis, and that the tug was therefore liable for at least half the damages.

2. SAME—EXCESSIVE SPEED.

   When two vessels approach each other at night in a narrow channel, under such conditions of weather as affect the visibility of lights and the hearing of sounds, there must always be some risk of collision. *Held*, therefore, that a large passenger steamer proceeding at over 12 miles an hour down the Elizabeth river below Norfolk, and approaching a low-lying fog bank, through which the white light of a tug was perceived, her colored lights being invisible, was in fault for violating rule 21, requiring every steam vessel, when approaching another vessel so as to involve risk of collision, to slacken her speed, and stop and reverse if necessary.

This was a libel in admiralty by Caleb Goodwyn, master of the tug Katie, against the steamer Newport News, to recover damages occasioned by a collision.

Sharp & Hughes and Whitehurst & Hughes, for libelant.
White & Garnett and Harrington Putnam, for respondent.

BRAWLEY, District Judge. The collision in the libel mentioned occurred about 6:40 p. m. on November 8, 1895, in the Elizabeth river, near Norfolk, on the reach approaching Boush's Bluff lightship. The Katie, a steam tug 91 feet in length and of 89.19 gross tonnage, having in tow a four-master schooner, left Lambert's Point that afternoon. She dropped her tow at Sewell's Point, about 5 miles distant,

and was on her return to Norfolk when the steamer Newport News ran into and sank her, two lives being lost in the collision. The testimony of all on board the Katie is that, after leaving Sewell's point, there was a thick low-lying fog, somewhat intermittent, and that, on her way down, she was going under one bell during the greater part of the time, and blowing her fog whistles. Witnesses who were on the Louise, crossing the Craney Island flats from Newport News towards Norfolk, testify to hearing the fog whistles; and it is clearly established that there was a fog between Sewell's Point and a point near where the collision took place. Goodwyn, the master of the Katie, who was in the pilot house on the starboard side, testifies to seeing the bright lights and a dim glimmer of the green light of the Newport News at a distance of about 400 yards a little on his starboard bow; that he gave the order for two whistles to be blown, and after a short interval blew two more whistles. These were the proper signals under the conditions prevailing, and the vessels should have passed starboard to starboard, and all accounts agree that there was sufficient room for the vessels to have passed safely, the dredged channel being 500 feet wide. The passing signals of two blasts given by the Katie were answered by the Newport News with two blasts. This is the concurrent testimony of all on board of the Newport News, and, as it is corroborated by independent and credible witnesses, I find it as a fact. Unfortunately, however, these answering signals were misunderstood. Those on board the Katie say that they heard but one whistle. Testimony has been offered to show that it sometimes happens that in certain conditions of the atmosphere two blasts sound as one, and that sometimes, because of water in the whistles, such confusion occurs. However that may be, the Katie, upon hearing what was supposed to be one whistle, changed her course, and, while attempting to cross the bow of the Newport News, was sunk. It is clear that the immediate cause of the collision was the crossing of signals. As these were initiated by the Katie, and properly responded to by the Newport News, and, if observed, would have allowed the vessels to pass safely, the responsibility for the collision would rest upon the Katie, unless her fault is extenuated by the circumstances surrounding her; and it is contended in behalf of the libelants that the conditions were such that any fault imputable to the Katie should be considered an error in extremis, and that the responsibility rests upon those whose omissions of plain duty brought about those conditions of extreme peril. This involves a more minute inquiry into the events immediately preceding the catastrophe, and as to the weather and other conditions prevailing.

The Newport News is a fast steamer, plying regularly between Washington, D. C., and Norfolk, carrying passengers and freight. She is about 275 feet in length, and is capable of making about 21 miles an hour. Her schedule time for leaving Norfolk is 6:10 p. m., and on the evening of November 8th she left at that hour. Other steamers of regular lines leave at and about the same schedule time, and between Norfolk and Old Point Comfort go over the same course, which passes by Lambert's Point, about 3 miles, Craney Island light about 4 miles, and Boush's Bluff light a little over 5 miles, respectively, from

Norfolk; Old Point Comfort being about 12 miles. The Newport News, proceeding at her usual speed, which is stated at from 10 to 12 miles an hour, was hauling abreast of the Boush's Bluff lightship at 6:38. The steamer Old Point, belonging to another line, leaving Norfolk about the same hour, reached the collision point a few minutes after her. The Katie, a tug engaged in and about those waters, should have expected to meet vessels about this point; and this must be considered in determining how far the suddenness of the peril mitigates the fault of her navigation. Goodwyn, her master, testifies that he saw the lights of the Newport News at a distance of about 400 yards. Estimates of distance upon the water in the nighttime upon moving vessels cannot, in the nature of things, be taken as accurate measures of distance. The condition of the weather—whether foggy or misty or rainy—accentuates the uncertainty. What men do ofttimes furnishes a more accurate means of determining the truth than what they say. Goodwyn's conduct was not that of a man confronted suddenly with impending calamity. He saw the lights. He exchanged words with the mate. He took his glasses, and saw the green light a little on his starboard bow. He gave the order to blow the passing signals. This was precisely the thing that he should have done. If he had had all the time required for cool deliberation, he could not have reached a more correct conclusion. These were not alarm whistles or fog whistles, but the signals prescribed by the rules of navigation, which would have insured safety if adhered to. The evidence sufficiently establishes a fog down the bay, but there was nothing in the condition of the weather near Boush's Bluff which prevented the visibility of lights for at least a quarter of a mile. I must conclude, therefore, that Goodwyn saw the lights of the Newport News in time to have avoided the collision, and that if he had "stuck to his two whistles," as he expressed it afterwards in the hearing of Blakey and Palmer, he would have passed safely.

The case does not fall within the principle which excuses because of error in extremis. It remains to consider whether there was any fault in the Newport News which contributed to the disaster. Much testimony was offered as to the state of the weather in and about Norfolk on that evening. While the Newport News is to be judged by the conditions prevailing where she was, and not by those existing at points at a distance from her, more or less considerable, yet the testimony is not without relevancy in enabling us to determine what was the actual state of the weather, and whether there were any circumstances which imposed the duty of unusual circumspection. It is claimed in her behalf that there was nothing in the state of the weather which required her to blow fog signals or to moderate her speed, and it is admitted that she did neither. No fog signals were given at the Craney Island lighthouse, nor at Boush's Bluff lightship. It is true that one witness, the steward of the ship, called for the libelants, testified that the fog bell was ringing; but the preponderance of testimony is that this bell was not rung before the collision, but after, and not as a fog signal, but as a warning to approaching vessels that a collision had taken place; and Lindstrom, a deck hand, on board the lightship, called for the respondents, testified that the

bell was not rung before the collision, but that the master of the ship, who had been playing cards in the cabin, went on deck about the time the Newport News was passing, and came back reporting that a fog was coming up, and that he was going to ring the bell. I am satisfied from this and other testimony that the bell was not rung before the collision.

The captain of the Newport News, his officers and lookout, all testify that there was no fog. Admiral Brown, of the United States navy, a passenger on the Newport News, saw slight evidences of a low fog as they were coming across from Portsmouth, and at Lambert's Point there was a low fog, which prevented his seeing the decking of the wharf, though he could see the lights above the wharf. He was not on deck at the time of the collision, but came out immediately after hearing the backing bells. He could see the lights of vessels anchored on the eastern side of the channel, and the lights at Hampton, 5 or 6 miles away. He could see lights in small boats 50 or 100 feet distant, but could not see the boats, and says that "the fog was thin and very low." He did not consider that the weather was such as to make navigation dangerous. Blakey, another passenger, who was on deck from the time of leaving Norfolk until very near the light-ship, and who was looking out for a view of the United States warship Columbia, testified that he could see lights distinctly all the way down. He went into the saloon just before the collision, on account of the rain, but continued to observe from that position.

Richardson, the captain of the Old Point, a steamer that left five minutes after the Newport News, says that there was a low fog at Norfolk; that he could see over it. At Lambert's Point there was some fog, and he blew his fog whistles at the turn, and the fog at that point was such that he went forward to assist the lookout. At the point of collision he says that there was a low fog on the water, that came up nearly to his pilot house, the floor of which was about 24 feet above the water, and that the fog might have been such as to obscure the view of the pilot house of the Katie, which he thought was about 10 or 12 feet above the water, and permit the view of the pilot house of the Newport News, which was about the same height as his own. Brown, lighthouse keeper at Craney Island, testified that there was no fog there, and no fog signals. All of the witnesses last named were called in behalf of the Newport News.

In behalf of the Katie, witnesses who were on board the tug Louise, passing from Newport News to Norfolk, over Craney Island flats, testify to thick fog, and to blowing of fog whistles, and to hearing the fog whistles of the Katie, estimated to have been a mile and a quarter distant. Some of these witnesses testify that, upon getting into the main channel at Craney Island light, the fog lifted, and lights were distinctly visible in the direction of Norfolk. Cadmus, who was on an oyster sloop 100 yards from Boush's Bluff light, testifies to the existence of a very thick fog. He says that the fog bell at that point was not rung until after the collision. Numerous witnesses testify to a thick fog at Old Point, at Hampton Roads, at Sewell's Point, and at Lambert's Point. My conclusion is that there was a low-lying fog, of considerable thickness, extending from Old

Point to within a half mile of Boush's Bluff lightship; that there was a fog of like character to the west of the channel, over Craney Island flats; that there was a low-lying fog at Lambert's Point, of sufficient thickness to require the customary precautions; that there was some fog at and about Boush's Bluff lightship, low-lying and thin. Neither the master, officers, or lookout of the Newport News could see the colored lights of the Katie. They testified to seeing her bright lights at a distance variously stated as from one-half to one mile distant. Had the weather been such as they describe, the bright lights should have been visible a much greater distance, and the colored lights which were of the kind required by law should have been distinctly visible more than a half mile. That they were not seen is conclusive evidence that the atmosphere was thick and hazy. The fact that the fog whistles sounded by the Katie were not heard aboard the Newport News is a circumstance to be considered. They were heard aboard the Louise as she was passing over the Craney Island flats to the westward of the main channel, and at a distance from the Katie no greater than that which separated the Newport News from her. The atmospheric conditions affecting the transmissions of sound are so imperfectly understood that the failure of those on board the Newport News to hear cannot be imputed to her as a fault, for there is no known test of the condition of acoustic opacity, the acoustic cloud not being visible to the eye or palpable to the touch; but my opinion is that the general atmospheric conditions prevailing that night in that much-frequented roadstead, in the main channel leading from the port of Norfolk, imposed upon the Newport News the duty of caution.

The twenty-first rule provides 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, and every steam vessel shall, when in a fog, go at a moderate speed." The testimony shows that the Newport News was going at her usual speed in that channel, which was stated as from 10 to 12 miles an hour. As the proof shows that she made the distance between Craney Island and Boush's Bluff, a distance of 1¹/₅ miles, in five minutes, she was evidently going at a speed greater than 12 miles an hour. Her engineer testifies that her engines make 117 revolutions a minute when going at full speed of 21 miles an hour, and that they were making 70 to 75 revolutions that night. Although her engines, according to the testimony of this witness, were backing at full power 30 or 35 seconds before the collision, the momentum of the Newport News was such that she cut through the keel of the Katie about midship on the port quarter, and tore the garboard streak on the starboard side. This, certainly, was not moderate speed, and, if there was a thick fog, the fault of the Newport News would be too clear for argument. Most of the cases cited apply to cases of thick fog, and are not applicable to the conditions as found. That the Katie had passed through a thick fog bank is clearly proved; that she was on the edge of it, and not entirely out of it, when first seen by the Newport News, seems also clear, for the witness Lindstrom says that the keeper of the light at Boush's Bluff reported a fog coming up in that direction, and was about to give the fog signals.

The Newport News would have seen the Katie earlier but for this fog. When she saw the white lights, and failed to see the colored lights, this should have indicated to her that the side lights were obscured by a low-lying fog. Such fogs are not of unusual occurrence, and it is the duty of navigators to give notice of their approach to fog banks, and to take precautions against vessels that may be enveloped in fog, although they themselves may not be shrouded. But assuming that, notwithstanding the omission of the Newport News to give notice of her approach by the required statutory signals, the vessels saw each other in time to have avoided the collision, as I have already determined to have been the fact in holding the Katie at fault, was the Newport News also at fault? It is impossible to define accurately what conditions "involve risk of collision" according to the exigency of the twenty-first rule; but it would seem that there must be "risk of collision" in a case where actual collision occurs, and, unless such collision appears clearly to have been the result of some gross carelessness or flagrant misconduct on the part of the other vessel, the twenty-first rule would seem to be operative. When two vessels approach each other at night, in a narrow channel, under such conditions of weather as affect the visibility of lights and the hearing of sounds, there must always be some risk of collision; and I am of opinion that the collective result of all the testimony shows that the circumstances of this case created such reasonable probability of danger as required compliance with the rule.

Havenner, the lookout of the Newport News, testifies that the night was dark, with a "light misty rain" falling. He afterwards substituted the word "drizzling" for "misty"; but it is clear from all the testimony that the atmosphere was thick, especially near the water. The side lights of the Newport News were about 30 feet above the water; the side lights of the Katie about 12 feet from the top of the water, and none of the witnesses on the Newport News could see them. The Katie was making about 3½ miles an hour; the Newport News, probably, over 12 miles an hour. They were approaching each other at the speed of a mile in something less than four minutes. If they saw each other at a distance of a quarter of a mile, they were less than a minute apart in time. If at half a mile, they were only two minutes apart. They were meeting nearly head on, or less than a point off. In such a roadway, on such a night, and under such conditions of visibility of lights, the peril of collision is ever present; and there should be no nice calculation that it may be avoided if measures can be taken which may diminish the probabilities or render it impossible. The rule referred to prescribes what those measures should be. "Slacken speed, or, if necessary, stop and reverse." The monarchs of the waves—fast-going passenger steamers—are naturally impatient of rules which tend to fetter their movements, and the observance of which sometimes prevents the keeping of schedules in which they have a just pride, and their passengers, through an unconscious bias, are prone to sustain them in such violations; but there can be no doubt as to the duty of courts to enforce the observance of rules which have the sanction of authority and of reason as promotive of safety.

It is to be regretted that, in a case involving so much conflict of tes-

timony, the court has not had the opportunity of observing the demeanor of witnesses to assist it to right conclusions, but having been heard by Judge SEYMOUR, whose death supervened before a decree, it has been presented upon the testimony taken before him, and upon depositions. While the testimony is greatly conflicting and unusually voluminous, the essential facts upon which the decision turns are few. The statements of the chief witnesses on either side cannot be accepted as absolute verity without rejecting the testimony of many credible witnesses not affected by the natural bias which is to be looked for in those chiefly interested. The exact spot where the collision occurred has been the subject of much contention. One would think that, in a place so much frequented, there ought not to have been much difficulty in fixing it with precision; but the only witness —Lander—who claims to have made an actual measurement fixes it at 1,045 yards from the Boush's Bluff lightship,—a much greater distance than that fixed by any of the other witnesses. The conclusion reached by me does not require an attempt to reconcile the testimony on this point. All testimony as to the exact time and place and distances of occurrences on the water at night is so uncertain that right conclusions must be the collective result of all the facts, rather than the rigid reliance upon any one isolated fact. The preponderance of testimony is that the collision occurred about a quarter of a mile from the lightship, but responsibility must be fixed by what was done rather than by where it was done. The fault is the main thing, not the place where it was committed; and the fixing of the exact spot, while important in the interest of accuracy, does not of itself point unerringly to the fault, although it may be helpful.

The immediate cause of the collision is not far to seek. It was undoubtedly the crossing of signals by the Katie. If the night had been clear, so that she could see at the usual distance the approaching vessel, there would have been no excuse for her mistake, and the loss must have rested where it fell. But the night was not clear. The lights of the Newport News were not visible at the usual distance, but were visible at such distance as enabled the Katie to determine her proper course; and, having so determined, she initiated the proper signals, which were properly answered, but, misunderstanding the response, she made the fatal mistake. If the Newport News had slackened her speed, as was her obvious duty under the circumstances, the Katie would have had time to slow down, to blow her alarm whistles, and to wait until she was assured that her initiatory signals were properly understood; but the speed of the Newport News was such that she had no time to wait, and she took the only course which then seemed to offer any hope of safety, and was run down. The original mistake being the Katie's, it must be attributed to her as a fault. That such mistake proved fatal was due to the speed of the Newport News, which, under the circumstances, must be attributed to her as a fault. Both vessels being at fault, the damages must be divided. Let a decree be entered directing a reference to ascertain the amount, and that the Newport News be adjudged liable to pay to the Katie one-half thereof; each party to pay its own costs.

CITY OF INDIANAPOLIS v. CENTRAL TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Seventh Circuit. December 10, 1897.)

No. 439.

1. CIRCUIT COURT OF APPEALS—JURISDICTION—ORDER INVOLVING CONSTITUTIONAL QUESTION.

An injunction restraining the enforcement of a statute reducing the rates of fare chargeable by plaintiff, a street-railroad company, was sustained by the circuit court on the ground that such statute was in violation of the state constitution, which provided that corporations should be created only by general law, while the statute in question was an amendment of the general law under which plaintiff was incorporated, but applied to no other corporation of the state. *Held*, that the circuit court of appeals was not without jurisdiction of an appeal from the order on the ground that the contract clause of the federal constitution was involved, which fact gave exclusive appellate jurisdiction to the supreme court, since such claim could only arise in case the statute in question was passed in violation of the provision of the state constitution, in which case it was invalid, without reference to the question of impairment of contract.

2. SAME—IMPAIRMENT OF CONTRACT RIGHTS—STATE STATUTE.

But the further contention in support of said injunction, that, if valid, the statute was an impairment of a vested contract right to charge a higher rate of fare, given plaintiff by the city ordinance under which it constructed its road, involves the application of the contract clause of the federal constitution, and fixes exclusive jurisdiction of an appeal in the supreme court.

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

Bill by the Central Trust Company of New York against the city of Indianapolis and others. Heard on motion by complainant to dismiss an appeal by defendant city from an order sustaining a preliminary injunction. 82 Fed. 1.

The appellee has entered a special appearance, and moved, in writing, to dismiss the appeal, for want of jurisdiction of this court over the subject-matter. The particular grounds on which the jurisdiction is denied are: First, that the case involves a question of the impairment of a contract, in violation of section 10 of article 1 of the national constitution, and a question of the denial of the equal protection of the laws, under section 1 of the fourteenth amendment to that constitution; and, second, that in this case a law of the state of Indiana is claimed to be in contravention of the constitution of the United States in the two particulars above stated. The appeal is from an interlocutory order for an injunction pendente lite. The suit was brought by the appellee, the Central Trust Company of New York, against the city of Indianapolis, the Citizens' Street-Railroad Company, and Charles S. Wiltsie, all citizens of Indiana. The bill, briefly stated, shows that the complainant is the trustee in mortgages made by the Citizens' Street-Railroad Company upon its franchises and plant to secure the payment of bonds to the amount of $4,000,000, with interest, of which bonds one-fourth are held in reserve, to take up earlier mortgages, and three-fourths have been issued, and are in the hands of innocent purchasers for value; that Wiltsie is the prosecuting attorney of Marion county, Indiana, charged with the enforcement of the criminal laws of the state; that the street-railroad company is a corporation organized under the general statute of the state, approved June 4, 1861, and is the owner in possession of all the street-railroad property in and about Indianapolis, having purchased the same in April, 1888, of its predecessor, the Citizens' Street-Railway Company, with all the privileges granted, and subject to the obligations imposed, by various ordinances (which are set out in the bill) enacted by the common council of the city before and since the present company came into possession; that by section 9 of the act of 1861 (section 4151, Rev. St. Ind. 1881; section 5458, Rev. St. 1894) the di-

rectors of the company are given power "to make by-laws," among other things, for regulating the running time of cars and the rate of fares on the road; that, by the original ordinance under which the Citizens' Street-Railway Company entered upon the streets of the city and constructed its plant, it was provided that "the rate of fare upon any line or route of railway shall not exceed five cents for each passenger for any distance"; that under the statute and the ordinance the rate of fare was first fixed by the company at five cents for each route, but afterwards was so modified as to give transfers from one line or route to another, and on that basis the cars of the company were run, without question concerning the rate of fare, from 1864 to 1897; that by section 11 of the act of 1861, which, it is said, is the only act ever passed in the state providing for the incorporation of street-railroad companies, and under which all such companies in the state were organized, it is provided that the act may be amended or repealed at the discretion of the legislature; that, by section 13 of article 11 of the constitution of Indiana, it is provided that "corporations other than banking shall not be created by special act but may be formed under general laws"; that on March 6, 1897, an act of the legislature of Indiana was approved by the governor of the state, whereby it was attempted to so amend section 9 of the act of June 4, 1861, as to require, among other things, that, in cities having a population of 100,000 or more by the census of 1890, "the cash fare shall not exceed three cents for any one trip or passage," etc., and to provide penalties and forfeitures for noncompliance with the requirement; that the enactment is in violation of the constitutions of the state and of the United States, in this: that, Indianapolis being the only city in the state which by the census of 1890 had a population of 100,000 or more, the statute is local and special, and it impaired the contract between the defendant company and the city of Indianapolis, and between that company and the state of Indiana, under the act of 1861, and the ordinances thereunder passed and accepted by the company and its predecessor,—the amendatory act being in conflict, it is alleged, not only with section 13 of article 11, but with section 23 of article 1, of the constitution of the state, touching the granting of special privileges and immunities, and also in violation of section 1 of the fourteenth amendment, as well as section 10 of article 1 of the national constitution. The motion for a preliminary injunction was granted on April 23, 1897, the court holding the act of 1897 to be invalid because in conflict with the constitution of the state. For the opinion of the court, see 80 Fed. 218. On June 15, 1897, the city of Indianapolis demurred to the bill, and entered a motion in writing to dissolve the injunction, one of the grounds alleged being "that it is plain upon the face of the complainant's bill that it was not entitled to the injunction." In support of the motion to dissolve was presented a decision of the supreme court of Indiana, rendered in a case begun and carried to that court after the granting of the injunction by the court below, whereby the act of 1897 was declared to be, in all respects, constitutional and valid. City of Indianapolis v. Navin, 47 N. E. 525. The court overruled the motion to dissolve, delivering an opinion, which is reported in 82 Fed. 1.

W. H. H. Miller, for appellant.

John H. Kern, for appellee.

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

WOODS, Circuit Judge, after stating the case, delivered the opinion of the court.

The right of appeal to this court from interlocutory orders of injunction is given by the seventh section of the judiciary act of 1891 only "in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals"; and it is well settled by the language of the act, and by numerous decisions, that, "in any case that involves the construction or application of the constitution of the United States," the only appeal allowed is to the

supreme court, and under existing statutes that cannot be had until after final decree or judgment. Hamilton v. Drisdale's Ex'rs, 2 U. S. App. 540, 3 C. C. A. 639, and 53 Fed. 753; World's Columbian Exposition v. U. S., 18 U. S. App. 42, 6 C. C. A. 58, and 56 Fed. 654; Railway Co. v. Evans, 7 C. C. A. 290, 58 Fed. 433; Green v. Mills, 25 U. S. App. 388, 16 C. C. A. 516, and 69 Fed. 852; Hastings v. Ames, 32 U. S. App. 485, 15 C. C. A. 628, and 68 Fed. 726; Barr v. City of New Brunswick, 39 U. S. App. 187, 19 C. C. A. 71, and 72 Fed. 689; Holt v. Manufacturing Co., 25 C. C. A. 301, 80 Fed. 1.

The contention of appellee is, and the decision of the court below (in part, at least) was, that by force of the statute providing for the organization of street-railroad companies, and by force of the requirement of the constitution of Indiana (section 13, art. 11) that all such corporations shall be created or formed under general laws:

"The state entered into a contract with this corporation whereby it was stipulated and agreed that, while that statute might be either amended or repealed, such amendment or repeal should only be compassed by a general law, applicable alike to all similar corporations throughout the state, and that thus the parties investing money in such an enterprise did so with the assurance that no legislation should be taken with reference to them which did not apply alike to all persons interested in property similarly situated. Western Paving & Supply Co. v. Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, and 28 N. E. 88; City R. Co. v. Citizens' St. R. Co., 166 U. S. 557, 17 Sup. Ct. 653."

This proposition assumes that the company had a vested right or privilege, within the meaning of the contract clause of the national constitution, not in the subject-matter of the contract (that is to say, not in the right to construct and to operate a line or lines of street railroad, and to charge fares, in accordance with the terms of the accepted ordinances of the city), but in the process or form of legislation by which it might be proposed to modify or annul the contract. It acquired no right, under the contract, which the state might not modify, abridge, or annul, by amending or repealing the act of 1861; but it is insisted that the amendment or repeal, by reason of section 13 of article 11 of the state constitution, can be effected only by a general law, applicable alike to all similar corporations throughout the state. And so the court below held, saying, among other things:

"This right [to charge a five-cent fare] cannot be modified otherwise than as provided in the charter contract, namely, by amendment of the act according to the terms of section 11, when read in the light of, and within the restrictions in, the Indiana constitution bearing upon the matter of amendment to that act."

From this premise it is argued that the question whether the amendatory act of 1897 is in harmony with the constitution of the state becomes a question of the impairment of contract, within the meaning of the constitution of the United States. The proposition is believed to be novel, and, for the present purpose, that may be its chief merit, since, so long as the contrary has not been established, it may be asserted with the better show of reason. Whether it is sound or tenable is not now the question; but it is not improper to observe that, if sound, it has a wider scope than has been suggested. If there is a contract between the street-railroad company and the

state to the effect that the act of 1861 can be amended only by an act which shall conform to the constitution of the state, that refers to the present constitution, and means that it is not in the power of the people of the state to so amend their constitution as to authorize special legislation which shall affect the rights of this company under the supposed contract, or of any company organized under the act of 1861. Rights once vested, within the meaning of the national constitution, are protected against impairment by amendment of state constitutions, no less than by ordinary legislation. The proposition may mean, too, that by no independent enactment, not purporting to amend the act of 1861, can the charters or contracts under that act be affected. For instance, the act of March 6, 1891, whereby Indianapolis was given a new charter, contains full provisions in respect to street railroads, and, if valid, would seem to have been a repeal by implication of the act of 1861, in so far as it applied to that city. So the supreme court of the United States seems to have understood when, in the case of City R. Co. v. Citizens' St. R. Co., supra, it held that the charter of the latter company was not repealed by the act of 1891, because that act was not to be given a retroactive construction.

It is contended by counsel for the appellant that the inquiry, whether the legislature of Indiana, by the amendment of 1897 has violated an implied engagement that the act of 1861 should not be amended by any statute violative of the state constitution, does not involve the application or construction of the constitutional provision against impairment of contracts, and therefore is not a federal question. In support of this view are quoted expressions from the opinions of judges in Jackson v. Lamphire, 3 Pet. 281; Charles River Bridge v. Warren Bridge, 11 Pet. 584; Dartmouth College v. Woodward, 4 Wheat. 563; Bank v. Buckingham's Ex'rs, 5 How. 317; Newton v. Commissioners, 100 U. S. 548; Stone v. Mississippi, 101 U. S. 817; Church v. Kelsey, 121 U. S. 282, 7 Sup. Ct. 897; Lehigh Water Co. v. Easton, 121 U. S. 388, 7 Sup. Ct. 916. But in none of those cases was there involved a question just like that now under consideration, and what was said, however persuasive, cannot be regarded as decisive. A further pursuit, however, of this discussion is unnecessary here, because it is plain that this phase of the case may be disposed of without determining whether there has been an impairment of contract. That the contract between the parties has been violated or impaired is asserted, on the theory of the proposition now under consideration, solely on the ground that the act of 1897 is in conflict with the state constitution. The court below, having jurisdiction of the case by reason of the diverse citizenship of the parties, even if not on other grounds, adhered to the view which it at first declared, notwithstanding the later decision to the contrary by the supreme court of the state, and reaffirmed the unconstitutionality of the enactment. From that conclusion, without going further, it followed that the motion to dissolve the injunction should have been overruled, as it was; and it was unnecessary in that court, and on a review of the question in an appellate court it will be unnecessary, to consider whether a question of the impairment of contract was or is involved. If, on the contrary, the conclusion had been that the act was constitutional, there could, of course, have re-

mained no question of the impairment of the contract on the ground that the act had not been constitutionally passed.

The next proposition on which the jurisdiction of this court is denied is that by the ordinance of 1864, and the acceptance thereof by the Citizens' Street-Railway Company, there was formed a contract for a five-cent fare between the city of Indianapolis, representing the sovereignty of the state, on the one side, and the street-railroad company on the other, which contract, it is claimed, is impaired by the enactment that only three cents shall be charged. This assumes that the act of 1897 is not in conflict with any provision of the state constitution, and the contention is that the company has a vested right, under the contract, to charge a five-cent fare, which by no form of legislation can be taken away. This is a distinct assertion that there is a contract right which has been impaired, and, unless the contrary is clear, it makes a case of which this court cannot take jurisdiction. The decision which, in its main features, seems to be most nearly in point, was made in Sioux City St. R. Co. v. Sioux City, 138 U. S. 98, 11 Sup. Ct. 226. In that case the street-railway company (organized under a general law which contained a reservation of power to amend and repeal not essentially unlike the power reserved in section 11 of the act of June 4, 1861) was required by its original charter (the ordinance of the city permitting it to occupy the streets of the city with its road) to pave between the rails of its track. After the company had constructed a part of its lines, and laid the required pavement between the rails, a statute was enacted to the effect that, in cities of the first class, street-railroad companies should be required to pave between the rails, and for one foot outside of the rails. Two years later Sioux City, having meanwhile become a city of the first class, passed an ordinance in conformity with the statute requiring the company to pave outside, as well as within, the rails of its track. Touching the question of impairment of contract, the opinion of the supreme court says:

"No question can arise as to the impairment of the obligation of a contract, when the company accepted all of its corporate powers subject to the reserved power of the state to modify its charter, and to impose additional burdens upon the enjoyment of its franchise. Under the act of March 15, 1884, it was made a condition of the enjoyment of its franchise by the company, that, when the city should determine that the streets should be paved, the company should bear a certain portion of the cost thereof; and any prior contract between the company and the city in regard to paving was subject to the provisions of section 1090 of the Code. There was nothing in the ordinance of December 12, 1883, which bound, or could bind, the city not to exercise its statutory authority to impose other conditions upon the exercise of the rights of the company. Our conclusion, therefore, is that there was no contract between the company and the state or the city, the obligation of which was impaired by the laying of the tax in question."

In City R. Co. v. Citizens' St. R. Co., supra, after declaring it entirely clear that the Citizens' Street-Railroad Company had a contract with the city, as had been decided by the supreme court of the state, it was added:

"It is true that by section 11 of the original act of 1861 a right was reserved to the general assembly to amend or repeal, at their discretion, the act authorizing the incorporation of street-railway companies; but that was a right re-

served to the general assembly itself, and was never delegated, if, in fact, it could be delegated, to the common council of the city."

But further along in the opinion is found this statement:

"The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its track, and operate a railway thereon, upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company, and the road built and operated as specified, became a contract, which the state was not at liberty to impair during its continuance."

In view of this utterance, the soundness of which it is not for us to question, it cannot be said to be clear that the company is not right in contending that it has a vested right to charge a five-cent fare until the original period of thirty years, and the additional period of seven years given by a later ordinance, which the supreme court declared valid, shall have expired. There is, to say the least, too much foundation for the contention to admit of the inference that it is made in bad faith; and, that being so, the question is one for the supreme court, and not for this court. The appeal is therefore dismissed.

ASHLEY v. BOARD OF SUP'RS OF PRESQUE ISLE COUNTY.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1897.)

No. 507.

1. FEDERAL COURTS—JURISDICTION—TRANSFER OF CAUSE OF ACTION.
   Where municipal bonds have been really and in good faith transferred to a citizen of another state, entitled as such to sue thereon in the circuit court of the United States, that a subsequent transfer of the legal title to another nonresident is merely colorable does not defeat the jurisdiction of such court, under 18 Stat. 470, § 5, relating to transfers of causes of action "for the purpose of creating a case" cognizable by that court.
2. SAME—MOTIVE IN MAKING TRANSFER.
   The fact that the purpose of a transfer of a cause of action was to enable the transferee to bring suit thereon in the federal courts does not defeat the jurisdiction of such courts, where the transfer was real and without reservation, the motive being material only as a circumstance to be considered in determining whether the transfer was in fact real.
3. ABATEMENT—EVIDENCE IN SUPPORT OF PLEA.
   A defendant who introduces a deposition in support of his plea in abatement, on the ground of want of jurisdiction, cannot destroy the effect of the testimony by argument that the witness is unworthy of belief, nor sustain his plea on an inference that the answers to certain questions which the witness refused to answer would have disclosed facts showing want of jurisdiction.

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

Action by William J. Ashley against the board of supervisors of the county of Presque Isle. From a judgment sustaining a plea in abatement, and dismissing the action, plaintiff brings error.

This case was before this court at a former term on writ of error, and, upon full consideration of the questions then before the court, the judgment was reversed and the case remanded for a new trial. 16 U. S. App. 656, 8 C. C. A. 455, and 60 Fed. 55. A full statement of the facts of the case, and the issues then disposed of, will be found in the opinion of the court, to which reference may be made without now restating the case in full.

For the purpose of understanding the question now to be decided, it is sufficient to say that the county of Presque Isle, Mich., issued certain municipal bonds, on a part of which the present suit was brought. The bonds were made payable to bearer, and recited that they were issued in conformity with the provisions of the enabling act of the legislature of Michigan, entitled " 'An act to authorize the county of Presque Isle to issue bonds and to provide for the retirement of bonds heretofore issued,' approved February 16, 1885, and authorized at a meeting of the board of supervisors of the said county of Presque Isle, March 25, 1885." All of the issue of bonds authorized by this act were delivered in exchange for bonds of a former issue, in accordance with the purpose of the act, which was to retire the outstanding bonds. Fourteen of the bonds of this last issue came into the possession of the Wayne County Savings Bank, of Detroit, Mich., as owner, for full value, and without any notice on the part of the bank of any objection to, or infirmity in, the bonds. Subsequently, William A. Moore, a director in and the attorney for said bank, took some of these bonds East, and among them the bonds now in question, with a view of selling them. He stopped with his brother-in-law, Dr. Whitbeck, a citizen and resident of Rochester, N. Y., and while there sold to Dr. Whitbeck three of the bonds and fourteen coupons (being those now in suit), for the sum of $3,500, which was below par. On the same or a subsequent day the same bonds and coupons were sold by Dr. Whitbeck to William J. Ashley, also a citizen of Rochester, the plaintiff in error, who was vice president of the Merchants' Bank of Rochester, N. Y., and Ashley brought suit upon the bonds and coupons in the court below, the county failing and refusing to pay. Moore, in his testimony, conceded that it was his purpose in selling the bonds to enable some one, not a citizen of the state of Michigan, to bring suit on the same. Dr. Whitbeck executed his note for the purchase price of the bonds, payable to the Wayne County Savings Bank, at one year, with interest. This note was paid at maturity by check of Mr. Moore, brother-in-law of and attorney in fact for Dr. Whitbeck, out of certain money realized on mortgage loans previously made by Moore for Whitbeck, the money belonging in part to Whitbeck and in part to his wife. When the case came to this court on the former hearing, no issue had been made as to the jurisdiction of the court by any plea in abatement or otherwise. Upon the trial, however, the defendant introduced depositions of Whitbeck and Ashley, which had been taken in the case, apparently for the purpose of showing that the transfers to them were not bona fide, but colorable and collusive, with a view to bring the case within the jurisdiction of the courts of the United States. There being no issue raising this question, the court did not pass upon it, nor submit any such question to the jury, and the case was tried in the court below, and disposed of in this court, on other issues, which were properly raised. In view of the introduction of this evidence, however, which it was supposed was intended to show that the transfers from the bank to Whitbeck through Moore, and from Whitbeck to Ashley, were collusive and fraudulent, this court, in sending the case back, said: "Another matter requiring attention is presented by the evidence recited in the bill of exceptions, which was introduced by the parties upon the subject of the bona fides of the transfer of the bonds in suit as affecting the jurisdiction of the court. No issue of any sort was framed in the court below on the subject, but a question arose for the action of the court under section 5 of the judiciary act of March 3, 1875 (18 Stat. 470, 472, c. 137), which requires the court on its own motion to dismiss the action if it shall appear at any time that it has been collusively brought. The circuit court declined to make any express decision of the question, but it must be deemed in legal effect to have negatived the suggestion of collusion; otherwise it could not properly have gone on in the exercise of the jurisdiction to the taking of the verdict and the rendition of the judgment. It is clear that such a question is an independent one, and can not properly be confused with the issue on the merits; otherwise it could not be determined from the verdict whether it was founded on a question of jurisdiction or of the cause of action. It was not a question for the jury as the pleadings stood, but was one which the court was bound to decide before submitting the case upon its merits. On the face of the record, the court had jurisdiction, and the question may not arise upon another trial. It would seem that, in a case of fair doubt, the question was one for the trial court, though un-

doubtedly the court of appeals could and would deal with it, if the fault clearly appeared. In the present case, upon reversing the judgment, we shall direct the circuit court to permit, in its discretion, an amendment of the pleading of the defendant by appending to the plea a plea in abatement, in accordance with the rules of practice of the circuit courts of the state, of the matter touching the jurisdiction, whereon a separate verdict can be taken, or, if it should be deemed best, to leave the question for its own disposition under the act of 1875." A plea in abatement to the jurisdiction was subsequently filed in the court below, after the case was remanded, setting up that "the said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, and that the said William J. Ashley is improperly and collusively made the plaintiff in said suit for the purpose of creating a case cognizable in this court under the acts of congress, and this the said defendant is ready to verify; wherefore it prays judgment if the said plaintiff ought to be answered to his said writ and declaration." Issue was taken on this plea, and, the case having been submitted to the jury under instruction, a verdict was returned in favor of the defendant, and judgment pronounced thereon, dismissing the suit, and the case is brought to this court on writ of error. Error is assigned to the action of the court in refusing the request of plaintiff in error at the conclusion of the evidence to direct a verdict in favor of the plaintiff on the plea in abatement, and this is the error chiefly relied on in this court for reversal of the judgment.

Griffin, Warner & Hunt (Otto Kirchner, of counsel), for plaintiff in error.

Henry M. Duffield, for defendant in error.

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

CLARK, District Judge, after stating the facts, delivered the opinion of the court.

It will be observed from the language of the plea that the question really made was on the transfer from Whitbeck to Ashley. Notwithstanding this, the plaintiff in error took issue on the plea in abatement. The evidence introduced for the defendant consisted of the depositions of Whitbeck and Ashley, previously taken in the case, in the absence of the issue raised by the plea in abatement and the replication thereto. These depositions were introduced by the defendant with a view to sustain the plea, and William A. Moore was introduced by the plaintiff in error. In the discussion of the case at bar in this court, the transfer from the bank to Whitbeck, as well as that from Whitbeck to Ashley, are treated as equally in issue under the plea in abatement, notwithstanding the limited form of the plea, and we have concluded to treat the plea in this broader aspect, as involving the good faith of both transfers.

Section 5, Acts 1875 (18 Stat. 470), referred to in the former opinion of this court and in the briefs, is as follows:

"That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable, under this act the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require and shall make such order as to costs as shall be just."

We think it is very clear that, as these bonds were payable to bearer, if the transfer from the bank to Whitbeck was a real one, in good faith, and not colorable merely, and collusive, the jurisdiction of this court cannot be defeated by reason of any objection that can be made to the transfer from Whitbeck to Ashley. Whitbeck being a citizen of the state of New York, if the transfer to him was a real one the case was then one properly within the jurisdiction of the circuit court, and the transfer from Whitbeck to Ashley could not create "a case cognizable or removable" in or to the courts of the United States. The facts necessary to jurisdiction were already complete, unless the transfer from the bank to Whitbeck could be successfully assailed.

In Stanley v. Board, 15 Fed. 483, the court said:

"The demands in suit were first assigned to Mr. C. P. Williams, a citizen of this state. Williams thereafter assigned to the plaintiff, in circumstances which would probably require a dismissal of the suit, pursuant to the fifth section of the act of March 3, 1875, were it not for the fact that the court had jurisdiction prior to and irrespective of the assignment. That the plaintiff's immediate assignor might have maintained this action, because the controversy is one arising 'under the laws of the United States,' was directly decided on the former trial, and is res adjudicata in this court. The assignment was not made for the purpose of 'creating a case' within the jurisdiction of the court, for such a case was already in existence. As the court must, in any event, retain jurisdiction, an inquiry into the relations existing between the plaintiff and his assignor can lead to no tangible result. Where a party, who is entitled to sue in the federal courts, transfers his cause of action to another, who has the same right, of what moment is it that the transfer was for an adequate consideration, or was wholly without consideration, so long as the legal title is transferred? The defendant has no reasonable ground for complaint, and the court, for whose advantage the statute was framed, has not been imposed upon or burdened with an improper or collusive controversy."

What was thus said is applicable to the question here presented. In this view, we put aside the transfer from Whitbeck to Ashley, and pretermit any discussion of the testimony relating to that transfer. The question then remains, was the transfer from the bank to Whitbeck a real one, or colorable and fraudulent? It is to be observed that it has been uniformly held that the fact that the purpose of the transfer was to enable the purchaser or vendee to bring suit in the courts of the United States does not affect the question. The cases fully recognize the right to transfer or convey with just such motive as this, provided the conveyance or transfer is a real one, intended to be final without reservation, and not solely for the purpose of giving jurisdiction. This doctrine was announced in the late case of Manufacturing Co. v. Kelly, 160 U. S. 327, 16 Sup. Ct. 307, in which previous cases are reviewed. The motive for transfer in such cases is to be regarded as a circumstance to be considered in connection with all the other circumstances of the case in determining whether the transfer is real. If, in a given case, the sale or transfer is real, the existence of a motive to confer jurisdiction on the courts of the United States does not invalidate the transfer nor defeat the jurisdiction.

Referring, now, to the testimony of Dr. Whitbeck, introduced by the defendant to sustain the plea in abatement, it is found that he states distinctly that he purchased the bonds and coupons in suit

from the bank through Moore, giving his note therefor, which was paid at maturity out of funds in the hands of Moore belonging to him and his wife. He says that Moore, as his agent, had loaned money for him on mortgage security in Michigan, and that he trusted him in managing such business matters. He says, in substance, that there was no understanding of any kind that his money was to be refunded in the event all or any part of the bonds or coupons was not collected in suit. In short, he says that there were no conditions in regard to the sale of the bonds. He states that he sold the bonds to Ashley, a citizen of the same place, for the same price at which he purchased them, taking Ashley's check, which was deposited in the bank of which Ashley was vice president. The burden of proof to sustain this plea in abatement was on the defendant, and, having introduced and read the deposition of Dr. Whitbeck, the defendant cannot be permitted by argument to say that the witness is unworthy of belief, or to destroy the effect of his testimony by argument which assumes that the witness is dishonest. It is true that the defendant might, by independent testimony, show that the facts were not as stated by the witness, and we may concede, without deciding, that it would be permissible for the defendant to argue from the facts stated by the witness himself that adverse statements were shown not to be true; but the defendant cannot be permitted to impugn the credibility of this witness, nor to insist that the plea in abatement is sustained by argument which, in effect, questions the honesty of the witness. So far as he testifies affirmatively, and gives the facts, the testimony of Dr. Whitbeck sustains the transfer to himself as a real and valid sale of these bonds. The defendant now criticises the testimony of this witness, not because of any facts stated, but on account of the refusal of the witness to answer certain questions. It was argued, from this refusal to answer what are said to be material questions, that the statements of Dr. Whitbeck, to the effect that the transfer was bona fide, are not true, and he is not to be believed. This, in our opinion, is in effect an attempt to discredit the defendant's own witness. The witness Whitbeck declined to answer the question from whom he purchased the bonds, further than to say it was from a person resident in Michigan. There is really no doubt that, the sale being through his brother-in-law, Moore, he failed to remember at the moment for whom Moore was selling the bonds, or the name of the bank, and he was not reminded by any question of any names. He further declined to answer the question whether he had purchased certain municipal bonds from Mr. Warner, a lawyer of Detroit. Whether this purchase took place or not, it had no relation to the bonds in question, and was clearly immaterial. He was then asked whether he did not know that these transfers had been made for the purpose of collecting the money due on these bonds and coupons in the United States courts. That question he declined to answer, but added that neither Mr. Moore nor his wife (Whitbeck's) had any interest in the bonds and coupons that he knew of. He was then asked if he was aware that there was a county of Presque Isle, and said that he was not. He stated that he had no memorandum from which

he could describe the bonds and coupons in question, but made an entry in his books of their purchase and sale. He states again that his wife had no interest in the bonds to his knowledge, and that he was not aware that Griffin, Warner, and Hunt had any interest in them. He further declined to answer the question who recommended the bonds to him as an investment, further than to say that it was a resident of Michigan; declining, however, to give the name, or to say what the business occupation of the man was.

We may remark that these questions were not relevant, in view of the issues under which the case was then being prepared for trial, and this may be regarded as explaining to an extent why the questions were not answered. If the defendant thought answers to the questions would bring out facts material to the case, the method provided by law for compelling the answer is very well understood, and was available to the defendant. It is probable that these questions would have been answered if the deposition had been taken after the issue on the plea in abatement, under which the case was submitted to the jury, but the defendant did not retake the deposition. It is apparent that there was really nothing willful or intentionally evasive in Whitbeck's refusal to answer. He was not represented by counsel, and the questions plainly indicated to him that facts impeaching the sale from the bank to himself were sought to be elicited. The apprehension thus excited, with the further fact that witness actually knew but little of the facts, having relied entirely on Moore, goes far to make this reluctance to talk natural, under the circumstances. Every material fact about which Whitbeck refused to testify was fully brought out and answered by the witness Moore, and Moore was unshaken and his testimony unaffected by searching and skillful cross-examination. It is very frankly admitted that one of his purposes in selling these bonds, and in going East to sell them, was to put them in the hands of some person who would be authorized, by reason of diverse citizenship, to sue in the United States circuit court; but he is very clear and positive in his statement that the sale was made bona fide, and was final and unconditional, without any understanding, express or implied, which in any way qualified the character of the transaction as a complete sale. On cross-examination, when asked whether, in the event Whitbeck had failed to realize what he paid for the bonds, he would have refunded the money to Whitbeck, he does say that would have been a question for the future. It is not to be doubted that he meant by this that in such a contingency as that suggested he would take into consideration whether or not he was under moral obligation to save Whitbeck from loss, but the testimony is positive that there was no such understanding. As we have said, if the sale by the bank to Whitbeck, through Moore, must be regarded as a valid and real one, the jurisdictional conditions were then complete, and the sale by Whitbeck, already competent to sue in the federal courts, to Ashley, could not have made, and could not have been intended to make or create, a case cognizable in the courts of the United States. The case, then, stated with reference to the effect of the testimony, is this: The defendant has proved no positive fact by its own wit-

nesses on which the court or jury could be asked to declare the sale from the bank to Whitbeck collusive. The defendant's own witness, as we have seen, declines to answer certain questions, and the court and jury are asked to infer from this refusal that the answers, if made, would have disclosed such facts as would have shown that the witness Whitbeck was testifying falsely when he said that the transaction was a real one, without reservation or condition. In answer to this, we remark that suspicion from refusal to answer cannot supply the want of facts. Hanson v. Eustace, 2 How. 653; 3 Tayl. Ev. (9th Ed.) § 1467; Lloyd v. Passingham, 16 Ves. 64. And, further, the defendant cannot be permitted in this indirect method to discredit its own witness. What we say is to be understood with reference to the specific facts with which we are here dealing. It is not the case where a party introduces himself as a witness in his own behalf, and refuses to answer questions in regard to documents, or knowledge peculiarly within his possession and keeping. The case is that of a party introducing a witness, and then undertaking to draw unfavorable inferences and supply necessary facts from the refusal of such party's own witness to answer certain questions.

When the evidence was all in, the plaintiff's counsel requested the court, in effect, to instruct the jury that, upon the undisputed testimony, the plaintiff was entitled to a verdict finding against the plea in abatement. This was, in effect, a motion to direct a verdict, and was so treated. The court refused to direct the jury as requested, and error is assigned on the action of the court in this respect. We are of opinion that this assignment is well taken, and that the motion should have been granted, and the jury directed as requested. We think there was no substantial proof on which the defendant was entitled to go to the jury on the plea in abatement. The jury could not, on the testimony adduced, justifiably have inferred the existence of the facts set up in the plea. This view of the case renders it unnecessary to consider other errors assigned on the instructions of the court to the jury. Reversed and remanded, with direction to set aside the verdict and order a new trial.

CENTRAL TRUST CO. OF NEW YORK v. GRANTHAM et al.

(Circuit Court of Appeals, Seventh Circuit. December 2, 1897.)

No. 342.

1. FEDERAL JURISDICTION—STAYING PROCEEDINGS IN STATE COURT—PRIORITY.
   Where a roadway of a railroad company is laid out in part across private property, which has not been condemned, the fact that a federal court, in a suit to foreclose a mortgage given by the company, to which the owner of the private property is not a party, decrees a sale, including the roadbed, which is sold and conveyed accordingly by its master, gives it no jurisdiction, by reason of priority or otherwise, to entertain a new suit to enjoin the enforcement of a judgment in ejectment rendered by a state court in an action by the owner of the private property, even though the applicant for an injunction claims through the master's sale, and was not made a party to the action in the state court.

2. SAME—INTERSTATE COMMERCE—MAIL ROUTE.

The fact that property affected by a judgment in ejectment rendered by a state court is used as a highway for interstate commerce and as a national mail route cannot be urged in support of the jurisdiction of a federal court over a suit to restrain the enforcement of the judgment, which is brought by a party not suing or authorized to sue on behalf of the public, and in which the United States or the attorney general is not a party complainant.

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

On January 24, 1896, appellant exhibited in the circuit court of the United States for the district of Indiana its bill of complaint, which, barring the exhibit therein referred to, was in words following:

"The Central Trust Company of New York, a corporation created by and existing under the laws of the state of New York, and a citizen of such state, brings this its bill of complaint against Wesley Grantham, who is a citizen of the state of Indiana, and a resident of the aforesaid district, and Charles E. Davis, who is sheriff of Montgomery county, Ind., and a citizen of the state of Indiana, and a resident of this district, and the Chicago & Southeastern Railway Company, which is a corporation organized and existing under the laws of the state of Indiana, and a citizen and resident of this district, and thereupon the complainant shows to the court:

"(1) That said railway company is now, and for some years last past has been, the owner of the line of railway about 100 miles in length, extending from Anderson, Ind., through the counties of Madison, Hamilton, Boone, Montgomery, Parke, and Clay, to the city of Brazil, in said last-named county, together with certain equipment and appurtenances thereto belonging. Said line of railroad is now and for some years has been an operated railway, with several trains running each way over said road daily, carrying passengers, freight, and United States mails, and said railroad is now engaged in the business of maintaining a public highway and performing its duties as a carrier thereon.

"(2) On October 30, 1891, the said defendant railway company executed and delivered according to law, to the complainant and one Josephus Collett, a certain deed of trust, in writing, wherein, for the purpose of borrowing money to construct, complete, and equip its railroad, it duly bargained, sold, granted, conveyed, and confirmed unto the complainant and said Collett all and singular the line of railway as the same then was or at any time thereafter might be constructed, together with all the equipment and appurtenances thereunto belonging, and the tolls, income, and revenue to be levied therefrom, and all and singular the powers and franchises thereto belonging. Such deed of trust was, shortly after its execution and delivery, duly recorded in each of the counties in which the said line of railroad or any part thereof was situated, including therein the county of Montgomery, in the state of Indiana, and such mortgage has ever since such execution and delivery and record vested in the complainant an interest in and lien upon said line of railway and each and every part thereof. In the year 1893 the said Josephus Collett departed this life, and no successor has ever been appointed to fill the vacancy occasioned by his death, and the said complainant has ever since the decease of said Collett been sole trustee in such conveyance.

"(3) Such conveyance was executed to secure the payment of an issue of bonds authorized to be certified thereunder upon the terms and conditions and to the amounts recited in said conveyance, reference being thereto had, a copy of which conveyance is filed and made a part of this bill of complaint as Exhibit A.

"(4) In accordance with the provisions and authorizations of such conveyance, the said railway company on or about the execution of said instrument, in 1891, duly executed six hundred and twenty-five (625) bonds, of $1,000 each, under the said conveyance, and complainant thereupon duly certified and attested the same; and thereupon the said $625,000 of bonds of said defendant railway company were duly negotiated and sold in good faith and for value, and have ever since been outstanding, and are now held by divers persons and corporations, and no part of the principal thereof has been paid.

"(5) The said line of railroad now owned by the defendant railway company

formerly belonged to the Anderson, Lebanon & St. Louis Railroad Company, a corporation organized under the laws of the state of Indiana, which about the year 1874 located and graded a continuous roadbed and line of railroad extending from Anderson westwardly into and through Montgomery county, Ind., to Waveland. That in the course of the construction of said road, in 1874 or 1875, the said Anderson, Lebanon & St. Louis Railroad Company entered upon the lands of one Thomas H. Messick, lying in Montgomery county, Ind., with the full knowledge and acquiescence of said Messick, who was then and there in possession of said farm, and located, laid out, and fully graded its railroad entirely across his said farm, and for many miles on each side thereof, continuously. Said last-named company, in 1875, mortgaged its railroad made and to be made, including its roadbed, rights, and franchises, to Kountz & Crosby, as trustees, to secure an issue of bonds, of which a large number were issued and negotiated to innocent holders for value. The said mortgage to Kountz & Crosby was duly recorded in all counties along the line, including the said county of Montgomery. For default in payment of interest on such mortgage, suit for foreclosure was brought in this court by the said Kountz & Crosby, and final decree of foreclosure was rendered therein against said Anderson, Lebanon & St. Louis Railroad Company. The property described in said mortgage was sold in 1885, and the sale confirmed, and conveyance thereof duly made by the master of this court to the Midland Railway Company, which entered into the possession of the property so purchased by it under the decree of this court, and completed the said railroad entirely through Montgomery county, Ind., about the year 1887, including that portion across the farm and lands of the said Thomas H. Messick; and the said railroad has ever since 1887 been continuously operated from Anderson across, over, and upon the right of way originally laid out and constructed, in 1874 or 1875, across the lands of said Messick.

"(6) In the year 1891, the defendant railway company purchased and acquired all and singular the line and road so sold under the decree of foreclosure in this court, and has ever since operated the same over and across the said right of way and between the terminals aforesaid, and the said railroad, including that portion thereof upon and across the said right of way across the farm belonging to the said Messick at the time the road was located and constructed as one continuous line, and to tolls and revenues thereof, constitute the only security for the bonds outstanding under the mortgage executed to the complainant.

"(7) The defendant Charles E. Davis is the sheriff of Montgomery county, Ind. He now holds in his hands as such sheriff a writ issued under the seal of the circuit court of Putnam county, Ind., upon a judgment in ejectment therein rendered in favor of the defendant Wesley Grantham, and against the Chicago & Southeastern Railway Company. The said writ so held by the said Davis, as sheriff, commands him to dispossess the said railroad company from the possession, occupancy, and enjoyment of that part of its railroad described as the right of way strip of the said railroad upon and across the lands in Montgomery county formerly belonging to Thomas H. Messick, and now claimed to be owned by the said Wesley Grantham, and requiring the said sheriff to deliver possession of that section of the said railroad into the possession, control, and enjoyment of the said Grantham. Complainant is advised, and therefore so charges, that the said writ issued out of the said Putnam circuit court upon a final judgment in ejectment therein rendered in an action prosecuted by the said Wesley Grantham against said railway company, wherein and whereby a final judgment of ouster was rendered against said railroad company of the possession of the said right of way strip aforesaid. The complainant charges that the said defendant Grantham acquired whatever interest or title he holds in and to the said land long after the record in Montgomery county of the mortgage to complainant, and several years after there had been a completed and operated railroad over and across the said right of way in dispute; and that being charged with full notice of the rights of the public in and to the said property as an unbroken line of communication, and of the further record of the complainant in and to the said premises, wholly failed, neglected, and refused to make this complainant a party to the said ejectment proceeding, so that it is in no manner whatever bound thereby; and the said judgment in ejectment of the Putnam circuit court, and the writ of possession thereon is-

sued, is, as against the recorded prior rights of the complainant, absolutely null and void.

"(8) The said defendant Davis, as such sheriff, acting under the direction of the defendant Grantham, now threatens to forthwith serve the said writ of dispossession in the hands of said sheriff, and deliver the section of the main operated railroad into the possession and enjoyment of the said Grantham, and complainant verily believes that unless enjoined by the order of this court the said writ will be so served immediately, and the said line of railroad severed, so that it will be rendered impossible to operate the same as a continuous line of road, or to run through trains thereon, or to transport the United States mails between the termini thereof.

"(9) The complainant charges that, both by the statute law of the state of Indiana and a uniform course of decisions constituting a rule of property as to constructed and operated railways, the only remedy which said Grantham can prosecute against the said railway company or the interests of this complainant is to obtain compensation for the taking of said property, and he is not entitled as against the recorded lien of this complainant, and its right to hold its security upon the unbroken line of railroad, to sever the security held by the complainant for the benefit of said $625,000 bonds by means of a judgment or writ in ejectment in which the complainant has never had its day in court; and that as to complainant such litigation and the writ now in the hands of said Grantham does not constitute due process of law, and complainant has a right to equitable relief as against the enforcement of the same. Complainant charges that, if the said writ of ejectment be allowed to be served, it will sever the said railroad, and prevent its operation, and prevent the receipts of its tolls and income, and greatly inconvenience the public, and inflict great and irreparable injury upon your complainant and the bondholders whom it represents, and to an amount largely in excess of the sum of $2,000, exclusive of interest and costs, and contrary to equity.

"The premises considered, complainant prays that the several defendants be duly summoned to appear and answer the premises, but without oath; and that upon the final hearing said Davis, as such sheriff, and said Grantham, and all persons claiming by, through, or under him, be perpetually enjoined from the enforcing of said judgment in ejectment, to which complainant was not a party, or in any way whatever, under color of that litigation or judgment, to seize upon or take possession of the said right of way strip, or any part thereof, or interfere in any way with the continuous operation of trains by the railroad company over, upon, or across the said right of way strip in the same manner as now operated; and, this being a case of emergency, the complainant prays that the court will temporarily restrain the said Davis and Grantham from executing the said writ of ejectment until a motion can be heard for a regular temporary injunction."

A stay order was thereupon made in accordance with the prayer of the bill. On the 21st of February thereafter, on motion of the defendants to dismiss the bill and dissolve the injunction, the following order was entered: "It is therefore ordered, adjudged, and decreed by the court that the bill be, and the same is hereby, dismissed for want of jurisdiction, and that the defendants recover their costs, taxed at $——, from the complainants. And, the complainants having advised the court of their intention to file their petition for appeal, the court doth find the motion to dissolve the restraining order ought to be, and it is hereby, overruled; and it is therefore further ordered, adjudged, and decreed by the court, on motion of the complainants, that the restraining order be, and the same is hereby, continued in force during the pendency of such appeal, and until the decision thereof by the circuit court of appeals and the filing of its mandate in this court." Appellant thereupon perfected its appeal, and in July following brought the record to this court.

Frank F. Reed, for appellant.

Tilghman E. Ballard, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge (after stating the facts as above). The order of dismissal was made pursuant to the rule expressed in

section 720 of the Revised Statutes of the United States, and, as stated in the brief for appellant, the case of Dillon v. Railway Co., 43 Fed. 109–114, was deemed in the circuit court to be specially in point. Section 720 reads:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In practice this section has been treated, apparently, as being a statutory sanction for that rule whereby a state court, without any statutory obligation, declines to interfere by injunction with proceedings in a federal court. The decisions on the subject are collected, and to some degree discussed, in a footnote to the case of Association v. Hurst, 7 C. C. A. 598, 59 Fed. 1. Hemsley v. Myers, 45 Fed. 289, may be specially referred to.

So far as concerns the force of section 720, the question here, therefore, would seem to be one of priority in time between the circuit court of the United States and the circuit court of Montgomery county, in the state of Indiana. It is contended that the bill filed by appellant is really dependent on, or supplemental to, the foreclosure proceeding of 1885; in other words, that the priority in time is with the circuit court of the United States. In Buck v. Colbath, 3 Wall. 334, Buck was the United States marshal for the district of Minnesota. An attachment suit was commenced in the circuit court of the United States for that district. In executing the writ of attachment Buck seized certain chattels as being the property of the defendants in the attachment suit. The case went to a final judgment in favor of the attaching creditor. This judgment involved the order that the property so seized by the marshal, or the interest of the defendants therein, be sold, and the proceeds paid to the plaintiff in satisfaction of his debt. Pursuant to this judgment, the sale was so made and the proceeds so applied. Meanwhile, Colbath, a stranger to the attachment proceeding, sued Buck in an action of trespass in one of the state courts of Minnesota. He proved that the goods so seized belonged to himself, and that the possessory right was in him, and not in the defendants in the attachment suit. Judgment went in his favor. The record was thereupon taken to the supreme court of Minnesota, and that court affirmed the judgment. The cause then went by writ of error to the supreme court of the United States, and there the judgment of the supreme court of Minnesota was affirmed. It will be seen that Colbath, instead of suing in trespass, might have made his application to the circuit court of the United States pending the attachment proceedings. In that event, the question touching his ownership would have been before that court; but as the case went, notwithstanding the order of sale, the judgment of the national court did not involve any adjudication or finding upon the matter of ownership in Colbath.

In the case at bar the foreclosure decree did not involve any question as between Messick and the mortgagees, Kountz & Crosby, or between Messick and the Anderson, Lebanon & St. Louis Railroad Company. The railroad company, it is said, had entered on Messick's land, and marked off the way or route for the proposed road, and had

graded the same. In this condition of the mortgaged property the foreclosure decree was rendered and sale thereunder made. The purchaser, the Midland Railway Company, took whatever right, as against Messick, was then vested in the mortgagor. But the decree did not necessarily involve the finding by the court that any right had so vested as against Messick. There was in this decree no basis for any writ of assistance against Messick in case he had seen fit to interfere with the purchaser under the foreclosure decree with respect to that portion of his land which had been marked off and graded as already mentioned. It is even questionable whether, by any necessary implication, it here appears that, at the time when the purchaser under the foreclosure succeeded to the railroad property, Messick could not have enjoined any further work on his land until he had received such compensation as he would have been entitled to under the law of eminent domain.

If in Buck v. Colbath the marshal had, after the final judgment and sale in the attachment suit, filed his bill in the circuit court of the United States to enjoin the proceeding in the state court, he would have failed. The theory of such a bill by him would have been that the circuit court of the United States, in ordering the property which had been seized under the attachment writ to be sold, did, in effect, adjudge that the same belonged to the defendants in that suit, and that it was necessary for the court to entertain the bill in order to effectuate and enforce its own judgment; or that the trespass suit could not be entertained in the state court, since the defendant therein, in committing the alleged trespass, had acted under color of process from the national court. But this view of that case is discredited in the supreme court opinion. So, here, Messick was not a party, or in privity with any party, to the decree of foreclosure. There is nothing in that decree which necessarily concludes him. We are unable to see that the foreclosure proceeding of 1885 is available to appellant as vesting the circuit court of the United States with a jurisdiction prior in time to that of the state court, or as being, in effect, an adjudication on the question of right in the owner of the Messick land to eject the railroad company therefrom.

It is urged that since the railroad is now in operation across the land in controversy, and since it is a public highway for interstate commerce, and is also a national mail route, the case should be litigated in the circuit court of the United States. If the United States, or the attorney general, were party complainant, this point might well be considered. But the appellant here is a mere mortgagee. It is a creditor with a mortgage, striving in its own right as creditor to prevent waste of, or injury to, the mortgaged property. It is not the custodian of public rights. It does not, nor is it authorized to, sue on behalf of the public. This is not an information and bill by the attorney general and this appellant.

The point that appellant was not a party to, and is hence not bound by, the judgment in the state court, is doubtless well taken. But the proposed ejectment of the railway company from the land in question is a matter within the jurisdiction of the state court. That court has control over its own process. The circuit court of the United

States cannot give the relief here prayed without interfering with the proceedings of the circuit court of Montgomery county, Ind. The national court ought not to so interfere, even if there were no such express statutory provision as section 720. The order of dismissal is affirmed.

THOMPSON v. ST. PAUL, M. & M. RY. CO. et al.

(Circuit Court, D. Minnesota. April 20, 1896.)

1. PUBLIC LANDS—PRE-EMPTION—WITHDRAWAL.
No rights can be acquired, under the pre-emption law, in lands withdrawn by order of the commissioner of the general land office.

2. RAILROAD GRANTS—INDEMNITY WITHDRAWAL.
Authority is vested in the commissioner of the general land office to withdraw from sale or entry lands within the indemnity limits of the grant to the Northern Pacific Railroad Company.

(Syllabus by the Court.)

This was a bill in equity by Andrew Thompson against the St. Paul, Minneapolis & Manitoba Railway Company and Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, to obtain an adjudication that the defendants had acquired the legal title to certain lands which of right belonged to the complainant, and to hold the defendants trustees of the title for the benefit of the complainant. The defendant St. Paul, Minneapolis & Manitoba Railway Company filed a disclaimer. The defendants Edwin H. McHenry and Frank G. Bigelow, as receivers of the Northern Pacific Railroad Company, claimed title under an act of congress approved July 2, 1864, granting lands to the Northern Pacific Railroad Company. 13 Stat. 365.

This act conferred a grant, for the construction of a railroad from Lake Superior to Puget Sound, of every alternate section of public land, designated by odd numbers, on each side of the line as definitely fixed, to the amount of 20 sections per mile in the territories and 10 sections per mile in the states through which the road should pass, with a right of indemnity selection, to be exercised not more than 10 miles beyond the limits of the granted lands, for the purpose of satisfying losses from the granted limits. By a joint resolution of congress approved May 31, 1870 (16 Stat. 378), a second indemnity belt was created, extending 10 miles beyond the limits prescribed, from which the company was authorized to select odd-numbered sections of land sufficient to satisfy those losses occurring subsequent to the passage of the act of July 2, 1864, which could not be satisfied from the first indemnity belt. November 21, 1871, the company filed its map of definite location opposite the land in controversy, which was situated more than 30 and less than 40 miles distant from said line, and within the second indemnity limits. December 26, 1871, the commissioner of the general land office directed the register and receiver of the district land office for the district within which the land was situated "to withhold from sale or location, pre-emption or homestead entry, all the odd-numbered sections" within the indemnity limits. August 25, 1873, the complainant filed a declaratory statement of intention to enter the land in question under the pre-emption law, and on May 30, 1876, offered final proof before the district land officers, paid the fees required by law, and received the usual final receiver's receipt. Prior to the complainant's final proof, and on April 30, 1874, the land was certified to the state of Minnesota under acts of congress of March 3, 1857 (11 Stat. 195), March 3, 1865 (13 Stat. 526), amended by the act of March 3, 1871 (16 Stat. 588), granting lands to aid in the construction of a railroad from St. Cloud to

St. Vincent, and conveyed by the state to the St. Paul & Pacific Railroad Company, the beneficiary under this grant. In a suit between the Northern Pacific Railroad Company and the St. Paul & Pacific Railroad Company it was decreed that, as between these companies, the right of the Northern Pacific Company was superior, and that the legal title was held in trust for the benefit of the Northern Pacific Company. The complainant, Thompson, contended that the land was subject to pre-emption on August 25, 1873, and that the withdrawal of December 26, 1871, was forbidden by section 6 of the Northern Pacific granting act of July 2, 1864. Section 6 is as follows: "And be it further enacted, that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

H. Jenkins and George L. Treat, for complainant.

F. M. Dudley, for defendants.

THOMAS, District Judge. After such an examination of the question involved, and a careful review of all the authorities cited, and many others, as I have been able to give, I have reached the following conclusion: That the land in question was reserved and withdrawn from the operation of the pre-emption and homestead laws by the secretary of the interior, and that he had legal authority to make such withdrawal, and that no right of complainant ever attached to said land by virtue of his pretended pre-emption claim. I have considered all the other questions involved, and am compelled to hold that the bill must be dismised. Let a decree be entered dismissing the complainant's bill, at his costs. The decree must be entered as of the date the case was submitted in open court. Let a stay be granted for 60 days from the date of the decree as to all matters of proceeding except the entry of said decree, to enable the complainant to take such action as he may be advised. The complainant duly excepted to this order.

UNITED STATES v. BOYD et al.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1897.)

No. 229.

1. INDIANS—CITIZENSHIP—EASTERN CHEROKEES.
   The Eastern Band of Cherokee Indians did not, by virtue of the treaty of New Echota, become citizens of North Carolina and of the United States, but are wards of the nation.

2. SAME.
   The act of February 8, 1887 (24 Stat. 388, § 6), declaring certain Indians to be citizens, has no application to a tribe of Indians.

3. SAME.
The political departments of the government have recognized the Eastern Band of Cherokee Indians as constituting a tribe; at least, as that word is used in the United States constitution.

4. COURTS—FOLLOWING EXECUTIVE ACTION.
It is a rule of the courts to follow the action of the executive and the departments in matters which it is the duty of the latter to determine.

5. SAME—CONSTITUTIONAL LAW.
Neither the constitution of a state nor an act of its legislature can prevent the application of an act of congress to the Indian tribes residing in the states, but subject to the control of the general government.

6. SAME—SALE OF TIMBER BY INDIANS—APPROVAL BY INTERIOR DEPARTMENT.
In the absence of fraud on the part of those representing the department of the interior, its refusal to sanction negotiations by the Eastern Band of Cherokee Indians for the sale of their standing timber is conclusive of the matter.

7. SAME—PROTECTION OF INDIANS.
It is both the right and the duty of the United States to institute such proceedings as will fully protect the interest and property rights of its Indian wards.

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

R. B. Glenn, U. S. Atty.

Louis M. Bourne, George H. Smathers, and W. T. Crawford, for appellees.

Before GOFF, Circuit Judge, and HUGHES and BRAWLEY, District Judges.

GOFF, Circuit Judge. This is a suit in equity, filed in the circuit court of the United States for the Western district of North Carolina, against D. L. Boyd, Harry Dickson, W. T. Mason, and the Eastern Band of Cherokee Indians; the complainants being the United States of America, Sampson Owl, Lewis H. Smith, Comeback Wolf, and all other of the Cherokee Indians who may choose to come in and make themselves party plaintiffs. It is set forth in the bill that one William H. Thomas and wife, for value received, and as directed by a decree of the United States circuit court for the Western district of North Carolina, conveyed by deed, in fee simple, to the Eastern Band of Cherokee Indians, a large tract of land, containing many thousand acres, situated in the state of North Carolina, and known as the "Qualla Boundary"; that subsequent to the execution of said deed the Eastern Band of Cherokee Indians entered into the possession of said lands, which were necessary to their support and maintenance; that in said deed was inserted the following clause, to wit: "to have and to hold the above-described premises, with the appurtenances thereunto belonging, unto the said Eastern Band of North Carolina Cherokee Indians, their heirs and successors, forever, but without power of alienation, except by and with the assent of their council, and the approval of the president of the United States"; that, after said band of Indians had so entered into the possession of the land described, some of them, with the approval and assent of their council, entered into a contract with the defendant D. L. Boyd, by which all the timber in

and upon a part of said land, containing about 33,000 acres, known as the "Cathcart Tract," was sold to him for the sum of $15,000, payable in three installments of $5,000 each; that immediately after the execution of such contract of sale said Boyd made a subcontract with the defendants Dickson and Mason, and that they took possession of the land with a large force of men, who commenced to cut and destroy said timber, and to make arrangements to ship the same to market; that many of the Indians of the Cherokee Band, among whom are those joined as complainants with the United States, are opposed to said contract, and think it is not for the best interest of the band; that such contract of sale was never presented to the president of the United States for his assent, and has never been approved by him, but that the department of the interior, acting for the United States in its dealings with the Eastern Band of Cherokee Indians, has refused to ratify and approve such contract; that such contract to cut the timber from said land was forbidden by the terms of the deed from said Thomas and wife, unless the same was assented to and approved by the president of the United States, and that, as he has refused to ratify the same, it is absolutely void; and that, therefore, the action of the defendants in cutting, destroying, hauling, and removing said timber is unwarranted and without legal authority. It is further alleged in the bill that by certain acts of the congress of the United States, and also by certain treaties heretofore made, as well as by the laws of the state of North Carolina, the Eastern Band of Cherokee Indians have been recognized as a tribe of Indians, under the control and government of the United States, to the same extent as the Indians on the reservations are governed; that by reason of such relation between said Indians and the United States the proper officers of the same have the right to control the action of said band, and to superintend all matters appertaining to their welfare, and to that end to reject the contract so made with Boyd as being contrary to the true interests of said Indians; that the complainants, under the law, and acting in the interest of said band of Indians, have the right to and do object to the waste being committed on said lands by the removal of said timber, and therefore they ask that the said defendants be restrained from doing so. The complainants ask in their bill that the court will pass upon and construe all matters in relation to said Eastern Band of Cherokee Indians, including the right of their council to lease said lands and to sell the timber thereon, and also to say as to the right of the United States to control, manage, and superintend the affairs of said Indians, and what right, if any, the defendants have to cut and remove the timber from the said land. The complainants claimed that the contract with Boyd was void, and that, unless the defendants were prohibited from cutting and selling the timber mentioned, a lasting and irreparable injury would be done the Eastern Band of Cherokee Indians, who are the wards of the United States. An injunction was prayed for, as also an accounting. On the filing of the bill, which was duly sworn to, the court below, on the 20th day of February, 1895, entered an order requiring the defendants to appear on the second Monday in April, 1895, and show cause why they should not be restrained and perpetually enjoined from cutting and hauling

the timber from said land; and in the meantime their agents and servants were restrained from so cutting and hauling.

The Eastern Band of Cherokee Indians, acting by and through Stilwell Saunookee, principal chief; Will Talalah, vice chief; Andy Standingdeer, Wesley Standingdeer, Jesse Reed, Dawson George, Screamer, Sevier Armachame, Cocumma, Morgan Calhoun, Abraham Hill, and Climbing Bear, members of their council,—filed its answer to the bill on the 16th day of April, 1895. In said answer the allegation in the bill that William H. Thomas and wife conveyed the land known as the "Qualla Boundary" to the Eastern Band of Cherokee Indians is denied, and it is claimed that the same was conveyed by William Johnston and wife, in fee simple; but it is insisted that said deed was not executed in pursuance of the award therein referred to, which directed that the deed should be made by said William Johnston "to the Eastern Band of Cherokee Indians, or to some trustee for them," and hence it is claimed that the words found therein as follows, "but without the power of alienation, except by and with the assent of their council, and the approval of president of the United States," were unauthorized by the award referred to, and inconsistent with the tenure of a fee-simple estate, in that it created a perpetuity, which is forbidden by the constitution and laws of the state of North Carolina; and it is also set out in the answer that by a decree entered on the 15th day of October, 1894, in the two suits pending in the circuit court of the United States for the Western district of North Carolina, entitled, respectively, "Eastern Band of Cherokee Indians vs. William H. Thomas, William Johnston, et al.," and "The United States vs. William H. Thomas, William Johnston, et al.," it was adjudged that said words so inserted in the deed were unauthorized and void, and it was ordered that a new deed should be executed, omitting therefrom the words so found in the proviso mentioned. It is also claimed in the answer that the Eastern Band of Cherokees did not in fact enter into the possession of said land under and subsequent to the date of the Johnston deed, but that they and their ancestors had been living continuously on said Qualla boundary of land under a contract of purchase of the same made with William H. Thomas soon after the treaty of New Echota, between the United States and the Cherokee Nation, dated the 29th of December, 1835 (7 Stat. 478), and that title to said land is claimed by said Indians under that contract, the award made concerning the same, and the decree aforesaid entered in the said two chancery causes mentioned. It is admitted in the answer that the council of the Eastern Band of Cherokee Indians sold the timber on the Cathcart tract of the Qualla boundary of land to the defendant D. L. Boyd at the price of $15,000, and that he resold the same to his co-defendants, Mason and Dickson, and also that said timber was being cut and prepared for the market until the restraining order was issued in this case. It is also admitted in this answer that the contract with Boyd was not approved by the president of the United States, and also that the secretary of the interior refused to ratify the same; but it is claimed that it was not necessary to the validity of said contract that it should have either the approval of the president or the ratification of the secretary of the interior, and therefore

it was insisted that the cutting of said timber was not an act of trespass on the part of the defendants, but that it was lawfully done, as the sale so made by the council of the Eastern Band of Cherokee Indians to said Boyd was in all respects valid.

The further claim is made in said answer that the true status of the Indians mentioned was that they were citizens of the state of North Carolina, and that they have been such since soon after the said treaty of New Echota, and that as such citizens they were incorporated a body politic by the general assembly of North Carolina in the year 1889, and that by the decree mentioned as entered on the 15th day of October, 1894, the title to the Qualla boundary was vested in said Indians as a corporation; that the general assembly of North Carolina, at the session held on the 8th day of March, 1895, passed an act amending said act of incorporation of 1889, and confirming the said contract of sale made to Boyd; that the Eastern Band of Cherokee Indians, against whom this suit is brought, are those Indians, and their descendants, who, after the treaty of New Echota, remained in North Carolina, and became citizens of that state, by virtue of the eighth and twelfth articles of that treaty, and that they have since said treaty paid taxes on their real and personal property, and that they have voted at state and national elections, and that they have been subject to all the liabilities, and entitled to all the privileges and immunities, of other citizens of the state of North Carolina; that the council of said band of Indians, at different times from the year 1890 to the year 1893, made application to the interior department for permission to sell the timber on said land, but that authority so to do was refused; that the council so applied to the interior department for authority to sell such timber because the United States have for the past 12 or 15 years appropriated money to carry on the Cherokee training school, and the council did not wish to incur the displeasure of the commissioner of Indian affairs and the secretary of the interior, and hence it sought their co-operation in making said sale, and not because the council believed that the approval of the president or the consent of the secretary was necessary to a valid sale of said timber. The answer further states that, of the $15,000 to be paid by Boyd for the timber, the sum of $6,000 has been paid by him to said council, and that the remaining $9,000, with interest at 6 per cent. per annum, is still due and unpaid, but is secured by a lien on the trees sold, as is shown by said contract. Other matters not involved in this suit, and not essential to the decision of the questions to be disposed of, are mentioned in the answer, but we do not deem it necessary to refer to them now. The joint and several answer of the defendants Dickson and Mason was also filed, and likewise the answer of the Dickson-Mason Lumber Company, to which company defendants Dickson and Mason had sold and transferred their interest in the Boyd contract, and which said Dickson-Mason Lumber Company had also been made a defendant to the bill by order of court. These answers, except as to certain matters peculiar to the said separate respondents, make the same defense to the allegations of the bill as was made in the answer of the Eastern Band of Cherokee Indians, and the same will not be again set forth. No answer was filed by the defendant Boyd.

The court below, on February 11, 1896, appointed George H. Smathers receiver, with instructions to collect the unpaid purchase-money notes given for said timber, and to take such steps as might be necessary to protect the interest of the rightful owner in the timber that had been cut, but which had not been removed, and was liable to deterioration in value. The court also referred the cause to the standing master, with instructions that he inquire into all the facts connected with the contract in issue, and the circumstances under which it was made, the adequacy of the consideration therefor, and the existence of any fraud or unfair dealing therein. The master duly returned his report, together with the evidence taken before him, from which it appears that Boyd contracted for the timber on the 28th of September, 1893, agreeing to pay $15,000 for the same, and that he sold it to Mason and Dickson in December, 1893, for $25,000; that H. G. Ewart, by a contract with said Indians made in October, 1891, was to receive 20 per cent. of the amount realized from the sale of the timber, for services rendered by him in the negotiations preceding said sale; that, in the opinion of the witnesses examined, the sum of $15,000 was an adequate and fair price for the timber sold to Boyd. The master so reported, and also stated that there was no fraud or unfair dealing in the making of said contract. The court on the 11th day of February, 1896, entered an order granting said Ewart the right to intervene in this suit, which he did by petition, and the court by decree of that date dissolved the injunction and restraining order granted when the bill was filed, and authorized the parties to the contract relating to the timber to carry the same out pursuant to the terms thereof. The court below, also, on April 5, 1897, passed a decree directing the allowance of the claim of the petitioner H. G. Ewart, and that provision should be made for paying the same out of the funds to be realized from the sale of said timber.

From these decrees the United States appealed, claiming that the court below erred as follows: First. Because, while it held that the Eastern Band of Cherokees were wards of the nation, and subject to the control of the department of the interior, still it held that the contract of said Indians relating to the sale of the timber on their land was good and binding, unless fraud or undue influence in connection with the execution of the same was shown. The United States contend that, as said Indians are the wards of the nation, all contracts made by them are void, unless they are approved by the proper officials of the government. Second. It is claimed that the court erred in holding that the contract of said Indians with Ewart was binding and of force, as the same was without the approval of the department of the interior. Third. That, even if the contract with Ewart was a valid one, still the court erred in holding that he had complied with the same, and in directing that he be paid from the proceeds of said timber.

We fully agree with the insistence of the complainants below that the Eastern Band of Cherokee Indians are the wards of the nation, and that they have been treated as such since the year 1848 by the executive and legislative departments of the government; and in this connection we may remark that said Indians themselves have recog

nized such relationship from said date down to the time during which the negotiations for the sale of the timber now in controversy were being carried on. Therefore we hold that the court below had jurisdiction of this suit, and that it was not only proper, but that it was the duty of the United States, to take such steps and to institute such proceedings as would fully protect the interests of said band of Indians. We are unable to agree with the claim of the appellees that by virtue of the treaty of New Echota this Eastern Band of Cherokees became citizens of the state of North Carolina, and of the United States. By the twelfth article of that treaty it was provided, in substance, that those individuals and families of the Cherokee Nation that were adverse to a removal to the Cherokee country west of the Mississippi, and were desirous of becoming citizens of the states where they resided, and such as were qualified to take care of themselves and of their property, and to become useful citizens, were to be permitted to remain within said states (North Carolina, Tennessee, and Alabama), and were to be entitled to receive their due portion of all the personal benefits accruing under said treaty for their claims, improvements, and per capita, and to a prescriptive right to certain lands. This certainly did not confer citizenship on any portion of the Cherokee Indians, and we are unable to find any statute or any treaty that makes them citizens of the United States, or that authorizes them to become citizens by naturalization. The action or assent of the United States is absolutely essential in order to enable the Indian tribes or bands, or individual members of the same, to renounce the dependent condition caused by the state of pupilage in which the Indians have been since the adoption of the federal constitution. If the treaty of New Echota can be held to authorize the members of the Eastern Band of Cherokees to apply to the courts for naturalization, on showing satisfactory proof of fitness for civilized life on their part, still it could not avail as far as this case is concerned; for there is no pretense that any of them have ever made such application, or ever been declared citizens of the United States by any court of the same, or of the state of North Carolina. On this subject, Judge Deady, in the case of U. S. v. Osborn, 6 Sawy. 406, 409, 2 Fed. 58, 61, has well said:

"But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form."

The effort to show that the Eastern Band of Cherokee Indians, in disposing of the timber in controversy, and in making the contract with Boyd, acted as a corporation created by the laws of the state of North Carolina, is without force; for it is well settled that neither the constitution of a state, nor an act of its legislature, can prevent the application of an act of congress to the Indian tribes residing in the states, but subject to the control of the general government. To hold otherwise would be to make the constitution of a state, and the

laws of the same, the supreme law of the land, instead of the constitution of the United States, and the laws and treaties made in pursuance thereof. City of Minneapolis v. Reum, 6 C. C. A. 31, 56 Fed. 576; U. S. v. Holliday, 3 Wall. 419; Worcester v. State of Georgia, 6 Pet. 515; Rollins v. Cherokee Indians, 87 N. C. 229. The congress of the United States has repeatedly, since the treaty of New Echota, recognized the Eastern Band of Cherokee Indians as a distinct portion of the Cherokee race, and has dealt with them, not as individuals, but as a band distinctive in character, dependent on the United States, and entitled to the aid and protection of the general government. 9 Stat. c. 118; 10 Stat. 291,700; 15 Stat. 228; 16 Stat. 362; 18 Stat. 213, 412; 19 Stat. 139, 176; 22 Stat. 328; 27 Stat. 122. The act of July 29, 1848 (cited above in 9 Stat.), treated said Indians as under the care of the United States, and provided that the sum of money due them under the treaty of New Echota should be held in the United States treasury indefinitely, and that interest thereon should be paid them. The act of July 27, 1868 (cited above in 15 Stat.), contained this provision:

"That hereafter the secretary of the interior shall cause the commissioner of Indian affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians."

The act of July 15, 1870, § 11 (cited above in 16 Stat.), reads as follows:

"That the Eastern Band of the Cherokee Indians, by that name and style be, and they are hereby, authorized and empowered to institute and carry on a suit or suits in law or equity in the district or circuit courts of the United States against the present or former Indian agent or agents of said band. * * * It shall be the duty of the district attorney and the attorney-general of the United States to institute and prosecute all suits or causes which may arise under this section."

The act of June 23, 1874 (cited above in 18 Stat.), provides for surveying the lands of the Cherokee Indians of North Carolina, under the direction of the secretary of the interior. In the act of March 3, 1875 (cited above in 18 Stat.), the congress made provision for the payment of the costs, attorney's fees, and other expenses incurred in the prosecution of the suits of the Eastern Band of Cherokee Indians against William H. Thomas et al., which had been instituted as authorized by the act of July 15, 1870. The act of August 14, 1876 (cited above in 19 Stat.), directed the commissioner of Indian affairs to receive certain lands at their cash value, which was "to be determined by an appraisal to be approved by the secretary of the interior, and conveyed to the Eastern Band of Cherokee Indians in fee simple." The land here referred to is the land from which the timber was sold to Boyd by the contract in issue in this cause. The act of August 15, 1876 (cited in 19 Stat.), provides for the salary of a special agent for the Eastern Band of Cherokees, and then abolishes the office; but the act of August 7, 1882 (cited in 22 Stat.), authorizes the secretary of the interior to appoint an Indian agent for said band of Indians. The act of July 13, 1892 (cited above in 27 Stat.), again abolished the office of Indian agent for the Eastern Band of Cherokee Indians, and required the superintendent of the Indian school at Cherokee, N. C., an officer of the United States government, to act as such agent for said Indians.

This shows that the original condition of the Indians in this country —that of pupilage under the government—has not been released, so far as this Eastern Band of Cherokees is concerned. It thus appears that the political departments of the government have recognized these Indians as constituting a tribe,—at least, within the meaning of that word as it is used in the constitution of the United States; and it is a rule of the courts, in matters of this kind, to follow the action of the executive and the departments whose duty it is to determine such affairs. U. S. v. Holliday, 3 Wall. 407. The supreme court of the United States, in U. S. v. Kagama, 118 U. S. 375, 384, 6 Sup. Ct. 1109, 1114, referring to this subject, says:

"The power of the general government over these remnants of a race once powerful, now weak and diminished in number, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

The appellees insist that, if the Eastern Band of Cherokee Indians were not made citizens by the treaty of New Echota, they certainly were by the act of congress of Febraury 8, 1887 (24 Stat. 388). That portion of said statute on which this insistence is based reads as follows:

"Sec. 6. * * * And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether such Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

This section has no application to a tribe of Indians, but is intended to cover the case of the individual Indian who has taken up his residence separate and apart from his tribe, and has adopted the habits of civilized life. There is no contention here that any members of the Eastern Band of Cherokees have so separated themselves from their band, thereby becoming citizens of the United States, and that as such they made the contract with Boyd concerning their individual property. On the contrary, it is the Eastern Band of Cherokee Indians, as such, that endeavors to sell the timber to Boyd, and to execute the contract relating to the same. Said statute is not applicable to the case we are now considering.

We are unable to agree with the court below that, because the United States sought the aid of a court of equity concerning the alleged contract said to have been made by Boyd with the Eastern Band of Cherokee Indians, it was the duty of the court, in the absence of fraud or unfair dealing in the making of the contract, to hold the same valid if the consideration paid for the timber mentioned therein was a fair and adequate price for the same. It must be kept in mind that the complainants below insisted in their bill that the United

States had refused to assent to the arrangements made by the council of the Eastern Band of Cherokees with Boyd, and that, therefore, no contract had in fact been made for the sale of the timber mentioned in the bill. Finding this to be true, we think it follows that the defendants were removing said timber unlawfully, and that, therefore, they should have been restrained from so doing, and perpetually enjoined from further interfering with the same. It will not do to say that the Indian tribes subject to the control of the department of the interior may be permitted to dispose of their property, real or personal, without the approval of that department, or over its protest, as in this case, and that the courts of the United States will sanction such proceedings, and decree them to be valid contracts, in the absence of fraud or unfair dealing. We must presume that the department had good reasons for declining to approve said sale, and we think that, in the absence of fraud on the part of those representing it, its refusal to sanction negotiations of the character here involved is conclusive of the matter. To hold otherwise would produce great confusion, and would transfer from that department to the courts most of the controversies relating to Indian affairs now properly disposed of by it; thereby fostering litigation, and producing continuous strife among the different Indian tribes. The conclusion we reach is altogether independent of the questions raised concerning the power of the Eastern Band of Cherokees to sell and transfer the land conveyed to it by William Johnston and wife, as, either with or without the restrictive clause in the deed from Johnston and wife before mentioned, we find that the United States have the power to supervise and control the affairs of those Indians, so far as said land is concerned.

For the error indicated, the decrees complained of must be reversed, and this cause remanded to the court from whence it came, with instructions to enter a decree of the character indicated by this opinion. The rights of the parties, as affected by the money paid by those claiming under the supposed contract with Boyd, as well as by the damages, if any, occasioned by the unlawful removal of said timber, can be adjusted by that court on such just and equitable principles as may appear to be proper from the facts as they now appear, and as they may hereafter be presented. Disposing of these questions as above indicated, we find it unnecessary to consider the other matters presented by the assignments of error. Reversed and remanded.

ARMSTRONG v. CHEMICAL NAT. BANK OF CITY OF NEW YORK.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1897.)

No. 473.

1. NATIONAL BANKS — AUTHORITY OF OFFICERS TO BORROW MONEY — USAGE BETWEEN BANKS.

The rule announced in Western National Bank v. Armstrong, 14 Sup. Ct. 572, 152 U. S. 346, that the vice president or cashier of a national bank has no power to borrow money on its behalf unless specially authorized by the directors, is not applicable in a case where a general and long-established usage is shown between corresponding banks, prevailing in both cities where the

lending and borrowing banks were respectively situated, of lending and borrowing through the executive officers of the banks, no further authority being furnished or demanded; the presumption being that such usage was known and acquiesced in by the directors of the borrowing bank, in the absence of notice to the contrary to its correspondents.

2. SAME—IMPLIED AUTHORITY FROM DIRECTORS.

The vice president of a national bank was engaged in outside speculations, to which the cashier and teller were privy, and in which funds of the bank were used. All were directors. Two of the remaining six directors were employés of the vice president, whom he had qualified to act by gifts of stock, and the remainder were selected by him for the purpose of giving him full control and management of the bank, which he exercised, borrowing money and pledging the securities of the bank therefor, and using large amounts of its funds and securities in his speculations, to the knowledge of a minority of the directors, and without inquiry or investigation on the part of any. *Held*, that such knowledge and conduct on the part of the directors gave implied authority to the vice president to borrow money on behalf of the bank.

3. SAME—RATIFICATION—PASSING OF CURRENT ACCOUNTS.

Where, by usage between two correspondent banks, one rendered a monthly statement to the other, which returned a reconcilement sheet noting any matter of difference, which was settled by correspondence, such a statement, showing a loan by the bank making it to the other, was notice of such loan to the directors of the latter; and a failure to notice or object to it was a ratification, though in fact the books of the borrowing bank showed the transaction to have been a deposit to its credit by its vice president, and the amount was credited to his individual account and used by him, the discrepancy having been overlooked by the bookkeepers who checked the statement. In such case, the negligence of the employés was chargeable to the directors, whose agents they were.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

Bill by the Chemical National Bank of City of New York against David Armstrong, receiver of the Fidelity National Bank. From a decree allowing the claim of the complainant (76 Fed. 339), the defendant appeals.

The bill in the circuit court was exhibited by the Chemical National Bank of New York City against David Armstrong, receiver of the Fidelity National Bank, to compel the allowance of a claim of $300,000, with interest, for a loan alleged to have been made by the Chemical Bank to the Fidelity Bank on March 2, 1887. In his amended answer the receiver denied that the Fidelity Bank had incurred the obligation, as alleged, or had received the proceeds thereof, but averred that its vice president, E. L. Harper, and its cashier, Ammi Baldwin, in pretending to bind the Fidelity Bank thereto, had acted fraudulently and without authority of its directors, and in furtherance of a fraudulent scheme, by which the proceeds of the alleged loan were all appropriated to the use of Harper, and that all this was without the knowledge of the bank or its directors. It was conceded that a large amount of collateral had been deposited to secure payment of the loan. At the original hearings in the circuit court, and in this court, the question of Harper's and Baldwin's authority to bind the Fidelity Bank was but little discussed, although made both upon the pleadings and in the assignments of error. It was disposed of in a single sentence against the contention of the receiver in the first opinion in this court. The main question there considered was whether the Chemical Bank was obliged to reduce its claim by the proceeds of collateral held to secure the debt, and collected after the declared insolvency and before the filing of proof. This court, reversing the circuit court, held that no such deduction need be made, but that the claim must be allowed in full for the principal and interest due and unpaid at the date of the declared insolvency. 16 U. S. App. 465, 8 C. C. A. 155, and 59 Fed. 372. A motion for rehearing was made by the Chemical National Bank on a subordinate question as to the interest to be allowed on delayed

dividends. Pending the motion, the supreme court of the United States announced its opinion in the case of Western Nat. Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, in which it was held that "the borrowing of money by a national bank, though not illegal, was so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money," and that where no special authority appeared, and no ratification of the unauthorized act was shown, the bank was not liable. Thereupon, while the case on rehearing was still before this court, Armstrong also made a motion for rehearing on the issue whether the Fidelity Bank was liable for the alleged loan. A rehearing was granted and had, and the following order was made: "That the decree of the circuit court is reversed, with leave to the parties to adduce further evidence upon the issue whether the Fidelity Bank owes anything to the Chemical Bank by virtue of the alleged loan; that, if the issue is decided in favor of the receiver, the bill shall be dismissed, and a decree entered in favor of the receiver for the restitution of the $100,000 paid by the receiver on July 25, 1892, to the Chemical Bank on the faith of the decree of the court below; that, if the liability of the Fidelity Bank for the loan is established, a decree shall be entered directing the receiver to allow the claim for $305,450 (being the amount of the loan and interest to the date of the declared insolvency, June 21, 1887)," and to pay the dividends accrued and accruing thereon, with interest on delayed dividends, taking credit for the $100,000 already paid, on the principle ordinarily applied in partial payments. 31 U. S. App. 75, 13 C. C. A. 47, and 65 Fed. 573. New evidence was accordingly adduced in the circuit court by both parties, and, upon the whole record, the circuit court held the Fidelity Bank liable for the loan, and thereupon entered a decree against the receiver in accord with the mandate of this court, for the allowance of the claim for $305,450, and for the payment, by way of dividends and interest, after crediting the $100,000 paid July 25, 1892 (referred to above), of $117,749.58, with interest from October 21, 1896. The opinion of Judge Sage, who presided in the circuit court, is reported in 76 Fed. 339.

The facts disclosed by the record are as follows:

On February 28, 1887, Harper, vice president of the Fidelity Bank, mailed at Cincinnati, to the cashier of the Chemical Bank, in New York, a letter, of which the following is a copy:

"Briggs Swift, President. E. L. Harper, Vice President. Ammi Baldwin, Cashier. Benjamin E. Hopkins, Ass't Cashier.

"United States Depository. The Fidelity National Bank.

"Cincinnati, February 28, 1887.

"Wm. J. Quinlan, Jr., Cashier Chemical National Bank, New York City—Dear Sir: Inclosed herewith we hand you for credit our certificate of deposit No. 345, for $300,000, with bills as collateral, as follows: [Then was set out a list of twenty-seven notes, aggregating $326,000.] We desire to keep a large reserve with you, and we trust you will make the rate as low as you proposed some time since. Please place the amount to our credit, and advise the rate.

"Respectfully, yours, E. L. Harper, Vice President."

The certificate of deposit inclosed was as follows:

"The Fidelity National Bank.

"E. L. Harper has deposited in this bank three hundred thousand ($300,000), payable to the order of himself on return of this certificate, in current funds.

"$300,000. Ammi Baldwin, Cashier."

Indorsed: "E. L. Harper."

This letter of February 28th was not copied into the letterpress copy books of the Fidelity Bank, and the stub of certificate of deposit was marked "Canceled." Of the collateral bills receivable sent, 19 pieces, aggregating $146,169.29, par value, were the property of the Fidelity Bank, and the remainder, aggregating $180,000, were mere accommodation paper procured by Harper, and not appearing on the books of the Fidelity Bank. The letter reached New York on March 2d, and upon that day Quinlan, cashier of the Chemical Bank, wrote and mailed the following letter:

"New York, March 2, 1887.

"A. Baldwin, Esquire, Cashier—Dear Sir: Your favor of the 28th inst. has been received. We credit Fidelity National Bank $300,000, and shall be considerate as to rate of interest when the loan is paid. * * *

"Wm. J. Quinlan, Jr., Cashier."

Upon the books of the Chemical Bank was entered, on March 2d, this credit in favor of the Fidelity Bank: "Fidelity Temp. Loans, $300,000."

Upon the 2d of March, two days before Harper could have received the answer, he directed Watters, the general bookkeeper of the bank, to credit his (Harper's) individual account with $300,000, and to charge the Chemical Bank with the same on account of "transfer of funds." These two entries, taken together, meant that Harper had deposited $300,000 in the Chemical Bank to the credit of the Fidelity Bank, and that the same had been carried to his individual credit on the books of the latter bank.

On May 19th the following telegram was sent to the Chemical Bank:

"Cincinnati, May 19, 1887.

"To Chemical National Bank, New York: We send other bills to take place. Will want all returned here without presenting, as we advised parties to arrange payment here. Fidelity National Bank."

On May 20th Harper wrote and mailed the following letter:

"May 20, 1887.

"William J. Quinlan, Jr., Cashier, New York—Dear Sir: Please do not present any of the collateral paper for payment. We have advised parties we would order back and charge up here. We will to-morrow send you new notes to take place of ones maturing. We will pay the loan July 15th, and will pay interest till that date, if agreeable to you.

"Yours, truly, E. L. Harper, V. P."

On May 21st Harper wrote and mailed the following letter:

"Cincinnati, May 21, 1887.

"Chemical National Bank, New York City—Gentlemen: Inclosed herewith we hand you to hold as collateral the following bills· [Then follows a list of twenty-one notes, aggregating $230,592.46.] Will you kindly return to me the following: [Then follows a list of nineteen notes of those forwarded in his letter of February 28th.] We will pay the loan July 15, 1887, if agreeable to you, and will pay interest now to that date.

"Respectfully yours, E. L. Harper, Vice President."

The substitution of collateral was effected in accordance with Harper's request. Nothing was paid on the loan, and nothing collected by the Chemical Bank on the collateral, until after the suspension of the Fidelity Bank. There is affirmative evidence that three or four of the nine directors had no actual knowledge of this loan. And there is no evidence that any of the other directors had knowledge of it except Harper and Baldwin, and probably Hopkins, the assistant cashier, who were all directors.

The Chemical Bank based its contention that the Fidelity Bank was liable for this loan on several grounds: First, that it was the custom in New York and Cincinnati for banks to borrow money one from another, and that the executive officers of the bank—the president, the vice president, and the cashier, or either of them—were, by custom, regarded as having authority to contract such loans; second, that the directors of the Fidelity Bank had entirely abandoned to Harper the direction and management of the affairs of the bank, and thereby conferred upon him all necessary authority to do what they might do; third, that the Fidelity Bank had full notice of the loan nearly three months before the suspension, and, by failure to repudiate it, ratified it; fourth, that the Fidelity Bank received the money and used it in its legitimate business, and is liable therefor as for money had and received.

It is convenient to state the facts of the case under these four heads:

First. Upon the question of custom seven witnesses were called from New York City and six from Cincinnati by the complainant and appellee.

William J. Quinlan, cashier of the Chemical National Bank since 1878, testified that, prior to the decision in the Western Bank Case, it was a very usual thing

for a national bank to borrow money; that the officer who acted for the bank was either the president, vice president, cashier, or assistant cashier; that never, in the many years during which the custom prevailed, had the lending bank demanded proof of the authority of the borrowing officer in the form of a resolution of the board of directors; that the loans so made were in amounts large and small, and that the loans were made either upon certificates of deposit, made payable to the lending bank or indorsed in blank, or merely upon request by letter; that collateral was usually required to the amount of the loan, in the shape of bills receivable.

George G. Williams, president of the Chemical Bank since 1878, and connected with it for 40 years as discount clerk, paying teller, cashier, and president, and for many years connected with the New York Clearing House, testified that it was usual for one bank to borrow money of another before the Western Bank decision; that it was done by a rediscount of its bills receivable, by its own note secured by collateral, or by a certificate of deposit; that the borrowing bank was represented in the transaction by the president, vice president, or cashier, or other executive officer who was authorized to sign drafts and letters for the bank, and that, before the decision in the Western Bank Case, the lending bank never required any evidence from the board of directors as to the authority of the borrowing officer, because the New York decisions were express to the point that it was not necessary; that his own bank did not borrow money, but that he had had a long experience in lending money for his bank to other banks.

Dumont Clarke, president of the American Exchange National Bank for two years, and connected with it for 30 years as assistant cashier, cashier, and vice president, testified that prior to the decision in the Western Bank Case it was a very common occurrence for one bank to borrow of another; that the cashier, or the president, or one of the officers, acted for the borrowing bank; that the lending bank never required proof of special authority granted to the borrowing officer by his board of directors; that the loan was made either by a rediscount of bills receivable or by a note of the borrowing bank, with collateral, or by a certificate of deposit, with collateral; that he knew the custom from the course in his own bank and by information as to the course in other banks; that his bank never borrowed money.

A. B. Hepburn, president of the Third National Bank for two years and a half, comptroller of the currency for several years, national bank examiner for three years, and superintendent of the New York state bank department for four years, testified that it was a usual thing for banks to borrow money from other banks prior to the decision in the Western Bank Case; that either of the executive officers—the president, vice president, cashier, or assistant cashier—acted for the borrowing bank in such transactions; that the lending bank never required any proof as to authority of the borrowing officer, but relied on the genuineness of his signature to the application and correspondence, and protected itself by passing the money to the credit of the borrowing bank upon the books of the lending bank, so that it could only be drawn out by the checks of the officers in the regular course of business; that he never knew of an instance where the lending bank required a grant of special authority by the board of directors of the borrowing bank to the borrowing officer; that the form of the loan was usually either a direct rediscount of bills receivable, with a margin of 20 or 25 per cent., or a note, with the bills as collateral, or a certificate of deposit; that loans were sometimes made on the unsecured note of the borrowing bank.

Edward Townsend, cashier of the Importers' & Traders' National Bank for 15 years, testified that it was usual for one bank to borrow money of another; that any official, whose signature was authorized with the lending bank, acted for the borrowing bank; that never, prior to the decision in the Western Bank Case, did the lending bank require a resolution of the board of directors of the borrowing bank; that the loan was effected either by rediscount of bills receivable or by a note, with collateral, or by certificate of deposit; that no change had taken place in the practice of his bank since the Western Bank decision.

George F. Baker, president, cashier, and teller of the First National Bank for 30 years, testified that it was a usual thing for a bank to borrow money from its correspondent bank; that any of its executive officers acted for the

borrowing bank; that no resolution of the directors evidencing the officer's authority to borrow the money was ever required before the Western Bank decision, but that such a resolution is now generally required; that the witness' own bank had litigation with the receiver over a loan made by it to the Fidelity through Harper.

Frederick D. Tappan, for 27 years president of the Gallatin National Bank, and connected with that bank for 45 years, testified that it was a usual thing for a bank to borrow of its correspondent bank; that the president, the vice president, or the cashier acted for the borrowing bank; that the lending bank never required any special authority from the board of directors of the borrowing bank prior to the Western Bank decision; that the loans were usually evidenced by notes, with security attached, and sometimes by a certificate of deposit; that ever since the Western Bank decision no change had occurred in the custom in witness' bank, and that collateral on such loans was not always required.

The first of the Cincinnati witnesses was M. M. White, who had been president of the Fourth National Bank of Cincinnati for 15 years, and cashier for 6 years prior to that. He testified that it was a usual occurrence, and regarded as legitimate in the line of banking business, for one bank to borrow money of another; that never, until the decision of the Western Bank Case, had the authority of the executive officer of the bank—the president, vice president, or cashier—to convey the liability of the bank upon his signature in borrowing money from another bank ever been questioned among Cincinnati banks, but that since the Western Bank decision many banks had required a resolution of the directors of the borrowing bank before making a loan; that it was an extraordinary thing for a banker in Cincinnati to borrow from $300,000 to $500,000 for his bank; that where a bank is short of money and long in bills, as frequently occurs, it was legitimate and proper, and not an unusual thing, for a bank to rediscount freely and build up its cash; that the witness' bank had once borrowed $75,000 for such a purpose; that it was reported to the directors, and all such transactions should be reported by the acting officers to the directors.

W. A. Goodman, 20 years a banker, and president of the Lafayette National Bank, testified that it was not a very unusual or extraordinary thing for a bank to borrow of its correspondent; that it was rather unusual, but was done frequently, though the witness' bank never did it; that witness' bank had not many country correspondents; that in making loans by rediscounting their paper no resolution of their board of directors was required; that he never had an application by a bank to borrow money on its own name, but that on such an application he would have required a resolution from the board of directors.

W. S. Rowe, cashier of the First National Bank, testified that before the decision of the Western Bank Case it was considered within the scope of the duties of a cashier to borrow money for his bank; that the country banks often borrowed money; that it was generally done by correspondence; that the letter would be signed by either the president, vice president, or cashier; that it was done either by rediscounting or by a direct note, signed by an executive officer of the bank, and that a resolution of the directors was never required; that the witness' bank had loaned as much as $150,000 to a country bank on bonds and securities; that the bank of Goodman, the last witness, did only a local business, and lent little or nothing to country banks; that such loans were always reported to the directors of the lending bank; that by country banks witness meant banks in the small cities in the agricultural districts, where, when crops were to be moved, more money was needed than they had; that witness would not regard it as good banking for an officer of a bank to borrow $300,000 without consulting his directors; that witness' bank did not borrow money.

H. C. Yergason, president of the Merchants' National Bank, testified that his bank had occasionally made loans to country banks, but had never required any authority from the directors, and had deemed the authority of the executive officer sufficient; that his bank had occasionally borrowed money, but the directors had always been consulted before doing so.

Griffith P. Griffith, vice president of the Citizens' National Bank, testified that he had been vice president and cashier of his bank 15 years; that he had been assistant cashier of the First National Bank from 1863 to 1866, and cashier of the Third National Bank from 1867 to 1880; that it was a usual thing for

banks to borrow money of their correspondent banks when applied for either by the president, the vice president, or the cashier of the borrowing banks, and that no proof of any special authority from directors was demanded from such officers; that the loans were made almost entirely by correspondence, and the proceeds of the loan were credited on the books of the lending bank to the borrowing bank; that the loans were made either by rediscount or by direct loans, with bonds or good securities; that banks with which he had been connected had not been in the habit of borrowing money; that witness would not hesitate to rediscount bills without consulting his directors, if there was a run on the bank.

J. D. Hearne, president of the Third National Bank of Cincinnati, and former president of the Covington City Bank, testified that it was an ordinary thing for one bank to borrow of another, and that prior to the decision in the Western Bank Case it was not customary for the lending bank to require from the borrowing bank a resolution from the board of directors; that the executive officers of the borrowing bank acted for it in the transaction; that no proof was required of special authority in those officers; that it was regarded as falling within the scope of the duties of cashier, president, or vice president to borrow money on behalf of his bank from another bank; that loans were made by a rediscounting and by direct loans, with bills receivable, or other collateral; that sums lent by his bank to other banks were usually not large; that witness had borrowed money in large sums for his banks; that he always consulted his directors before borrowing; that he never advised the lending bank in such cases of the approval of his board of directors, because it was never requested; that since the decision in the Western Bank Case the custom had changed, both in his bank and in other banks with whose mode of business he was familiar, and that a resolution of the board of directors is now required by them before lending money to a bank.

No witnesses upon the subject of custom were called by the receiver.

Second. E. L. Harper was a director, Ammi Baldwin was cashier, and Benjamin Hopkins was teller of the Third National Bank. While occupying these positions they had been engaged together in wheat gambling, and had been charged with misconduct in the management of that bank in connection with the gambling. In February, 1886, Harper and others organized the Fidelity Bank, and the bank opened for business March 1st. Harper took more than one-quarter of the stock. He was elected vice president; Baldwin, cashier; and Hopkins, assistant cashier. Shortly after organization a committee of the directors investigated the charges concerning Harper, Baldwin, and Hopkins, made by Hearne, then president of the Third National Bank, but the directors declined to hear the report. Alter, a director, who wished to read the report, made himself still more obnoxious by asking to see the call loan account, but access to it was denied him. The directors held four meetings in 1886,—one in February, to elect officers; the second in May, to appoint a committee to draft by-laws; the third in August, to approve the by-laws; and the fourth a special meeting, to vote a dividend. No other business was done by the directors during that year, and Harper managed the bank without the slightest supervision of any kind. At the annual election Alter was dropped as a director, and, of the nine elected, Harper, Baldwin, and Hopkins, Mathews, Harper's brother-in-law, and Gahr, his confidential secretary, constituted a majority. Mathews and Gahr were, confessedly, Harper's puppets in the board. He gave them 10 shares each to qualify them, and then each also held a large amount of stock in his name which belonged to Harper. Mathews was first elected in February, 1886, and resigned to allow some one else to be elected in his place. He was re-elected in January, 1887, to take the place of Alter, and remained in the board to the end. The explanation of his position in the board, and of that of Gahr, is seen by the following question and answer: "Q. Mr. Mathews, you said something a little while ago off the record, which did not go down in the stenographic report,—something about your directorship being nominal. Will you explain what you meant by that? A. Yes, sir. It was understood between Mr. Harper and me,—and I think the same is true as to Mr. Gahr,—that we were to be directors only until others were found to take our places; and, in explanation, I will say that one time Mr. Harper told us that one of us would have to step out,—that one of us would have to resign as director to allow somebody else to supply the place,—and I know Mr. Gahr and I tossed coppers

to see which of us would withdraw." Mathews was not only Harper's brother-in-law, but he was one of the executive officers of Harper's corporations,—the Riverside Rolling-Mill Company, Swift's Iron & Steel Works, and E. L. Harper & Co. In January, 1887, Harper and Hopkins entered upon a comprehensive scheme of wheat gambling, and Baldwin was accessory thereto. In carrying out their plan, Harper raised money by discounting, with the funds of the bank, the paper of E. L. Harper & Co., Swift's Iron & Steel Works, and the Riverside Rolling-Mill Company, in all of which companies he was the controlling member, and also by cashing the checks of these companies, and carrying the checks as cash on the books of the bank. This was done with the knowledge and connivance of Mathews, the director. In these ways Harper consumed of the money of the bank, between January and June, $750,000. The daily discounts were recorded in a book, which was open to the inspection of the directors. Kineon, one of the directors, repeatedly called the attention of Swift, the president, to the large discounts in favor of Harper's companies, and objected to it. Swift reported the matter to Harper, who said that if Kineon ran the bank he would keep all the money in the bank. Swift called Kineon's attention to Harper's large credits, and Kineon wanted to know where he got them. No further investigation or inquiry was made, however, until Kineon's resignation, hereafter described.

Harper's brokers in the wheat deal were Wilshire, Eckert & Co. He advanced, from the funds of the bank to that firm, on their notes and by cashing their checks and carrying the same in cash, a million and a half dollars, to be expended for his benefit in buying wheat on the Chicago market. He advanced, from the funds of the bank, by way of discounts, to Whitely, Fassler & Kelly, a firm who were interested in the wheat deal, $375,000. He borrowed in February and March, 1887, in the name of the Fidelity Bank, from the first National Bank of New York, $400,000, used $113,000 of the Fidelity Bank's bills receivable in so doing, and had $400,000 transferred to his credit on the books of the Fidelity Bank, without exhibiting any written evidences of his right to such credit. He borrowed, in the name of the Fidelity Bank, from the Chemical Bank, the $300,000 here in controversy, in March, 1887, and forwarded as security $146,000 of the bills receivable of the Fidelity Bank. In June, 1887, in order to tide over the stress in which the bank then was, he borrowed from the Chemical Bank about $1,000,000, and transferred to that bank bills receivable of a greater value. He did this without any action by the board of directors. During this period of less than six months, over which these transactions extended, the board of directors held five meetings,—one meeting in January, to elect officers; another in February, to approve of Harper's purchase of $340,000 in government bonds to qualify the bank as a United States government depository. These bonds were bought from the First National Bank of New York, and as part of the contract of purchase that bank agreed to lend the $400,000 already spoken of, but it does not appear that this was known to the directors. The third meeting was held in March, to declare a dividend; the fourth in March, to vote an increase of stock; and the last in May, when Kineon, a director, demanded that the bills receivable be examined. Harper objected, and told Kineon he ought to resign. Kineon said he would if Harper would buy his stock, which Harper then did. A committee of directors was then appointed to examine the bills receivable, but no record is made of its reporting. No other business was done by the directors than has been stated.

The by-laws of the bank provided for monthly meetings, but during the year 1886 five meetings failed for want of a quorum. The by-laws provided that the president, vice president, and cashier should have power to discount and purchase bills, notes, and other evidences of indebtedness, and to buy and sell bills of exchange, and to sign all contracts, drafts, and checks. The cashier was made responsible for all the moneys, funds, and valuables of the bank, and was required to deliver the same to the order of the directors. The president and vice president were made responsible for all sums of money and property intrusted to them or placed in their hands by the cashier. The last by-law expressly forbade the carrying of checks or other memoranda as cash, but required them to be entered upon the books as call loans. In spite of this, Mathews, one director, was privy to the carrying of $400,000 for several months in this way for Harper's accommodation. The president, Briggs Swift, and

Chatfield and Moorehead, directors, were also accommodated in this way. Watters, the general bookkeeper, testifies that from the beginning to the end of the bank the entries of cash upon the book were false, because of these so-called cash items; and Hinsch, the assistant receiving teller, testifies that nothing was carried as a cash item except upon Harper's order.

Armstrong, the receiver, filed a bill against the directors to recover compensation for the loss occasioned and made possible by their negligence and failure to supervise Harper's control of the bank. He charged them therein with liability for losses arising from excessive loans made by the banks to Wilshire, Eckert & Co., to Harper's companies, and to Whitely, Fassler & Kelly. He also charged them with permitting Harper, by their negligence, to embezzle more than $500,000, and, from the evidence adduced in support of the averment, it is clear that this charge referred to the transfer of funds by Harper, to his credit, of $700,000, at the times when he had obtained the loans from the First National Bank and the Chemical National Bank of New York. The solvent directors compromised the suit by paying the receiver $450,000, of which Swift, the president, paid $300,000; Chatfield, one director, $100,000; and Pogue & Zimmerman, the remaining $50,000. Watters, the general bookkeeper, testified that Harper controlled all the affairs of the bank; that no one else attempted to supervise his action in this regard; and that the directors permitted him to run the bank as he thought best. Kineon, director, testified that "Harper did everything; he ran the whole bank"; and that the directors were aware of this. Hinsch, the assistant receiving teller, testified that Harper dictated as to all the operations of the bank.

Armstrong, the receiver, in his bill against the directors, said: "And complainant further avers that the said E. L. Harper, vice president of said association, was permitted by the said directors of said bank to manage the affairs of said banking association, and to have charge and control of its moneys and assets, without any investigation or control of his management of the business of said banking association." Again, the bill averred as follows: "Complainant further says that the said E. L. Harper, in connection with the said Ammi Baldwin and Benjamin E. Hopkins, had been theretofore, and for many years prior to the transactions in this petition alleged, engaged in excessive and reckless speculations in wheat and other commodities, and were well known to the president and directors of said association to be excessive and reckless speculators, and wholly unfit to have the charge, management, and control of the moneys, assets, and affairs of the said the Fidelity National Banking Association; and complainant avers that by reason of said facts, and the knowledge thereof, the said president and directors were put upon inquiry as to the management of the affairs of said banking association, and the safe-keeping and investment of its moneys and other properties, during the whole time during which the money of said association was being loaned and embezzled and misappropriated, as hereinbefore set forth, yet the said president and the said directors, and each of them, in gross and willful disregard of their duty as such directors, wholly failed to exercise the slightest diligence or make the slightest investigation of the conduct of the business of said bank; and that any investigation of the affairs of said bank, or examination of its books and of the evidences of indebtedness held by said bank, would have disclosed to the said president, or either of said directors, that the moneys of said bank were being loaned, and liabilities to said bank were being contracted, in violation of the law, and that the affairs of said bank were being mismanaged, and its moneys and assets were being embezzled and misappropriated, in the manner hereinbefore set forth; and that the exercise of proper care and diligence in the discharge of their duty as president and as such directors would have prevented the losses described to said banking association."

Third. The Chemical Bank was the reserve agent and correspondent of the Fidelity Bank from its organization to its suspension, and the latter kept a regular deposit with the former. At the end of each month the Chemical Bank transmitted to the Fidelity Bank an account current, showing the debits and credits for the month as taken from its ledger account. This account current was compared by the bookkeepers of the Fidelity with the books of the Fidelity, and the differences noted on what was called a "reconcilement sheet," which was returned to the Chemical Bank, where the differences were examined, and correspondence, with explanations, ensued. Upon April 1st the Chem-

ical Bank sent an account current for the month of March, in which the Fidelity appears credited, as of date March 2, 1887, "Temp. Loan, $300,000." The bookkeepers of the Fidelity Bank negligently overlooked the discrepancy between the account current of the Chemical Bank and their own books as to this item, in that in the account it appeared as a temporary or call loan from the Chemical to the Fidelity Bank, while on their books it appeared, not as the proceeds of the obligation of the bank, but only as a deposit by Harper in the Chemical Bank to the credit of the Fidelity Bank. Accounts current and reconcilement sheets passed between the two banks on April 1st, May 1st, and June 1st. In June, 1887, the Chemical Bank advanced $1,000,000 to the Fidelity Bank as a loan, by way of overdrafts, and received notes as collateral exceeding in value the amount. The validity of the loan has never been disputed by the receiver. The circumstances under which it was made do not appear in the record, though the minutes fail to show that it was ever authorized by resolution of the directors. The Chemical Bank paid itself the $1,000,000 out of the collateral, after the suspension of the Fidelity Bank, and sought to use the surplus remaining for payment of the $300,000 loan, claiming that all the collateral held by it was equally applicable to both debts. The receiver, though not at that time denying the liability of the Fidelity Bank on the $300,000 loan, disputed the right of the Chemical Bank to "mass" the collateral, and contended that only the collateral deposited with each obligation could be applied to it. In an equity suit in the United States circuit court of New York this issue was decided in favor of the receiver.

Fourth. The $300,000 credit of March 2, 1887, in the Chemical Bank, was drawn against by the Fidelity Bank in the usual course of business, and went to pay concededly legitimate obligations of the latter bank. It was all drawn out before April 1, 1887. Harper's account, including the transfer of $300,000 to his credit, was largely overdrawn when the Fidelity Bank went into the hands of the receiver, June 21, 1887.

John W. Herron, for appellant.

William Worthington and George H. Yeoman, for appellee.

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

TAFT, Circuit Judge (after stating the facts). Can the case before us be distinguished on any satisfactory grounds from that of Western National Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572? If not, the decree of the circuit court must be reversed.

In the Western Bank Case it appeared that by a letter of May 16, 1887, Harper asked for a loan from the Western Bank of $200,000, and inclosed four notes, for $50,000 each, due in four months, signed by A. P. Gahr, and indorsed by Harper, and secured by 1,600 shares of Fidelity Bank stock. The letter, though written on a letter head of the Fidelity Bank, was signed by Harper in his own name, without any official designation, but contained a request that the proceeds of the loan be put to the credit of the Fidelity Bank on the books of the Western Bank. This credit was, in a short time, exhausted by drafts drawn in the name of the Fidelity Bank, and signed, some of them by Hopkins, the assistant cashier, and the remainder by Harper himself. The money thus drawn was appropriated by Harper to his own use, and never came into the actual possession or use of the Fidelity Bank, and was not applied in any way for its benefit. There was evidence that Harper was vice president and general manager of the business of the Fidelity Bank.

The only question argued by counsel in the supreme court was whether Harper and Jordan, who made the loan for the Western

Bank, intended a loan to Harper or to the Fidelity Bank. The supreme court based its decision upon a ground not advanced or discussed, and held that, even if Harper intended to bind his bank by this loan, he had no general authority, as its vice president and principal executive officer, to do so, and that the record did not show any special authority conferred by the directors upon him for the purpose. The court further held that there was no evidence of a subsequent ratification of the loan by the directors, or of a receipt of the proceeds by the bank to its use and benefit. Upon the question of the power of Harper and the directors, the court, speaking by Mr. Justice Shiras, used the following language:

"The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing $200,000 at four months' time. It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the eighth section of the national bank act (Rev. St. § 5136, par. 7): 'A national bank can exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes.' The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court in the case of First Nat. Bank v. National Exch. Bank, 92 U. S. 122, 127, 'authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.' Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money. Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers."

The reasoning of the court is here based upon two propositions: First, that the borrowing of money by a bank is not within the ordinary business of the bank; and, second, that because it is of an extraordinary character, it is not within the scope of the power of the chief executive officer of the bank, without special authority conferred by the governing body of the bank,—the board of directors. The court does not hold that the national banking act either expressly or impliedly forbids a bank to borrow money, but only that the power to do so is not expressly given by the act. The court concedes that, among the incidental powers necessary to carry on the banking business, is the power, under certain circumstances, temporarily to borrow money, but says, in effect, that it is so much out of the course of ordinary and legitimate banking that the executive

officers of the bank, who have only authority to transact the ordinary business of the bank, could not exercise the power to borrow money without special authority from the directors.

No special authority appears by the record to have been conferred on Harper to borrow the money here in question, but complainant below sought to establish the necessary authority by evidence that in New York and Cincinnati the executive officers of the bank were, by a general banking custom, accorded authority to borrow money on behalf of their banks. Two questions arise upon this evidence: Does it establish the custom? If it does, can the proof of the custom supply the place of the special authority decided by the supreme court to be necessary?

We have set out in the statement of the case, at perhaps too great length, a résumé of the evidence as to usage, because its sufficiency has been vigorously attacked by the counsel for the appellant. We think that the evidence establishes, in a most satisfactory way, that in 1887, when the loan at bar was made, and for many years previous, it was the frequent practice of banks in the interior to borrow money of their New York correspondents; that a similar practice prevailed in Cincinnati between the country banks in the neighboring territory and their Cincinnati correspondents, and that the borrowing was always done by one of the executive officers of the borrowing bank, and usually by letter; that no special authority from his board of directors was ever required; and that by the usage of banks in those two cities, at least, he was treated as having adequate authority for the purpose, as between his own bank and the lending bank. The only witness whose statement may be considered as falling short of this is W. A. Goodman, of Cincinnati, and he seems to have had little experience in transactions with country banks, and none in borrowing money for his own bank.

It does not militate against our conclusion that several of the witnesses testified that it was usual and proper for the borrowing officer to consult his directors before obtaining the loan, or to report it to them afterwards. There are many important transactions of the bank concededly within the power of the executive officers, concerning which they consult their directors or of which they make report. The question here is not what is the customary duty of a cashier or other executive officer in keeping his directors informed of what he is doing, but it is, what is his customary authority in acting on behalf of his bank and borrowing money from other banks? It does not detract from the weight of the evidence that the banks of a majority of the witnesses do not borrow money. It is the lending bank who has to decide in such cases upon the question of appearance of authority, and their officers are best able to say what is the authority, in the matter of borrowing, which well-known usage gives to the executive officers of the borrowing bank. Moreover, three of the Cincinnati witnesses had borrowed money for their banks, and their evidence was like that of the others.

Nor do we see how it affects the question of authority of the borrowing officer that collateral is usually demanded from the borrowing bank, and that the proceeds are credited in the books of the lending

bank to the borrowing bank, to be drawn out in due course on drafts of the latter. This course of business, which operates as a check upon possible fraud by the officer assuming authority to borrow, does not indicate that he is not given, by custom, the requisite apparent authority to contract the loan on behalf of his bank, but, on the contrary, suggests a reasonable explanation why a custom, by which banks of the borrowing class might otherwise be prejudiced and exposed to risk of loss by the frauds of their executive officers, has been accepted and acquiesced in by them. The failure of the defendant to call witnesses to contradict the evidence of the complainant upon the question of usage lends most significant support to the view that it was well known and generally acquiesced in. Sumner v. Tyson, 20 N. H. 384–387; Insurance Co. v. McLaughlin, 53 Pa. St. 490. The New York and Cincinnati witnesses strongly corroborate each other as to the usage prevailing in both places; for it is well settled that the existence of a well-known usage in one place, or in one trade, has a tendency to establish the same usage in the same trade in another place similarly situated, or in a closely-allied but different trade. Insurance Co. v. McLaughlin, 53 Pa. St. 490; Falkner v. Earle, 3 Best & S. 360; Fleet v. Murton, L. R. 7 Q. B. 126.

The next question is whether the usage proven can make up for the absence of proof of Harper's and Baldwin's special authority to contract this loan. The theory upon which it is offered is that bank directors in Cincinnati, who committed to their executive officers authority to conduct the business of their bank with a New York correspondent bank, were presumed to know the apparent authority which New York usage in the banking business would attribute to those officers, and are estopped, in the absence of special notice to such correspondent bank, to deny that those officers had actual authority equivalent to their customary authority. We think this theory to be sound. The borrowing was done in New York, and it is New York usage which is important here. Bank directors in Cincinnati, doing business in New York. are presumed to know the usages in that city, at least so far as they affect out of town banks. Goodenow v. Tyler, 7 Mass. 36–47; Dwight v. Whitney, 15 Pick. 179–183; Lewis v. Marshall, 7 Man. & G. 729–744; Leach v. Beardslee, 22 Conn. 404; Cropper v. Cook, L. R. 3 C. P. 194; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950. The presumption of knowledge by the bank directors of the Fidelity Bank of the New York usage is greatly strengthened in this cause by proof that the same usage prevails with respect to the officers of banks bearing the same relation to Cincinnati banks which Cincinnati banks bear to New York banks. Well-established usages of a trade are presumed to be known to all persons engaged in that trade. Carter v. Coal Co., 77 Pa. St. 286. It is noteworthy that the receiver did not call a single witness from the directors of the Fidelity Bank to rebut this presumption as to their knowledge of the usage.

But it is said that to give such effect to the usage is, in effect, to refuse to follow the authority of the Western Bank Case. We cannot understand why. Usage is a matter of fact until it becomes so

general and well known to courts, and is so often recognized by them, as to be crystallized into law. There was no evidence of usage adduced or considered in the Western Bank Case. That makes a broad distinction between that case and the one at bar.

Again, it is said that the usage is illegal, because contrary to the law of the Western Bank Case. The court in that case did not decide that it was unlawful to intrust the vice president or cashier with power to borrow money for his bank; it only held that in the absence of special authority, conferred either by by-law or resolution of the directors, such authority did not appertain to the office of cashier or vice president, but remained with the directors. The manifest inference, from the language of the opinion, is that, if the directors chose to do so, they might expressly confer such authority by a by-law. If they could do this by a by-law, why may they not by acquiescence in a well-known usage effect the same result? Can, therefore, a usage which assumes the conferring of authority be unlawful? We think not. It cannot affect the validity of the usage that it may have derived strength from, or even had its origin in, decisions of the state courts which differ from the decision in the Western Bank Case. It is undoubtedly true that there were decisions in the state courts of New York, Pennsylvania, Missouri, Wisconsin, and Ohio (Barnes v. Bank, 19 N. Y. 152; Bank v. Sullivan, 11 Wkly. Notes Cas. 362; Donnell v. Bank, 80 Mo. 165; Sturges v. Bank, 11 Ohio St. 153, 167; Rockwell v. Bank, 13 Wis. 653; Ballston Spa Bank v. Marine Bank, 16 Wis. 120–134) which take a different view of the implied authority of the cashier to borrow money for his bank; but if these decisions have given rise to a usage in New York and Cincinnati well known and recognized by bankers in both places, and having only the same result which might lawfully be brought about by express action by each board of bank directors, it is difficult to see why, because the origin of the usage may have been in an erroneous view of the law of implied authority of a cashier, it should not be binding on those who engage in business with a knowledge of and acquiescence in it.

In Merchants' Bank v. State Bank, 10 Wall. 604, a suit between two national banks, the question was whether the cashier of one of them had authority to certify three checks, amounting in all to $600,000, to pay for certain gold coin bought of the other. It did not appear that the cashier had ever certified checks before or bought gold. Evidence by the officers of 22 banks in Boston was admitted to show a usage by which, without by-law or vote, powers were intrusted to cashiers of such banks to borrow and lend the money of their banks of and to each other, to buy and sell exchange of and to each other, and in all such transactions to pledge the credit of their respective banks,—usually by cashiers' checks, sometimes by certificates of deposit or memoranda; that these transactions were frequent, involving large sums of money; and that they were uniformly conducted in faith of the implied powers of cashiers, without inquiry. The supreme court held the evidence competent for the jury to consider on the issue whether the cashier had power to buy gold and certify checks without special authority from the board of directors. The ruling in this case certainly upholds the view that a well-known usage, by which an executive

officer of a bank exercises authority to do acts on its behalf, which otherwise could only be done by the directors, is equivalent to a specific delegation of authority by the board. It is worthy of note that the usage, which was here held admissible to show apparent authority, was one by which cashiers were permitted to borrow large sums of money for their banks without receiving special authority from their directors. It is hardly conceivable that the supreme court would have held such usage admissible in evidence if it was illegal or unreasonable.

Our conclusion is that the complainant, by its proof of usage, has taken this case out of the rule laid down by the supreme court in the Western Bank Case, and has shown thereby that Harper and Baldwin had apparent authority to make this loan for the Fidelity Bank.

2. The conclusion just reached, based upon the usage of banks, is greatly strengthened when we come to consider the actual authority exercised by Harper in the affairs of the Fidelity Bank. It is evident, from the facts set forth at length in the statement of the case, that the board of directors was practically chosen by Harper for the very purpose of giving him free rein in the management of the bank, and in the use of its funds and its credit to carry on enormous wheat gambling transactions on the Chicago market. He selected as directors for this purpose, in addition to himself, Baldwin, the cashier, and Hopkins, the assistant cashier, who had previously been engaged in a similar transaction with him at the Third National Bank, and who were privy to his present plans; and two of his own employés, Mathews and Gahr, whom he had qualified by gifts of stock, and who confessedly were only his representatives on the board, and quick to do his bidding. When a director manifested any desire to look into his management, he dropped him from the board at the first opportunity. That Harper in this way succeeded in having the whole power of the board of directors delegated to him, in fact, is clearly manifest from what he did in the bank. The indifference of the directors is most emphatically shown by a failure of a quorum to attend the regular monthly meetings for five months, and by the perfunctory and merely formal matters passed upon by the board when a sufficient number did meet. The subordinates in the bank, whose assistance was necessary to Harper in making the transfers of funds to his credit, and in carrying in the cash account worthless checks aggregating three times the capital of the bank, recognized Harper as the manager, not only of the bank, but of the directors. The slightest questioning of one of them at any time during the last six months would have developed the peculiarities of Harper's control. Indeed, it is quite clear that the flagrant violation of one of their by-laws by Harper, in respect to "cash items," was well known to more than the majority of the board. In order to effect the loan here in question, and other loans, he took from the bank large quantities of the bank's bills receivable, to be used as collateral, without registering any explanation of their whereabouts, and without arousing the slightest inquiry, either by the president or any of the directors. When, near the close, a loan had to be secured in a fruitless effort to save the bank, he negotiated one, and sent away a million dollars' worth of bills receivable, without any authority from the board. We think that, for practical purposes, Har-

per was the bank, and that the directors recognized him as such, and that, included in such a delegation of authority as this condition of affairs implies, was the power to borrow money, if, as held in the Western Bank Case, that power rests with the directors. We reach this result, not only on the direct evidence, but also upon the bill of the appellant herein filed against the directors, in which the averments paint, in the strongest colors, the supreme authority over bank and directors which Harper was allowed to exercise, and which does not lose evidential force from the fact that the receiver obtained, in compromises, $450,000 from the solvent directors on the character of his averments and the strength of the proof adduced by him in support of them.

In Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, the issue was whether a bank was bound by the act of its cashier in having canceled obligations of its debtor, secured by a first lien on his property, in exchange for a partial payment on them and new obligations secured by a second lien. It was conceded by the court that the ordinary powers of a cashier do not include the release of security and the canceling of any obligation due the bank, except upon payment; but Mr. Justice Harlan, delivering the opinion of the court, set out at some length the circumstances, to show that, in fact, the whole business of the bank had been delegated to the cashier by the directors, whose supervision over him was most perfunctory, and who were very little in the bank, and that, if the directors did not abdicate all authority as such, they acquiesced in the cashier's assumption of exclusive management of the bank's business, and held that the directors and the bank could not be heard to deny the requisite authority in the case in hand. Mr. Justice Harlan's language, in closing his opinion, was as follows:

"It is quite true, as contended by counsel for appellants, that a cashier of a bank has no power, by virtue of his office, to bind the corporation except in the discharge of his ordinary duties, and that the ordinary business of a bank does not comprehend a contract made by a cashier—without delegation of power by the board of directors—involving the payment of money not loaned by the bank in the customary way. Bank v. Dunn, 6 Pet. 51; U. S. v. City Bank of Columbus, 21 How. 356; Merchants' Bank v. State Bank, 10 Wall. 604. Ordinarily, he has no power to discharge a debtor without payment, nor to surrender the assets or securities of the bank. And, strictly speaking, he may not, in the absence of authority conferred by the directors, cancel its deeds of trust given as security for money loaned,—certainly not, unless the debt secured is paid. As the executive officer of the bank, he transacts its business under the orders and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier—at least where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who, in good faith, deal

with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

Now, it is quite true that the holding out in the case at bar was of a somewhat different character from that in the case cited. Here the power to transfer the bank's collateral, the acquiescence in the accounts current based on the loan for three successive months, the interchange of collateral, the negotiation by Harper of a second loan for $1,000,000, and the transfer of the requisite collateral, were all circumstances reflecting on Harper's authority, upon which the Chemical Bank might rely in either making the loan or not compelling its payment by those contracting it before the failure.

In Davenport v. Stone, 104 Mich. 521, 524, 62 N. W. 722, 723, the principle is stated as follows:

"The directors intrusted the entire management of the bank to Mr. Bradley [the cashier]. Therefore neither the bank nor its receiver can now be heard to deny the authority of the cashier to do any of those acts which it or its directors might lawfully authorize the cashier to do."

The act in question in that case was the rediscount of a renewal note. In Wing v. Bank, 103 Mich. 565, 61 N. W. 1009, the same principle was recognized, where the act of the cashier, the validity of which was in issue, was the release of a surety from a note held by the bank. In Bank v. Perkins, 4 Bosw. 420, the issue was, like that at bar, as to the binding effect upon a bank of a loan contracted in its name by one of the executive officers. In that case the cashier had had exclusive control of the bank for several years, without any supervision or interference by the directors. This particular loan the cashier had taken to himself after its proceeds came to the bank. The superior court of New York, made up of Chief Justice Bosworth and Judges Woodruff and Moncrieff, stated, as the principle which led them to hold the bank, that where directors of a bank allow its cashier for several years in succession, without interference or inquiry by them, to transact the business of the bank in such manner as, in his judgment, may be proper and for its interest, they thereby, in effect, authorize him to make all and any contracts which he deems expedient in relation to its business that the directors might lawfully make, and such contracts will conclude the bank, as between it and a party who has dealt with it through such cashier, and, on the faith of his having authority to make such contracts, has loaned money to such bank, provided the charter of the bank does not prohibit it from making such contracts through its cashier. The case was affirmed by the court of appeals on another ground. Bank v. Perkins, 29 N. Y. 554. See, also, to the same point, Cox v. Robinson,

82 Fed. 277, a decision by the circuit court of appeals for the Ninth circuit.

3. Another distinction between the Western Bank Case and the one at bar grows out of the relation which existed between the Chemical Bank and the Fidelity Bank as correspondent banks exchanging monthly statements of the account between them for the prior month. In the Western Bank Case there was no such relation between the two banks involved. This difference has an important bearing on the question of notice to the directors and ratification by them of the loan. The supreme court, in the Western Bank Case, in effect says that when the loan was made to the Fidelity Bank, at the instance of an unauthorized agent, the lending bank could not predicate ratification of the loan by the Fidelity Bank without bringing knowledge of the same home to the directors, the only body in the bank with authority to make the loan. The general rule as to ratification is, as we conceive it, that a failure to repudiate the unauthorized act of an agent can never work a ratification of the act, unless the principal either has actual knowledge, or, by the exercise of due diligence, would have had knowledge, of the act. Now, due diligence presupposes an affirmative duty owing from the principal to the other party to advise himself of the fact. In the case of a stranger seeking relations with a principal through an unauthorized agent, no duty arises on the part of the principal towards the stranger to inform himself of an agent's unauthorized acts, because he has the right to assume that the agent will not attempt to exercise authority not intrusted to him, and that a stranger will not credit the agent with greater authority than he has. Such was the Western Bank Case, and so the principle stated by the court had full application there. But where there is an existing relation between the principal and the other party, imposing on the former a duty of knowledge in respect of a class of facts which embraces the unauthorized act, then a neglect by the principal to discharge the duty and inform himself will have the same effect as actual knowledge upon the issue of his ratification of the unauthorized act by estoppel. To illustrate by the case of Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657: There a depositor in a bank was held to ratify, by estoppel, his agent's forgeries in raising checks by failure to repudiate them, not because of his knowledge, but because his relation to the bank as a depositor bound him to advise himself, from the statements sent by the bank to him, as to the condition of his account, and the validity of the checks, payment of which was noted therein. Had the forgeries been passed upon a stranger, the principal could not have been held to ratify them in favor of the stranger on the ground that he had been careless in not supervising his agent in the drawing of checks. He would, in that case, have owed no duty to the stranger of which his careless confidence in his agent would have been a violation. In the case at bar the Fidelity Bank bore much the same relation to the Chemical Bank that an individual depositor does to his bank. The Chemical Bank submitted monthly statements of the current account between it and the Fidelity Bank to the latter bank, and in due course the latter bank re-

turned a reconcilement sheet, showing discrepancies, if any existed, and correspondence continued until the differences were explained and reconciled. This was the regular course of business between the two banks from the organization of the Fidelity till its close. The affirmative duty was thereby imposed upon the Fidelity Bank to inform itself of the correctness of the items therein charged, and to object to the same if unwarranted or erroneous. Negligence in doing so was a failure of duty towards the Chemical Bank, and was the equivalent of actual knowledge of those things which proper inquiry would have developed. Notice through such accounts was notice to the directors of the items therein contained, because it was notice to the Fidelity Bank by the course of business between the two banks. The directors cannot rid themselves of such notice by saying that their agents failed to communicate the facts to them. As between them and the Chemical Bank, they were under an affirmative duty to examine into the accounts, and so a neglect by the agents to discharge this duty was their negligence. Now, it might be that, if the agent who committed the fraud originally was the only person to make the examination, his failure to report it could be considered so much a part of his scheme to defraud that notice to him would not be notice to the bank. But here no such difficulty arises. The account current for March and the books of the Fidelity Bank differed in this: that the account current showed the source of a credit to the Fidelity Bank of $300,000, of the date of March 2, 1887, to be a temporary loan from the Chemical Bank to the Fidelity Bank. The books of the Fidelity Bank showed the source of the same credit to be a deposit in the Chemical Bank by Harper to the credit of the Fidelity. The bookkeepers of the Fidelity negligently overlooked the discrepancy, and, by sending a reconcilement sheet calling attention to other items, in effect reported to the Chemical Bank that the item of $300,000, as contained in the account current, was correctly set forth therein. They were not privy to the fraud, and, if they had discovered the difference, it would have been their duty to prepare a letter to be forwarded to the Chemical Bank calling attention to it, and to have told the executive officers of the bank of it. The general bookkeeper says that he would have reported it to the cashier, but one would think that a discrepancy so vitally concerning the personal account and integrity of the vice president would be reported to the president. In any event, we can not presume that such a discrepancy would have been suppressed, if the president, who was certainly not privy to the fraud, had been exercising any care.

If our theory of notice to the directors by the monthly accounts current is correct, then this case cannot be distinguished from the Leather Manufacturers' Bank Case, already cited. The grounds for an equitable estoppel, based on the delay in repudiating the loan, are clearly shown. It appears that, more than a month after the acquiescence by the Fidelity Bank in the account containing the item of the $300,000 loan, the Chemical Bank, on the faith that the loan was a loan to the Fidelity Bank, consented to a substitution of worthless collateral for good collateral at the instance of Harper, as

vice president. It is also quite probable that, had the Chemical Bank known that there was any doubt as to Harper's authority in April, it would have saved itself from loss by recourse to Harper.

The effect of notice through monthly statements made in due course by one bank to another of unauthorized transactions of agents is clearly shown in the case of Kissam v. Anderson, 145 U. S. 435, 12 Sup. Ct. 960. In that case the cashier of a country bank drew bank drafts on its New York correspondent bank in favor of New York brokers, who were conducting a speculation for him. The country bank failed, and its receiver sued the brokers for the money of the bank, because received by them on these drafts with knowledge that the cashier was using the funds of his bank for private speculation. The brokers sought to have the claim reduced by deposits which they had made to the credit of the country bank with its New York correspondent by direction of their client. It appeared that the New York correspondent sent regular monthly statements of the deposit account to the country bank showing these credits, but they were not transferred to the books of the country bank, and some of the accounts thus sent were not even opened. The cashier drew new drafts on these deposits, and squandered the money elsewhere. The circuit court held that unless it appeared that these deposits actually reduced the sum total of the cashier's total defalcations, by whatever means, below the amount of the drafts received by defendants, they could not set off the deposits returned by them. The supreme court, in an opinion by Mr. Justice Brewer, reversed the judgment of the circuit court. He said:

"Defendants returned this money to the Albion Bank. They deposited it with the Third National Bank, the correspondent of the Albion Bank, and the bank from which they received the money on the checks from the Albion Bank. In fact, therefore, the money was placed where it was before it was taken,—in the possession and under the control of the Albion Bank. Not only that, the Third National Bank, in its due course of business, by monthly reports, informed the Albion Bank that they had received this money, and held it subject to its order; and it was subsequently used by the Albion Bank in drafts drawn by it in favor of other parties. It it be said that no officer of the Albion Bank knew of these deposits except Warner, the wrongdoer, and that he subsequently drew out most of these moneys in drafts to further other wrongs, the reply is that the other officers and directors of the Albion Bank were chargeable with knowledge of these deposits. If, through their negligence, they did not in fact know, that is a matter for which the Albion Bank, and not the defendants, were responsible. Kissam, Whitney & Co. had no supervision over its affairs,—no knowledge as to how those affairs were managed. They were not called upon to go to Albion and hunt up the various officers and directors, and inform them, one by one, personally, that these moneys had been deposited to their credit in the Third National Bank. It was enough that they deposited them, and that that bank, in the regular course of business, by monthly statements, informed the Albion Bank that it received and held those moneys. * * * It will not do to say that they put the money where he could check it out, and therefore are responsible for what he did with it. They deposited it to the credit of the Albion Bank, and it was for the officers and directors of that bank to take care of its deposits. The rule might be different if Warner, the cashier of the Albion Bank, was the only officer authorized to draw on the Third National Bank, or charged with knowledge of the state of the account; but the president and teller had equal authority, and were equally chargeable with knowledge. In fact, it appears that these officers did draw drafts on the New York bank, and thus diminished the total amount of deposits, and the other directors, also, were under some obligation to know the affairs

of the bank; and it will not do to say that the bank can ignore the negligence of all its officers and profit by their omission of duty."

The same effect was given by Judge Drummond to monthly accounts current between correspondent banks in Burton v. Burley, 13 Fed. 811, where a bank president had paid his personal debts by directing charges to be made upon the correspondent bank's books against his own bank.

4. Another distinction said to exist between the case at bar and that of the Western National Bank is that there the money borrowed from the Western Bank was at once drawn out by drafts payable to Harper, and not a penny of it went to the benefit of the Fidelity, while here the credit of $300,000 obtained by the loan was drawn out on drafts issued to meet legitimate obligations of the Fidelity Bank. Upon the day upon which the credit was given in New York to the Fidelity Bank by the Chemical Bank for the loan, however, Harper directed a credit to be made in his favor on the Fidelity books of $300,000, and a charge of that amount to the Chemical Bank, and he afterwards checked out this credit. Under the circumstances, can the Chemical Bank hold the receiver as for money had and received? The question is not free from difficulty, and as the members of the court might not be able to agree in their conclusions upon the same, and as the grounds already stated are quite sufficient to require the court to affirm the judgment of the circuit court, we do not decide the point. The decree of the circuit court is affirmed, with costs.

MONTGOMERY v. McDERMOTT et al.

(Circuit Court, S. D. New York. November 30, 1897.)

DEATH OF DEFENDANT PENDING ATTACHMENT PROCEEDINGS—PLAINTIFF'S EQUITABLE REMEDY.

A bill alleging, in substance, the issue and levy of an attachment in an action brought to recover a large indebtedness due, the death of the defendant pending the action, and the refusal of his foreign executors to revive it, a fund in control of the court, arising from the property attached, and a conspiracy on the part of defendants to defraud the orator by removing such fund beyond his reach, states sufficient grounds for equitable relief.

W. W. MacFarland and Stephen H. Olin, for complainant.
Charles C. Beaman and Gherardi Davis, for defendants.

COXE, District Judge. This is an equity action in aid of a suit at law in which the orator is plaintiff and one James McHenry, deceased, was defendant. A warrant of attachment was duly issued in the suit at law and was levied upon the property of McHenry; the fund so attached being now, through the possession of the marshal, in the custody of this court. The orator has no remedy in the suit at law, for the reason that McHenry died in 1891 and his foreign executors have not revived and decline to revive the suit, and also because the property is claimed by various parties named as defendants, several of whom have combined together to procure the removal of the fund beyond the jurisdiction of this

court and there divide it among favored creditors to the injury of the orator. A portion of the property which is alleged to be covered by the attachment was sold with the consent of the orator who relinquished his lien upon the express understanding that the proceeds of the sales should be held by the trustees of the McHenry trust, in lieu of the property sold, until his rights therein were fixed and determined. In violation of this agreement the said trustees in collusion with other defendants are seeking to dispose of the fund so realized with intent to hinder and delay the orator in the collection of his debt.

The foregoing are some of the salient facts alleged in the bill. The relief demanded includes a decree directing the defendant trustees to pay into the registry of the court the fund held by them which is subject to the attachment and also an injunction restraining the defendants from interfering with the attached property. The bill is demurred to on the grounds that the orator is not entitled to the relief prayed for or to any relief, that the bill is indefinite, uncertain and multifarious, that there is a defect of parties defendant and that the orator has been guilty of laches. In brief, the bill alleges a large indebtedness due from McHenry's estate to the orator, an attachment issued and levied in a suit at law brought to recover this debt, a fund in the control of this court applicable to the payment thereof, inability to obtain relief at law, and a conspiracy on the part of the defendants to defraud the orator by removing beyond his reach the fund which should, pro tanto, satisfy his debt.

Assuming, as the court must assume, the verity of these allegations, it seems reasonably clear that unless the orator can maintain this bill he will lose his debt. No other remedy is open to him. His action at law, though alive, is paralyzed and moribund. He must obtain relief here or nowhere. It is thought that the bill can be sustained upon the authority of Case v. Beauregard, 101 U. S. 688, Bank v. Wetmore, 124 N. Y. 241, 26 N. E. 548, and People v. Van Buren, 136 N. Y. 252, 32 N. E. 775, and cases cited.

In the Van Buren Case, supra, the court say:

"It would seem to be illogical to accord to the plaintiff the right to attach property fraudulently transferred, as he concededly may under the decisions in Hall v. Stryker, 27 N. Y. 596, and the other cases cited above, and yet deny him the right to have the lien preserved until he can merge his claim in a judgment and issue final process for its collection. No adequate remedy at law can be suggested in such a case. The jurisdiction of a court of equity to reach the property of a debtor justly applicable to the payment of his debts, even when there is no specific lien, is undoubted."

To turn a suitor out of court who presents such a statement of the difficulties which beset him as is found in this bill would seem contrary to the principles of equity which delights in finding a remedy for every wrong.

The point that no levy was made upon any property of McHenry and therefore that there is no attachment or lien to be protected and maintained is met by the allegations of the bill to the contrary, at folios 10, 11, 20 and 21.

The bill further alleges that the transfers of the certificates by McHenry to Moran and Woodman were merely for the convenience

of McHenry, the transferees holding them as his agents and employés without the actual possession and control thereof. Their title, says the bill, was only nominal, the real interest being held by McHenry. Bank v. Dakin, 51 N. Y. 519, Rinchey v. Stryker, 28 N. Y. 45, and Hall v. Stryker, supra, are authorities for the proposition that an attachment may reach property which the debtor has disposed of in fraud by his creditors.

The bill attempts to excuse the laches in bringing this action and succeeds in doing so sufficiently, at least, to prevent the delay from being available on demurrer.

The other grounds of demurrer are special and do not go to the merits of the controversy, but relate to alleged defects of parties and insufficient allegations of the bill. It is unnecessary to discuss these questions at this stage of the litigation. The court is now under the impression that the entire controversy can be determined upon the bill as it is now exhibited. Should it become necessary it can be amended hereafter, and, should the orator succeed, the decree can be so framed as to preserve the rights of all. Upon the whole case it is thought that the court should not attempt to deal with the complicated situation foreshadowed by the bill upon demurrer, but should postpone its consideration until the parties have had an opportunity to present their proofs. The demurrers are overruled; the defendants to answer within 30 days.

BUTLER v. WHITE, Collector of Revenue, et al. BERRY v. SAME. RUCKMAN v. SAME.

(Circuit Court, D. West Virginia. November 8, 1897.)

1. OFFICERS OF THE UNITED STATES—CIVIL SERVICE LAW.
   The act known as the "Civil Service Act" is constitutional.
2. SAME—DELEGATION OF LEGISLATIVE POWERS.
   Congress has not delegated to the president and the commission legislative powers.
3. SAME.
   By rule 3, § 1, the internal revenue service has been placed under the civil service act and rules made in pursuance of it.
4. SAME—WHO ARE OFFICERS.
   The plaintiffs in these actions are officers of the government in the internal revenue service.
5. SAME—REMOVAL FROM OFFICE.
   They cannot be removed from their positions except for causes other than political, in which event their removal must be made under the terms and provisions of the civil service act and the rules promulgated under it, which, under the act of congress, became a part of the law.
6. SAME.
   The attempt to change the position and rank of the officers in these cases is in violation of law.
7. SAME—EQUITY JURISDICTION.
   A court of equity has jurisdiction to restrain the appointing power from removing the officers from their positions if such removals are in violation of the civil service act.

(Syllabus by the Court.)

These were bills in equity filed against A. B. White, collector of internal revenue for the district of West Virginia, and others, by William Butler, H. C. Berry, and J. G. Ruckman, respectively, to enjoin the defendants from removing them from their positions as gauger and storekeeper, in a distillery, or from transferring them to other and subordinate positions.

Chas. J. Faulkner, for complainants.

John W. Mason, for commissioner of internal revenue.

Joseph H. Gaines, U. S. Dist. Atty., for defendant White.

JACKSON, District Judge. These causes are now heard upon the bills of plaintiffs and the demurrers and answers of defendants, which, by stipulation of counsel, are heard together. The object and purpose of the bills are to restrain the defendants from removing the plaintiffs in this action from their present positions as gauger and storekeeper, respectively, in the Hannis Distillery, or transferring them to any other and subordinate positions in the same distillery. These officers were commissioned by the government, and assigned to duty, and were in the active discharge of the functions of their respective offices when the defendant White was appointed collector of internal revenuė for the district of West Virginia. It is alleged in the bills that this defendant is about to remove the plaintiffs in these actions upon political grounds, and it is claimed that neither the defendant nor the appointing power has the right or power to remove the incumbents from their offices for political reasons. The demurrers to the bills in these cases raise 14 grounds of objection, which may all be embraced in three points:

First. Is the act of congress known as the "Civil Service Act," passed in 1871, and as amended in 1883, constitutional? In considering this question, it is well to refer to the history of the country which finally led to the passage of this act. The learned counsel who argued these cases on behalf of the plaintiffs reviewed, to some extent, the action of the various administrations of this government from that of Washington down to 1820, when congress passed an act fixing, for the first time, the tenure of office for district attorneys and marshals of the United States. Prior to this time it appears that removals from office were comparatively few, and that such action, when had, was always for causes other than political. After the passage of the act of 1820, subsequent administrations began to make changes in that class of officers who held their positions at the pleasure of the executive. As the country grew, not only in territory but in population, the thirst and greed for office became so great that a growing necessity was felt that some legislation should be had to correct, as far as possible, the evils growing out of the existing system of appointments. Such was the condition of the public mind of the country that President Grant, one of the greatest men that ever occupied the presidential chair, felt it incumbent on himself, in his annual message of December 4, 1870, to call the attention of congress to the importance and necessity of reform in "the manner of making all appointments." He employs the following strong and striking language, in his message, from which I quote:

"Always favoring practical reforms, I respectfully call your attention to one abuse, of long standing, which I would like to see remedied by this congress. It is a reform in the civil service of the country. I would have it go beyond the mere fixing of the tenure of office of clerks and employés who do not require 'the advice and consent of the senate' to make their appointments complete. I would have it govern, not the tenure, but the manner of making, all appointments. There is no duty which so embarrasses the executive and heads of departments as that of appointments; nor is there any such arduous and thankless labor imposed on senators and representatives as that of finding places for constituents. The present system does not secure the best men, and often not even fit men for public place. The elevation and purification of the civil service of the government will be hailed with approval by the whole people of the United States."

In pursuance of this recommendation of President Grant, congress, on the 3d day of March, 1871, passed an act the purpose and object of which, among other things, was "to regulate admissions to the civil service." It appears, however, that this act was insufficient to accomplish the purposes for which it was framed. Its terms and provisions were so criticised that there was a consensus of opinion that further legislation was needed. President Arthur, influenced, no doubt, by the public sentiment of the country, felt it his duty, in his annual message of December 4, 1882, to the Forty-Seventh congress, to call the attention of that body to this subject, in which he employed the following language:

"I trust that, before the close of the present session, some decisive action may be taken for the correction of the evils which adhere in the present method of appointment; and I assure you of my hearty co-operation in any measures which are likely to conduce to that end."

After this recommendation of President Arthur, congress took up the subject, and promptly passed an act "to regulate and improve the civil service of the United States," which was approved by the president on the 16th day of January, 1883. Bills were introduced in both houses of congress, but the bill that was passed by the senate, after much discussion in the house, was passed by the house, and approved by the president. In the discussion that took place upon this bill in the senate some of the most distinguished lawyers of that body participated, among whom were Senator Hoar, of Massachusetts, Senator Edmunds, of Vermont, Senator Brown, of Georgia, Senator George, of Mississippi, Senator Ingalls, of Kansas, Senator Cockerell, of Missouri, and Senator Allison, of Iowa. I refer to the utterances of these distinguished lawyers as part of the contemporaneous history of this act, and it is to be observed that not one of these gentlemen entertained any doubts as to the constitutionality of this act, but the general trend of the discussion seems to have conceded its constitutionality. The utterances of both Senator Hoar and Senator Edmunds maintain its constitutionality, and the skeptical legal mind that differs with me, and entertains doubts as to the constitutionality of the act, is referred to the able discussions that took place at the time it was under consideration.

This court might well content itself with what it has now said, but I am not either without authority or precedent upon this subject. The constitution of the United States (article 1, § 8, cl. 18) confers upon congress the right "to make all laws which shall be

necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." Under this provision of the constitution, congress, as early as the 27th day of July, 1789, passed an act that "the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it." That act has been in force from the day of its passage to the present time. Here is a power conferred by the authority of congress upon the head of each department, and is in no sense a delegated power of legislation. The evident purpose of congress was to furnish each department with authority to regulate the conduct of its officers and employés, and the distribution and performance of the business of the office. If such a power to legislate had been delegated under that act, the courts of this country would long since have been invoked to pass upon the power of congress to delegate a power to the head of any department which alone belonged to it; but long acquiescence in the act is of itself sufficient evidence of the right of congress to pass it.

Judge Marshall, in his opinion in the case of McCulloch v. Maryland, 4 Wheat. 421, uses the following language, which I think appropriate to the discussion of the question under consideration:

"All must admit that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

In the case of Ex parte Curtis, 106 U. S. 371, 1 Sup. Ct. 381, this doctrine was again affirmed by the supreme court of the United States, in an opinion delivered by Chief Justice Waite, in which he uses the following language:

"That the government of the United States is one of delegated powers only, and that its authority is defined and limited by the constitution, are no longer open questions; but express authority is given congress by the constitution to make all laws necessary and proper to carry into effect the powers that are delegated. Article 1, § 8. Within the legitimate scope of this grant, congress is permitted to determine for itself what is necessary and what is proper."

I assume that, when congress passed these acts, it did determine for itself what was necessary and what was proper; that there was a necessity to remedy the evil growing out of the existing appointments to office; and that the acts passed were constitutional, and therefore proper. Is it not competent, and clearly within the legitimate scope of the powers of congress, under the constitution, to remedy an existing evil? If so, did congress, in the passage of these acts, exceed its legitimate power under the constitution? I think not. Under our system of government, congress, by law, is vested with the power alone to remedy existing evils; but it is the

duty of the executive, when congress by an act applies a remedy, to see that the act is faithfully enforced. When congress undertakes to apply a remedy to an evil by repealing an existing law, or by amending the law, or by the passage of an act which has for its object an improvement of the civil service of the country, can it be said that congress has exceeded its power? I think not. If the time should ever come in the history of this government when congress cannot regulate the administration of the civil service of the country, in my judgment it will be an untoward event, which will strike at the very foundation of the existence of the government.

I reach the conclusion that there can be no question as to the constitutional power of congress to pass these acts. In support of this position I cite clause 18, § 8, art. 1, Const. U. S.; Marbury v. Madison, 1 Cranch, 137; McCulloch v. Maryland, 4 Wheat. 421; Ex parte Hennen, 13 Pet. 259; Ex parte Curtis, 106 U. S. 371, 1 Sup. Ct. 381; U. S. v. Perkins, 116 U. S. 483, 6 Sup. Ct. 449.

The second ground of demurrer is that the assignment or revocation of assignment of these parties to duty is not protected by the provisions of the civil service law or the regulations in pursuance thereof. It is urged that the plaintiffs hold positions not technically in the executive civil service. I cannot agree with this position. Section 1, rule 3, of the revised rules promulgated May 6, 1896, declares that:

"All that part of the executive civil service of the United States which has been or may hereafter be classified under the civil service act, shall be arranged in branches, as follows: The departmental service, the custom-house service, the post-office service, the government printing service and the internal revenue service."

Storekeepers and gaugers are appointed by the secretary of the treasury, and are required by the statute to take an oath to faithfully perform the duties of their offices, and to give bond for the faithful discharge of their duties. The storekeepers are to receive a compensation not to exceed four dollars a day, to be determined by the commissioner of internal revenue, and are not permitted to engage in any other business while in the service of the United States without the written permission of the commissioner of internal revenue. The fees of gaugers are to be determined by the quantity gauged, under such regulations as the commissioner may prescribe. These places held by the plaintiffs are positions of honor and trust, and have attached to them a fair compensation. It is true that their duties are ministerial; yet the faithful discharge of them is so important to the government as to require men of capacity and integrity. Section 6 of the same rule declares that:

"The internal revenue service shall include officers and employés in any internal revenue district who have been, or may hereafter be, classified under the civil service act."

By the direction of the president, the secretary of the treasury classified all persons not before classified in the internal revenue service, except those merely employed as laborers or workmen, and those whose appointments are subject to confirmation by the sen-

ate, and made report to the commission, in pursuance of rule 12, § 1. It must be apparent that gaugers and storekeepers are either "officers or employés" in the internal revenue department, and it is immaterial whether they are officers or employés. In either event they are protected under the rules of the civil service, as they do not fall within the exception of rule 12, § 1.

The acting commissioner of internal revenue, Mr. G. W. Wilson, reported to the commission the classification of the internal revenue service, which was approved by the secretary of the treasury. A provision of section 7 of the act is that, after the expiration of six months from the passage of the act, "no officer or clerk shall be appointed, and no person shall be employed to enter, or be promoted, in either of the said classes now existing, or that may be arranged hereunder, pursuant to said rules, until he has passed an examination or is shown to be specially exempted from such examination in conformity herewith." But this act provides for certain exceptions, one of which is that persons who have been honorably discharged from the military or naval service are not required to be classified under this act. By rule 3, § 1, the internal revenue service was placed in the classified service; and under section 6 there were included "the officers and employés in any internal revenue district who have been or may hereafter be classified under the civil service act." As we have seen, section 7 forbids the appointment of a person, after the expiration of six months from the passage of the act, until he has passed an examination or is shown to be specially exempt from such examination in conformity with its provisions. The plaintiffs in these actions having been more than six months in possession of the offices from which it is now sought to remove them, no person can be appointed or employed to take either of said positions except as provided for in section 7, unless they fall within the exception to rule 9.

But it is claimed that the assignments made to take the places of the plaintiffs in these various actions do fall within the exception to rule 9, which provides that:

"A vacancy in any position which has been, or may hereafter be, classified under the civil service act, may, upon requisition of the proper officer and the certificate of the commission, be filled by the reinstatement, without examination, of any person who, within one year preceding the date of said requisition, has, through no delinquency or misconduct, been separated from a position included within the classified service at the date of said requisition and in that department or office, and that branch of the service, in which said vacancy exists."

The answer to this position is that there are no vacancies, and until vacancies occur, under the rules of the civil service, no assignments can be made. In the cases before us there are no vacancies in these positions, either by death or resignation; nor can there be vacancies by removal unless they are in conformity with the civil service act and the rules and regulations made under it. But it is insisted that this is not a removal, but a transfer, and that under the provisions of section 3154 of the Revised Statutes, passed August 15, 1876, the commissioner may transfer any gauger or storekeeper. That section provides that:

"The commissioner may also transfer any inspector, gauger, storekeeper or storekeeper and gauger from one distillery or place of duty or from one collection district to another."

This section is mandatory and binding upon every officer of the United States who comes within its terms, but it does not authorize the appointing power to make the changes proposed by the defendant collector. It is obvious from the reading of that section that it only authorizes the commissioner to transfer the officers mentioned in it from one place of duty to another place of duty in the same district, or from one collection district to another. It does not in express terms say that you may transfer the officers mentioned in it from one position to another in the same distillery. It was evidently the intention of congress, in the enactment of this clause of that section, to permit transfers as I have indicated; but there is no provision for the reducing of a man in the grade or position that he has held. Congress evidently supposed that, if it became necessary to remove or reduce a man for incompetency to a lower position in the same grade, the appointing power might exercise the power of removal; but, since the passage of the civil service act, that power of removal is now limited and controlled by it, which, being a subsequent act to section 3154, so far as they are in conflict with each other, limits and controls the commissioner in his action.

It is idle to say, as in the instance of Ruckman, in this case, that, where he has held the position of "head or day storekeeper," he can be changed or transferred from that position to that of "additional storekeeper," which is a change in rank, without nullifying the civil service act and the rules in force under it. A transfer of this character from the head or chief position to a secondary position, as that of additional storekeeper necessarily must be, is a change of rank in a public position, which is necessarily a removal that can only be made under the civil service act and the rules formulated under it. Can it be said that a transfer or assignment in the same distillery, from one position to another, does not operate as a removal from one position to the other? Is not the position from which the officer is transferred vacated, and is he not placed in a new position? What can be the object and purpose of a transfer unless it is to remove the incumbent from the position he occupies? As we have before said, these officers held their positions before and at the time the present collector was appointed, and entered upon the discharge of his duties on the 1st day of July, 1897. It is obvious from what appears in these cases that the present collector is attempting to secure a change in positions or a revocation of the assignments of these officers, and to substitute others in lieu of them. If there were vacancies in these offices, of course he would have the right to make recommendations to the commissioner to have persons appointed to fill the vacancies; but there are no vacancies, and none can be created except in case of death or resignation, or in conformity to the civil service act and the rules promulgated under it.

It has been held that an appointment to an office operates as a removal of the then incumbent. An office, when once filled, cannot be deemed vacant until the term of service expires, or until the death

or removal or resignation or abandonment of the incumbent. 5 Waite, Act. & Def. § 14; Keenan v. Perry, 24 Tex. 253; Johnston v. Wilson, 2 N. H. 202. By a provision of clause 2 of section 2 of the civil service act, their positions can only be filled by selection, according to grade, from among those graded highest as the result of competitive examination. It is true that, by a provision of rule 9, certain exceptions are made to that rule, and it is claimed that these parties fall within the exception because they have heretofore held these positions, and seek to be reinstated therein. If, however, there were vacancies, the appointments to fill the positions, to be legal, should be made in pursuance of clause 2 of section 2, in connection with the exceptions contained in rule 9; but there is no pretense upon the part of the appointing power that they ever intended to comply with those provisions of the law. The effort to remove these officers seems to be in violation of the executive order of July 27, 1897, amendatory to civil service rule 2, which provides that:

"No removal shall be made from any position subject to competitive examination, except for just cause, upon written charges filed with the head of the department or other appointing officer, of which the accused shall have full notice and an opportunity to make defense."

The present incumbents hold positions of honor and trust, which positions, I hold, are within the provisions of the civil service act and the rules formulated and adopted in pursuance of it. If I am correct in this position, then these incumbents could only be removed in the manner provided for by that act and the executive order of July 27, 1897. Now, it seems to me no grounds have been shown for their removal, except "for the good of the public service." This is a reason that was employed by the officers of the government, when they desired to remove any one that was obnoxious to them, long prior to the passage of the civil service act. It is too general, vague, and indefinite to authorize the removal of an officer under existing law. By the very terms and provisions of the rule just referred to, he has to be confronted with the charges that are made against him, and to have full notice and an opportunity to make defense. No charges of a specific character have been preferred against these officers; no notice has been served upon them of any charge; and no opportunity has been furnished them to meet the vague and indefinite charge "for the good of the public service." The very object and purpose of the rule which was promulgated on the 27th day of July, 1897, was to furnish a full opportunity to every officer who was within the civil service to meet any charges made against him. This has not been done in this instance, and I must hold that under the rules formulated by the president and the civil service commission, and promulgated by that executive order, the effort to remove the officers in question is illegal. The rules promulgated by the president and the commission are clearly within their scope and power, under the act of congress; and, when they exercise the power to limit and restrict the power of removal as they deem best for the public interest, it is only the execution of a duty imposed upon them by congress, and which should be effectually performed and fully complied with.

To my mind it is clear that storekeepers and gaugers are employés

of the government that are protected by the rules and regulations promulgated under the civil service act by the executive and the commission; that a revocation of the assignments or transfer of the plaintiffs in these actions is in effect a removal, and that a removal for political reasons falls within the inhibition of the civil service act and the rules promulgated under it; that there can be no appointment to any position unless there is a vacancy; and that the vacancy must be filled in conformity to the provisions of the civil service act and the rules made under it.

The third ground of demurrer is that a court of equity cannot enjoin an officer or party from exercising the power of removal. I have heretofore discussed this question in the case of Priddie v. Thompson (United States marshal for this district), and, although some of my brothers have differed with me in the conclusions I reached in that case, yet I have seen nothing emanating from them to shake my convictions. 82 Fed. 186. In discussing a grave and important question of this character, it is well sometimes to have recourse to first principles. Story, who is a standard authority, says that "equity has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence where a plain, adequate, and complete remedy cannot be had in the courts of common law." 1 Story, Eq. Jur. (12th Ed.) § 33; 1 Coop. Eq. Pl. 128, 129; Mitf. Jeremy, Pl. Eq. 122, 123; 1 Wood, Lect. vii. pp. 214, 215. "The remedy must be plain, for, if it be doubtful and obscure at law, equity will assert jurisdiction. It must be adequate, for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity." Accepting this definition as not only precise, but descriptive of the powers of a court of equity, does not the case under consideration fall within the jurisdiction of such a court? In the bills filed in these cases it is alleged that the plaintiffs have not only an interest in, but a right to, the possession of the offices they hold, and their emoluments, and to that extent a vested right, of which they cannot be deprived except by operation of law, and not by the capricious action of a superior officer. Has not a person who holds and is in possession of an office to which there is a fair salary attached, to remunerate him for his services, a right to the protection of the law to prevent an injury to him by the doubtful assertion of the rights of another as to his office? Has he not a material interest in the possession of the office and the salary attached to it? If he has such an interest in the office and emoluments, is there not a right which should be recognized and protected by the law in the employment of it? The fact that another party desires and seeks the office is evidence of its value to him, and, if it is valuable to the one seeking it, surely it must be to the one holding it. If no value was attached to the position, there would be no occasion for these proceedings. The fact that they have been instituted to protect the incumbents in the enjoyment of their offices is conclusive evidence that there are some rights involved.

What, then, is the most complete remedy afforded? The plain answer to this question is that the only remedy that is adequate and complete must be of a preventive character, which seeks to restrain the defendants from ousting the plaintiffs from their positions. There

can be no legal remedy, for the reason that the incumbents, when once ousted from their positions, have no recourse whatever. The plaintiffs are entitled to a preventive remedy to preserve the "status quo" until the titles to the different positions and offices can be settled by some legal proceeding. Equity alone furnishes that remedy, and, if this remedy does not exist, then there is a case of an alleged wrong without a remedy. In the progress of a civilization that is giving us railroads, telegraphs, telephones, and numberless other things, all of which are regarded as necessary to both our business and social life, it often becomes necessary to invoke the latent powers of our jurisprudence as a necessity arises which requires it. This jurisdiction is only the application of existing powers in a court of equity to a new case. Courts of equity have exercised their jurisdiction permitting officers de facto of a school district to restrain persons claiming to be officers de jure, but who are not in possession, from taking possession of a school house, and from interfering with the officers de facto in the employment and management of school affairs. Brady v. Sweetland, 13 Kan. 41. The question involved in these proceedings may be said to be analogous to the case just referred to. This injunction is to restrain the defendants from interfering with the plaintiffs in the possession of their offices, and is in no sense to try the right of possession or title to the offices. Proceedings by injunction cannot be used for that purpose.

I think the foregoing views are clearly sustained by Story's Equity Jurisprudence. But I do not rely upon text-books alone to support my views as to this position. In Waite's Actions and Defenses there will be found many references where courts of equity have exercised this jurisdiction where there was a controversy between parties claiming the same office. It will never be assumed to oust a person from an office under a color of title until his right to such office has been determined; but it will be exercised to protect a party in the possession of his office until he has been ousted by a legal proceeding. In a well-considered case by the supreme court of Louisiana it was held that an officer cannot be dispossessed by a third person whose title he disputes until the latter shall first try the disputed right; and the learned judge who delivered the opinion of the court cites the cases of Brady v. Sweetland, 13 Kan. 41, and Palmer v. Foley, 45 How. Prac. 110. The reason is very obvious that a claimant cannot take the law in his own hands, even with the assistance of others, to oust an incumbent in advance of judicial termination of the disputed right; and that court held that "the claimant and all others may be properly enjoined from interference with the party in possession of the office until the dispute can be judicially settled." Guillotte v. Poincy (La.) 6 South. 507.

In the case of Ex parte Sawyer, 124 U. S. 402, 8 Sup. Ct. 482, Chief Justice Waite, referring to the remedy by injunction, uses the following language, which seems to support the view I have taken of the question under consideration:

"I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremediable mischief. Such cases may rarely occur, and the propriety of such an application may not often be seen;

but if one arises, and if the exercise of the jurisdiction can ever be proper, the proceedings of the court in due course upon a bill filed for such relief will not be void, even though the grounds upon which it is asked may be insufficient."

The law as thus laid down by the learned chief justice in the case cited would seem to dispose of the question under consideration.

In the case of Marbury v. Madison, 1 Cranch, 166, Chief Justice Marshall uses the following language:

"But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

Specific duties, in the cases of these plaintiffs, are assigned to them by law, viz. the duties of gauger and storekeepers. The "individual rights" or the rights of the owners of the distillery to which they have been assigned for duty depend to a great extent upon the faithful performance of their duties. They claim to have an "individual right" in the offices they respectively hold, and they conceive themselves to be injured in their rights when there is an effort to remove them from their positions. Under the authority of the cases cited, I hold that they have a right to resort to the courts of their country for a remedy. If they cannot resort to the courts for a preventive remedy to stay the hand of the appointing power in removing them from their positions, then they have no remedy, although the act of the appointing power may be in violation of the civil service act and the rules made under it. It cannot be said that where congress, by its act, has undertaken to limit and restrain the appointing power, and the appointing power attempts to nullify the plain provisions of the act, that there is no remedy.

High on Injunctions says that:

"The plaintiff says: 'I am the actual incumbent in possession of the office to which I claim to be legally entitled. Defendant, claiming under a title the validity of which I dispute, is seeking to oust me extrajudicially, in which effort he will have the aid of my fellow members on the board; and I ask judicial aid to protect my incumbency to the position until defendant shall, in due course of judicial procedure, establish his right and title.' Such an action falls within a well-recognized branch of relief by injunction. While courts of equity uniformly refuse to interfere by the exercise of their preventive jurisdiction to determine questions relating to the title to office, they frequently recognize and protect the possession of officers de facto by refusing to interfere with their possession in behalf of adverse claimants, or, if necessary, by protecting such possession against the interference of such claimants; and the granting of an injunction in such a case in no manner determines the question of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession, and whose title is not yet established." 2 High, Inj. (2d Ed.) § 1315.

It is said by the learned judge who delivered the opinion of the supreme court of Louisiana, supra, that the doctrine as laid down by High "is in the interest of social peace and order, and conforms to the object and policy of the law in all remedial provisions, for the settlement of disputed rights which always respect and maintain the status quo until the controversy shall be settled in the orderly course of judicial procedure. Plaintiff is undoubtedly the de facto officer, because he claims the office and is in possession of it, performing the duties under color of appointment." 5 Waite, Act. & Def. p.

7, § 9; Buckman v. Ruggles, 15 Mass. 180; Com. v. McCombs, 56 Pa. St. 436; State v. Howe, 25 Ohio St. 588; Braidy v. Theritt, 17 Kan. 468.

A recent work, entitled American & English Decisions in Equity (volume 3, p. 440), lays down the principle, and quotes the following authority, and sustains it: "The actual incumbent of an office, whether de jure or de facto, if duly qualified, and if in office by virtue of a certificate of election issued by the proper officers, will be protected by injunction against unlawful interferences with his possession thereof" (Brady v. Sweetland, 13 Kan. 41; Braidy v. Theritt, 17 Kan. 469; Guillotte v. Poincy, 41 La. Ann. 333, 6 South. 507; Palmer v. Foley, 45 How. Prac. 110; State v. Superior Court [Wash.] 48 Pac. 741); as, by illegally electing another in his stead (Wheeler v. Board of Fire Com'rs, 46 La. Ann. 731, 15 South. 179); or by removing him without authority (Armatage v. Fisher, 74 Hun, 167, 26 N. Y. Supp. 364). It will also sometimes interfere to protect the interests of the public; e. g. when two different bodies claim to act as the common council of a city. Kerr v. Trego, 47 Pa. St. 292.

The plaintiffs in these actions are all officers "de facto," if not "de jure," claiming the possession of their offices and performing the duties under color of appointment. I therefore reach the conclusion that the plaintiffs have a right and interest involved in the offices they hold, and that that right and interest is questioned by the defendants in these cases, and that the only legal remedy they have to protect themselves in the enjoyment of their various offices, as against those who are seeking to oust them, is the restraining power of this court to prevent interference with their possession until the titles to the offices have been settled by due course of law.

It follows from what I have said—First, that the act known as the "Civil Service Act" is constitutional; second, that congress has not delegated to the president and the commission legislative powers; third, that by rule 3, § 1, the internal revenue service has been placed under the civil service act and rules made in pursuance of it; fourth, that the plaintiffs in these actions are officers of the government in the internal revenue service; fifth, that they cannot be removed from their positions except for causes other than political, in which event their removal must be made under the terms and provisions of the civil service act and the rules promulgated under it, which, under the act of congress, became a part of the law; sixth, that the attempt to change the position and rank of the officers in these cases is in violation of law; seventh, that a court of equity has jurisdiction to restrain the appointing power from removing the officers from their positions if such removals are in violation of the civil service act. For the reasons assigned, the demurrers to the bills will be overruled.

I come now to consider the defense raised by the answers, other than the questions of law which were disposed of on the demurrers. The main question for consideration is a question of fact. The contention of the defendants is that they were not served with the injunction before the commissioner had attempted to vacate the positions of gauger and storekeeper by the transfer or assign-

ment of others to the positions of Ruckman, Butler, and Berry. From the answer of Collector White, as well as from his affidavits, and of the commissioner, it appears that there was, for some reason, hasty action in regard to these officers. The action by the commissioner was taken by him on the evening of September 30th, by wire, when he notified the plaintiff Ruckman of his transfer, and the plaintiffs Butler and Berry of the revocation of their assignments. The collector claims that he was present on the morning of October 1st to execute the telegraphic order of the commissioner. As we have before said, these plaintiffs, being officers of the government, were not removable at the will or caprice of the commissioner; and, the commissioner also being an officer of the government, his action in this matter must conform to the law, and not be in violation of it. The evidence does not show that the commissioner sent any commissions to the defendants Thayer and Sutton, who were assigned to take, respectively, the offices of gauger and head storekeeper, before the time that they were served with the notice of the injunction restraining them from interfering with the possession of the incumbents. No officer in charge of an official position would be justified in turning over his position to his successor until that successor had appeared with his commission, and taken the oath, and given bond, as required by law. The evidence does not disclose that a single one of any of these prerequisites of the law had been complied with before this service of the injunction. It is very apparent that what was done in regard to these removals was done in haste. One thing is clear both from the answer and the affidavit of Collector White: that he does not deny the fact that he knew of the intended application for an injunction or that the injunctions had been allowed. This is a significant fact, tending to show either that he was very ignorant of what was going on, or that he carefully avoided committing himself either as to the application or the pendency of the injunction. But he must have known of the allowance of the injunction in the Butler case, which was allowed in term time, in open court, on the 29th day of September; and the evening of the very next day there was an attempt to transfer Ruckman, and to revoke the assignment of Butler. It cannot be doubted that he knew of the Butler injunction; hence his effort to have Ruckman transferred and Berry's assignment revoked before they secured injunctions. If he knew of the allowance of the injunctions, he was bound to respect them as much as if he had been served with notice.

Upon the question of notice and service of the order of injunction there is some conflict in the evidence. I will consider the evidence in the cases of Butler and Ruckman together, as the same affidavits apply to both cases. Ruckman, who was head storekeeper, swears that he did not surrender his possession; that, at the time the injunction was served on White, he was in possession of his office, discharging its duties; that the did not take upon himself and discharge the duties of additional storekeeper, the position held by Butler; that he only received notice of his transfer from head storekeeper to additional storekeeper at 10:55 a. m., October 2, 1897; and that this information was contained in a letter from the collector, mailed

from Parkersburg at 4 p. m. of October 1st. He further states that Sutton admitted to him on the 1st day of October that he had received no authority from the defendant to act as storekeeper, and that the authority reached him on the morning of October 2d. Ruckman could not have acted as additional storekeeper, for the reason that his assignment was canceled by wire October 2d, the same day that he received notice that Sutton was to take his place. Sutton was to take Ruckman's place, and Ruckman was to take Butler's; but Ruckman's place was never vacant, or, if it was, he was directed by wire on the evening of October 2d to remain in charge of the warehouse until further orders. It is apparent that Sutton never took possession of the warehouse, or, if he did, he was superseded by the order directing Ruckman to remain in charge, which, by its terms, shows that he was to continue in his position, and not to vacate it. Butler testifies that he was in the actual service of the government at the time the injunction was served on White, and that Ruckman did not take his position, nor did he (Ruckman) perform the duties of additional storekeeper, for the reason that he had been served with the order of injunction, and declined to perform the duties of the office held by affiant. The deputy marshal says that the process was served on Ruckman on the evening of the 1st of October. Faulkner proves that Berry handed a letter to Ruckman on the morning of the 2d of October, authorizing Ruckman to act as additional storekeeper. Ruckman swears that, at the time of the service of the injunction in this case upon Sutton (who admits that it was about 9 o'clock on the night of October 1st), he was performing and discharging the duties of head storekeeper at the distillery. The affidavits of White and Sutton contradict the sworn statements of Butler, Ruckman, Faulkner, and the deputy marshal. The weight of evidence as to the notice seems to be, and is, with the plaintiffs. It is unfortunate this this conflict should have occurred. One thing is evident: that Butler has never surrendered his position, and, so far as the defendant Ruckman is concerned (who does not claim it, but who insists upon his right to hold the position of head storekeeper), Butler holds his position adverse to Ruckman.

In the case of Berry, gauger, the same character of conflicting evidence exists as in the cases just passed upon. Berry denies that Thayer entered upon the duties of gauger on the 1st day of October, but swears that he was in possession of the property as gauger. Berry states that on October 2, 1897, Thayer came out to the distillery, and, after asking him if he was the gauger in charge, showed him a telegram purporting to come from the commissioner of internal revenue, assigning him as gauger at said distillery. This affidavit is supported by the affidavits of Faulkner and McMahan. It is contradicted by White and Thayer as to the time when Thayer took possession of the office, and as to the time of the service of the injunction. The marshal testifies that they were served the evening of October 1st with a copy of the injunction. Faulkner and McMahan sustain Butler as to what occurred on the morning of the 2d day of October, from which it clearly appears that Thayer came that morning to take possession of the office. The only two disin-

terested witnesses to all of these occurrences, and particularly as to the time of the service of notice, are Faulkner and McMahan. Both of these witnesses sustain Ruckman, Butler, and Berry. The affidavits of both White and Thayer say they were at the distillery on October 1st, and that Berry was not there, and could not therefore turn over the possession of any government property in his charge to Thayer. But White says there was no government property to turn over. The commissioner required him to turn it over, but the collector says there was none to turn over. By reference to the "Regulations and Instructions Concerning the Tax on Distilled Spirits," under the Revised Statutes of the United States, and subsequent acts, issued February 19, 1895 (pages 14 and 15), it will be seen: "That gaugers are made custodians of cistern rooms, * * * and that under no circumstances will they entrust the key to the lock on the door of the receiving room to any person other than the collector of the district." A pertinent question arises: Did Berry turn the keys of the cistern room over to Thayer? It is not claimed that he did, but, on the contrary, Berry states that "on the 2d day of October I was still in the possession of the property of the government, as well as the keys, which, as such gauger, it is my duty to hold"; which contradicts the statements of Thayer and White as to the possession of the office. Another pertinent question is: What became of the gauger's outfit, consisting of box containing hydrometer cups, hydrometer, and stems, with which each gauger is supplied, which is the property of the government? The law says: "Standard hydrometers * * * are supplied for the use of internal revenue gaugers, at the expense of the government." Regulations and Instructions Concerning Tax on Distilled Spirits, p. 123. Did Berry have any distilling stamps, and did he turn over any to Thayer? Id. p. 114. I might refer to other things to show that every gauger is in possession of property of the government, and, when he is removed, must turn it over to his successor in office. No outfit was turned over to Thayer, which shows that possession was not surrendered by Berry to Collector White or Thayer. It is apparent that Collector White is, at least, under a great misapprehension as to what is the outfit of a gauger when he says in his affidavit of October 19, 1897, that "Berry had no property in his possession to turn over to the defendant Thayer, to complete Thayer's assignment." He may entertain honestly that conviction, but I must hold that it is a mistaken conviction, and does not accord with the statutes cited, supra.

I reach the conclusion that the preponderance of evidence is with the plaintiffs, and that neither the gauger nor storekeepers have ever vacated or surrendered their offices or positions; that, in contemplation of law, they are in the legal custody of their offices, and can only be displaced by proceedings instituted under the executive order of July 27, 1897; that the offices not having been surrendered, and the injunction being served while plaintiffs were in possession, it was effective to prevent the interference of the defendants with the plaintiffs in the possession of their offices. I deem it unnecessary to discuss the competency of the plaintiffs for their positions,

though the evidence tends strongly to show that they were fully competent, having served in those positions since 1893.

One other position of the plaintiffs remains to be noticed, and that is that under the legislative and judicial act of 1885, re-enacted in 1886, the collector is prohibited from recommending to the secretary of the treasury, for appointment, more officers of this class than 15 per cent. in excess of the number engaged in performing the duties at the time. It is very clear from the affidavit of Ruckman that the act has been violated, but it is not necessarv to rest the case upon this position. I think that both the law and the facts are with the plaintiffs, and the injunctions heretofore awarded must be made perpetual.

REYNOLDS et al. v. MANHATTAN TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1897.)

No. 667.

1. MECHANICS' LIENS—TIME OF CONTINUANCE.
   Under the Nebraska law which gives to a subcontractor 60 days from the last day of the month in which the labor was done or materials furnished to file his claim therefor, and declares that the lien shall continue for two years (Consol. St. 1891, §§ 2170, 2171), the lien of such a contractor continues, not for two years from the expiration of the 60 days, but only for two years from the time when the last act was done in the performance of the contract, whereby the lien first becomes determined in amount, so as to be complete and actionable.

2. SAME—RAILROAD MORTGAGES.
   A recorded railroad mortgage held by the trustee before any bonds are issued or any mortgage debt created is held by it merely as the agent of the railroad company, so that mechanics' liens which attach prior to the issuance of any bonds are prior in lien.

3. SAME—FILING MECHANIC'S LIEN—CONTINUANCE OF LIEN.
   Under the Nebraska statute which provides that the failure to file the statement of claim within the periods of 90 or 60 days, as required in the cases of contractors and subcontractors respectively, shall not defeat the lien, except against purchasers or incumbrancers, in good faith, without notice, whose rights accrued after the expiration of such periods (Consol. St. 1891, § 2171), a lien exists for two years in favor of a subcontractor, without the filing of any statement or notice of lien whatever, as against all purchasers and incumbrancers whose rights accrue after the commencement of work by such subcontractor, and before the expiration of 60 days from the last day of the month in which the contract is completed.

4. RESCISSION OF CONTRACTS.
   Where a railroad subcontractor has agreed to subscribe for certain amounts of stock and bonds of the railroad company, and to accept from the principal contractor such stock and bonds at their par value, in part payment of the work to be done, and thereafter the principal contractor pledges all the stock and bonds to a third party, so as to disable himself from making delivery thereof, this is in itself a repudiation of the subscription contract, and gives the subcontractor a right to treat it as a rescission, and sue the principal contractor for the amount which he was to receive in stock and bonds. And a settlement and receipt in full made by the subcontractor, without knowledge of such pledge of the stock and bonds, and his acceptance of the certificate of the trust company that he was entitled to the stock and bonds, would not prevent him from asserting a mechanic's lien for the amounts which he had agreed to take in stock and bonds.

5. MECHANICS' LIENS.

Where a contractor has bestowed his labor and material upon the improvement until he has completely performed his contract, a lien exists in his favor; and, if the owner has not paid for the work or material in any way, it is immaterial in what way he promised to pay, and the contractor may avail himself of the security which the statute gives him.

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

F. M. Hall and G. M. Lambertson (J. W. Deweese on the brief), for appellants.

John L. Webster (Craig L. Wright on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This case presents a contest for priority between a mortgage and mechanics' liens upon a railroad. The mortgage was made on July 1, 1889, and was recorded in November of that year, but no bonds were issued under it until April 10, 1890. The mechanics' liens were based on two construction contracts, one of which was made on April 18, 1889, and work under it was completed on October 1, 1889; while the other was made on December 14, 1889, work under it was commenced at about that time, and was continued until about June 27, 1890, when it was completed. The appellee the Nebraska & Western Railway Company was the mortgagor, and the appellee the Manhattan Trust Company was the trustee to whom the railway company gave this mortgage to secure bonds to the amount of $2,583,400 which were to be issued under it. The appellants are the members of a partnership styled E. P. Reynolds & Co., which built the railroad covered by the mortgage under the two contracts which have been mentioned. On December 18, 1890, the trust company exhibited its bill for the foreclosure of the mortgage. On June 30, 1891, a decree of foreclosure was rendered. A sale was made under this decree, which was confirmed on October 30, 1891. Reynolds & Co. had not been parties to this suit, and on November 2, 1891, they filed a cross bill in it to establish mechanics' liens for $37,400, which they claimed to be due upon their first construction contract, and for $13,600, which they claimed to be due upon their second construction contract. They sought by this cross bill to charge the moneys in the hands of the court which were the proceeds of the foreclosure sale with a first lien in their favor. Their claim was contested by the trust company and the railway company, by answers which they filed to the cross bill; and bonds were given to secure the payment of the amounts of these liens in case they should be adjudged to be superior to that of the mortgage. The court dismissed the claim for the lien for the balance due under the first contract upon the face of the pleadings, and referred the questions of fact and law which arose under the claim for the balance under the second contract to Mr. William A. Redick, who reported the facts in detail, and found that the appellants had a lien upon the proceeds of the sale superior in equity to that of the bondholders under the mortgage. The trust company filed exceptions to this report, which were sustained by the circuit court, and a decree

was entered which dismissed the cross bill. The appeal challenges this decree.

The facts out of which this controversy arises are these: The mortgage, by its terms, covered the railroad, the franchises, and all the after-acquired property of the mortgagor, but the railroad was constructed by Reynolds & Co. under their contracts after the mortgage was made and recorded. On March 15, 1889, the railway company made a contract with the Wyoming Pacific Improvement Company for the construction of its railroad. The substance of that agreement was that the improvement company would construct the railroad, and the railway company would pay for the construction $20,000 in cash and $20,000 in its first mortgage bonds for every mile of railroad that the improvement company built. On April 18, 1889, Reynolds & Co. made a contract with the improvement company, to the effect that they would build about 80 miles of this railroad, and that the improvement company would pay them therefor in cash, on monthly estimates of the engineer. They finished the performance of this contract on October 1, 1889. Their final estimate was settled by crediting them with $37,400 upon the amount which they owed to the improvement company upon a subscription which they had made for $68,000 of its stock, and by paying them a balance of about $5,000 in cash. Thereupon, on October 8, 1889, they gave to the improvement company a receipt in full for their claim against it under this first contract. The subscription which has been mentioned was made by Reynolds & Co. on April 20, 1889. By the terms of the subscription contract, Reynolds & Co. agreed to pay to the Manhattan Trust Company, for the use of the improvement company, $68,000 in certain installments; and the improvement company agreed that, when these payments were completed, it would deliver to them first mortgage bonds of the railway company to the amount of $34,000 on or before April 20, 1891, or as soon thereafter as issued, and negotiable certificates for stock of the improvement company to the amount of $37,400. They had paid several installments upon this subscription contract in cash, and, after the credit of the $37,400 which they had earned by the construction of the 80 miles of railroad under the first contract, they still owed the improvement company on the subscription contract $13,600 on December 14, 1889. On that day they made a second contract with the improvement company for the construction of an additional 46 miles of the railroad, and immediately entered upon its performance. This contract contained an agreement of the improvement company to pay for the construction in cash on monthly estimates, and a promise that the $13,600 owing on the subscription contract should not be declared in default, until the completion of, and the final settlement under, the construction contract. When this second construction contract was made, the mortgage had been made and recorded, but no bonds had been issued under it. On February 1, 1890, while Reynolds & Co. were engaged in the performance of this contract, the Manhattan Trust Company and five other parties agreed to loan to the improvement company, and to pay over to the trust company, $1,050,000 for the purpose of purchasing the right of way and paying for the construction of the railroad which Reynolds & Co. were building. This promise was made on the ex-

press condition that the money loaned should be collected from the lenders and disbursed by the trust company for that purpose, and that all the bonds issued or to be issued by the railway company should be pledged with the trust company to secure the repayment of the money so loaned. On the same day, and as a part of the same transaction, the railway company, the improvement company, and the trust company made a written agreement, by which all the bonds to be issued under the mortgage were pledged with the trust company to secure the repayment of the money to be advanced under the agreement for the loan; and by this agreement the trust company was authorized to sell these bonds at public or private sale in case of a default by the improvement company in the repayment of the loan when due. Between April 9, 1890, and August 31, 1890, $1,050,000 was loaned to the improvement company under these agreements, and $450,000 more, and all the bonds, except bonds to the amount of $9,980, were issued and delivered to the trust company as collateral security for these loans. The bonds to the amount of $9,980 were issued on September 18, 1890, and delivered to the trust company for the same purpose, and no additional moneys were advanced by the lenders on account of this issue. In December, 1890, the improvement company procured another loan of $270,000 through the trust company, for which it pledged some of these railway bonds to the amount of $675,000, and it used the proceeds of this loan to repay a part of the first loan. The improvement company failed to pay these loans when they fell due, and the bonds were sold under the pledges in May and June, 1891, for 10 and 15 per cent. of their par value. A large portion, and perhaps all of these bonds, were purchased for the pledgees. If any of them were purchased for any other parties, the record does not disclose for whom.

When Reynolds & Co. completed their second contract, in June, 1890, their final estimate was $66,173.97. They consented that the $13,600 which they still owed to the improvement company, by the terms of their subscription contract, should be charged against this estimate, accepted the balance of the estimate in cash, and gave to the improvement company a receipt in full for all claims arising under their second construction contract. When this fact came to the attention of the trust company, on July 7, 1890, that company credited the $13,600 on the subscription certificate of Reynolds & Co., and issued to them two certificates,—one to the effect that they were entitled to receive on May 1, 1891, or as soon thereafter as they should be issued, mortgage bonds of the railway company to the amount of $34,000; and another that they were entitled to stock of the improvement company to the amount of $37,400. These certificates were subsequently assigned by J. H. Reynolds, one of the members of the firm of Reynolds & Co., for the firm, and were thereafter subdivided into several certificates of like character; but none of the bonds of the railway company and none of the stock of the improvement company has ever been tendered or delivered to Reynolds & Co., or to any member of the firm, on account of their subscription and its payment. On August 29, 1891, Reynolds & Co. filed, in the proper offices in the counties through which the railroad extended, accounts and affidavits of the materials they had furnished and the labor they had performed under these two con-

struction contracts, and claimed liens upon the railroad for the balances of $37,400 and $13,600 which they claimed to be due to them under these contracts respectively. The foregoing facts were undisputed.

The following facts were questioned, but, in our opinion, they are established by the evidence in this record: At the time that Reynolds & Co. permitted the $13,600 which was due to them upon their seond construction contract to be applied in payment of their subscription, they did not know that all the bonds which the improvement company had received or was to receive from the railway company had been pledged by it as collateral security for its notes, and they assented to this application of the $13,600 in the expectation that they would receive the bonds and a proper certificate for the stock called for by their subscription upon making their final payment upon it. They would not have consented to this application if they had known that the improvement company had disabled itself from delivering the bonds. The Manhattan Trust Company acted in these transactions for itself and as trustee and agent for the railway company, the improvement company, and the lenders for whose benefit the bonds were pledged as collateral security. The trust company knew of the two construction contracts of Reynolds & Co., of their subscription to the stock of the improvement company, of the terms of their subscription contract, of the manner in which the two credits of $37,400 and $13,600 were made upon that contract, and it knew that those sums represented the respective balances due them in money upon their construction contracts. It also knew at the time when the credit of $13,600 was made that all the bonds of the railway company which had been or could be lawfully issued had been pledged as collateral security for the debts of the improvement company, so that the latter could not deliver the bonds called for by the subscription contract of Reynolds & Co. E. P. Reynolds, Jr., was the managing partner of Reynolds & Co., and he was the only member of the firm who had authority to sign the contracts or checks, or to handle the securities of the firm. He refused to accept for the firm the certificate for the bonds issued by the trust company on July 7, 1890. The indorsement of that certificate by J. H. Reynolds for the firm was without authority, and the trust company had notice of this fact. The record discloses many other facts, but none that are material to the questions that must be determined by this court.

The first question which demands consideration in this case challenges the action of the court in dismissing the appellants' claim for a lien for $37,400 under their first construction contract. The labor and material bestowed upon a building or a railroad by a contractor enhance the value of the property of the owner, and become lost to the builder. If he receives no compensation for them, he never can take them back, but the owner and those who take under him receive all their benefits. It is therefore just and equitable that the laborer and material man should have a lien for their wages, and for the value of their materials, upon the improvements which they construct; and statutes which authorize such liens should be liberally construed, to advance this reasonable and salutary remedy. Nevertheless, the me-

chanic's lien does not exist under the common law. It is the creature of the statute which establishes it, and must stand or fall by the law of its creation. The statute of Nebraska on which these liens are based provides that, when the material has been furnished or labor performed in the construction of any railroad in that state, the contractor or subcontractor shall have a lien therefor upon the roadbeds and improvements he makes, and upon all land upon which the same may be situated, including the rolling stock thereto appertaining, and the right of way of the railroad upon which the improvements are situated. It provides that every person, whether contractor or subcontractor, who claims such a lien, shall file with the clerk of the county in which the property to be charged with the lien is situated, a true statement of the time when the material was furnished or labor performed, and of the time when the contract was completed, verified by his affidavit, and that—

"Such verified statement or account must be filed by a principal contractor within ninety days, and by a sub-contractor within sixty days, from the date on which the last of the material shall have been furnished, or the last of the labor is performed; but a failure or omission to file the same within the periods last aforesaid shall not defeat the lien, except against purchasers or incumbrances in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for the lien was filed: provided, that when a lien is claimed upon a railway, the sub-contractor shall have sixty days from the last day of the month in which said labor was done or material furnished within which to file his claim therefor: * * * provided further, that such lien shall continue for the period of two years, and that any person holding such lien may proceed to obtain a judgment for the amount of his account thereon by civil action; and when any suit or suits shall be commenced on such accounts within the time of such lien, the lien shall continue until such suit or suits be finally determined or satisfied." Consol. St. Neb. 1891, §§ 2170, 2171.

It is insisted that the cross bill to enforce the lien under the first contract was not exhibited within the time of the lien. The work under that contract was commenced in the spring or summer of 1889, and was completed on October 1st of that year. The statute provides that the lien shall continue for the period of two years. The cross bill was not filed until November 2, 1891. The only question presented by these facts is, when did the two years of the continuance of the lien commence to run? The lien undoubtedly attaches at the time when the contractor commences to perform his agreement, and it continues and grows pari passu with the work as it progresses, so that in one sense it commences and continues from the time when the performance begins. But it does not become fixed in amount or capable of enforcement until the last act has been done to complete the performance of the contract, and it is only from that time that a vested lien for a determined amount can be said to exist and continue. It may be argued with considerable force that a lien exists and continues unimpaired, under the first part of section 2171, for 60 days after the last day of the month in which the performance of the contract is completed without the filing of any statement or claim to it, and that the subsequent proviso, which declares that it shall continue 2 years, extends the term of its existence for 2 years from the expiration of the 60 days. But that construction would continue it for 2 years and

60 days at least, and the provision of the statute is express and clear that it shall continue for 2 years. Accordingly, our conclusion is that the true construction of this section 2171 is that the lien of the railroad contractor continues 2 years, and no longer, from the time when the last act is done in the performance of the contract, from the time when the lien first becomes determined in amount, complete, and actionable. The lien under the first contract had therefore expired two months before the cross bill was filed, and the claim for this lien was properly dismissed. Fowler v. Bailley, 14 Wis. 136, 141, 142; Chapman v. Wadleigh, 33 Wis. 267.

The lien under the second contract stands in a different position. It attached to the property in December, 1889, when the appellants commenced the performance of that contract. At that time the mortgage to the trust company secured no bonds,—no debt,—because no bonds had been issued and no mortgage debt had been created. Until bonds were issued and sold or hypothecated, the trust company held the trust deed as the mere agent of the railroad company, and was bound to release or dispose of it as that company directed. It had no superior right to or better claim upon the mortgaged property than the mortgagor itself. Iron Co. v. Eells, 32 U. S. App. 348, 363, 15 C. C. A. 189, 199, and 68 Fed. 24, 34. There is no doubt that the lien of a recorded mortgage securing bonds which have been issued or sold and pledged is superior to any claim or equity of a subsequently created debt of the mortgagor for the construction of the railroad mortgaged, which is not secured by a mechanic's lien. Railroad Co. v. Hamilton, 134 U. S. 296, 299, 10 Sup. Ct. 546. But the debt of these subcontractors was secured by a mechanic's lien, which had attached, and was superior to the interests of both the mortgagor and the trustee under the mortgage, before any of the bonds it was to secure had been pledged or issued. It is true that the statute under which this lien was created required these subcontractors to file the statement of their lien within 60 days from the last day of the month in which their labor was done or their material was furnished, and that they did not file it until nearly a year after that time had expired; but the statute also provided that "a failure or omission to file the same [the statement] within the periods last aforesaid shall not defeat the lien, except against purchasers or incumbrances in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for the lien was filed." The effect of this statute was to give to the subcontractors a lien upon the railroad which they constructed as against the owner, and as against all purchasers and incumbrancers under it whose rights accrued after they commenced the performance of their contract, and before the expiration of the 60 days after the last day of the month in which they completed it, without the filing of any statement or notice of their lien whatever. The theory and reason of the statute are that during the construction of the railroad, and for 60 days after the last day of the month in which the performance of the contract is completed, the new railroad itself shall be notice to all purchasers and incumbrancers of the lien of the subcontractors upon it, and that all who take any title to or incumbrance upon the improvement or the right of way on which

it stands during this time shall take their rights and claims cum onere, and with constructive notice of the mechanic's lien upon it. In this view it is that the statute expressly declares that the failure to file the claim of lien within the time prescribed shall not defeat it except against purchasers and incumbrances in good faith and without notice, whose rights accrued after the expiration of the 60 days. It divides innocent purchasers and incumbrancers for value into two classes,—those whose rights accrued between the commencement of the performance of the contract and the expiration of the time prescribed for the filing of the statement of the lien, and those whose rights accrue after the expiration of that time. It declares that the lien of the mechanic or contractor, as against the claims of the members of the former class, shall prevail, and that it shall not be defeated by any failure to file the statement and claim of the lien, but that, as against the rights of the members of the second class, any omission to file it before the expiration of the prescribed time shall be fatal. Wisconsin Trust Co. v. Robinson & Cary Co., 32 U. S. App. 435, 439, 15 C. C. A. 668, 670, and 68 Fed. 778, 780; 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, 66 Iowa, 662, 664, 24 N. W. 265; Hoskins v. Carter, 66 Iowa, 638, 24 N. W. 249; Doolittle v. Plenz, 16 Neb. 153, 20 N. W. 116; Squier v. Parks, 56 Iowa, 407, 409, 9 N. W. 324; Gilcrest v. Gottschalk, 39 Iowa, 311, 315. Conceding now that the pledgees of the mortgage bonds had no actual notice of the claims or of the lien of the appellants, their rights were nevertheless subject and inferior to that lien by the express terms of this statute. They were members of the former and not of the latter class of incumbrancers. Their rights accrued after the appellants had entered upon the performance of their second contract, and between February 1, 1890, when the agreement for the hypothecation of the bonds was made, and August 29, 1890, when the 60 days for filing the statement of the appellants under the statute expired. Between these dates the entire $1,500,000 was advanced upon the security offered by the bonds, and while it appears that at some subsequent time $270,000 was loaned by some one on the pledge of bonds to the amount of $675,000, and was applied to the payment of a part of the original loan, and that all the bonds were subsequently sold under the pledges, it also appears that a part of these bonds were purchased at the sales for the original pledgees; and it does not appear for whom the others were purchased, nor does it appear that any of the bondholders ever acquired any rights superior to those of the original pledgees. The lien of the appellants under their second contract, therefore, must be held to be prior in time and superior in equity to that of the bondholders under the mortgage, by force of the statute of Nebraska which created and established it.

It is contended, however, that the acts of the appellants in June and July, 1890, permitting the balance due on this construction contract to be credited on their contract of subscription for the stock of the improvement company, receipting for the amount due under the construction contract, and taking, indorsing, and permitting a subdi-

vision of the certificates of the trust company that they were entitled to the railway bonds and the stock due them under their subscription contract, constitute a waiver of this lien, and are fatal to the attempt to enforce it. Before entering upon the discussion of this position, let us obtain a clear understanding of the situation of these parties when these acts were done. The improvement company owed the appellants $13,600 in money for their work under the construction contract. That company had agreed by the contract of subscription that it would deliver to them railway bonds secured by the first mortgage of the Nebraska & Western Railway Company to the amount of $34,000, and certificates for stock of the improvement company to the amount of $37,400, in consideration of the $68,000 which the appellants had agreed to pay to it therefor. The latter had already paid on this contract $54,500, and there was still due upon it $13,500. Meanwhile the improvement company had become insolvent, so that its stock and its promises were alike worthless, and it had disabled itself from the performance of the subscription contract by pledging all the railway bonds it was entitled to receive to secure advances it could never repay. This act of the improvement company was in itself a repudiation of the subscription contract, and it had already given to the appellants the right to accept this action as a rescission of the contract, and to sue the company for a recovery of the $54,500 which they had paid upon it. Smiley v. Barker, 83 Fed. 684; Ankeny v. Clark, 148 U. S. 345, 353, 13 Sup. Ct. 317; Nash v. Towne, 5 Wall. 689, 701. Perhaps the appellants would have exercised this right if they had known these facts. But they were not aware of them, and in their ignorance they allowed the improvement company to set off its indebtedness to them under the construction contract against their supposed indebtedness to it under the subscription contract. In other words, they exchanged the promise of an insolvent corporation to pay them $13,500 in money for its promise to pay them in bonds and stock, which it had already disabled itself from performing, and for the certificates of a trust company that they were entitled to the performance of this promise. We are now prepared to consider the contention of the appellees at this point. Their claim is that this exchange of promises, the execution of their receipt by the appellants, and their acceptance of the certificates of the trust company, waived their lien and satisfied their claim. The position is utterly untenable. If the promise of the improvement company had been performed, if the bonds and certificates for the stock had been delivered, the lien would undoubtedly have been discharged. But the proposition is now too well settled to admit of discussion that an agreement to pay the debt secured by a mechanic's lien by the note of the promisor, or by the bond, note, mortgage, or other obligation of a third person, will effect no waiver of the lien when that agreement has never been performed. If the contractor has bestowed his labor and material upon the improvement until he has completely performed his agreement, the lien exists; and, if the owner has not paid for the work or material in any way, it is immaterial in what way he promised to pay, and the laborer or material man may avail himself of the security which the statute creates. McMurray v. Brown, 91 U. S. 257; Chicago & A.

R. Co. v. Union Rolling-Mill Co., 109 U. S. 702, 721, 3 Sup. Ct. 594; Wisconsin Trust Co. v. Robinson & Cary Co., 32 U. S. App. 435, 441, 15 C. C. A. 668, 671, and 68 Fed. 778, 781; Central Trust Co. v. Richmond, N., I. & B. R. Co., 31 U. S. App. 675, 687, 15 C. C. A. 273, 278, and 68 Fed. 90, 94. The exchange of promises therefore did not destroy the lien. Nor did the delivery of the receipt. It is a general rule that a receipt is open to explanation. It never estops the receiptor from proving the truth, unless some one has acted on the faith of it to his prejudice; and this receipt is buttressed by no such action. It was signed and delivered in consideration of the delivery of the railway bonds and the certificates for the stock which the appellants then believed they would receive as soon as information of the receipt and settlement could be forwarded from Sioux City, Iowa, where it was signed, to the trust company in New York. The appellants have never received and never can receive the consideration for this receipt, and it cannot bar them from showing these facts and enforcing their lien.

Finally, it is strenuously argued that this cross bill seeks relief through the rescission of the contract of settlement, which cannot be granted, because the appellants accepted the certificates for the bonds and stock issued under this settlement by the trust company, indorsed those certificates, and permitted them to be subdivided and reissued. It is true that it is a condition precedent to the rescission of a contract that he who has received or deprived the other contracting party of anything of value under it must return it, and restore the latter to his original situation. But this rule has no application to the case in hand, (1) because the certificates of the trust company which were issued under the settlement were never accepted or indorsed, but were rejected by the only member of the firm of Reynolds & Co. who had authority to act for them in the premises; and (2) because, if we concede that these certificates were indorsed by Reynolds & Co., they did not confer upon them or deprive the trust company or the improvement company of anything of benefit, advantage, or value. The improvement company had made a worthless promise, which it had disabled itself from performing. The certificates of the trust company were nothing more than its statements that the appellants were entitled to the fulfillment of this worthless promise. The trust company did not guaranty its performance, or obligate itself in any way to the appellants. Its certificates vested no rights and imposed no obligations. Their return to the trust company would neither have released an obligation nor conferred a benefit. Their return was therefore not a prerequisite to a rescission of the contract of settlement, because the law never requires the performance of an idle ceremony. Moreover, the joint acts of the improvement company and the trust company by which they pledged all the bonds to secure loans from strangers, and thus disabled the former company from delivering the bonds, were in themselves a distinct repudiation of the contract of settlement, and gave to the appellants the option to accept those acts as a rescission of the contract, and to recover the consideration they gave for it, or to bring an action against the improvement company for damages for breach of the contract. Smiley v. Barker, 83 Fed. 684; Nash v. Towne, 5 Wall. 689, 701; Ankeny v. Clark, 148 U. S. 345, 353, 13 Sup.

Ct. 317; Eames v. Savage, 14 Mass. 425; McCrelish v. Churchman, 4 Rawle, 26; Baston v. Clifford, 68 Ill. 64; Stahelin v. Sowle, 87 Mich. 124, 49 N. W. 529; 2 Smith, Lead. Cas. (7th Am. Ed.) 30, note; Withers v. Reynolds, 2 Barn. & Adol. 882; Planchè v. Colburn, 8 Bing. 14; Palmer v. Temple, 9 Adol. & E. 508; Tiff. Sales, 235. The appellants have chosen the former alternative, and are rightfully pursuing it. Their claim for their lien under the second contract must accordingly be sustained. The decree below is reversed, with costs; and the case is remanded to the circuit court, with directions to overrule the exceptions to the report of the special master to confirm that report, and to render a decree in accordance with its recommendations.

LONDON & SAN FRANCISCO BANK, Limited, v. SNELL, HEITSHU & WOODARD CO. (MALLINCKRODT CHEMICAL CO., Intervener).

(Circuit Court, D. Oregon. November 18, 1897.)

No. 2,302.

INSOLVENT DEBTOR—PART PAYMENT FROM COLLATERALS—BASIS OF DISTRIBUTION.

At the suit of a bank, a receiver was appointed for a corporation, and the business continued by him for more than a year, at the bank's request, to enable it to collect accounts which it held to the amount of about 80 per cent. of its claim, it being the principal creditor. It was paid interest on its claim by the receiver, and collected about 70 per cent. of the collaterals, while the newer accounts could only be made to realize about 50 per cent. of their face value. In the final winding up of the business, only enough remained to pay a small per cent. on all claims. *Held*, that the bank's pro rata share should be based on its claim as reduced by what it has received.

Rufus Mallory, for plaintiff.
F. V. Holman, for intervener.
Wallace McCamant, for receiver, F. K. Arnold.

BELLINGER, District Judge. In the final winding up of the business of Snell, Heitshu & Woodard Company, there remains about $18,000 to be distributed among the creditors. The largest of these creditors is the London & San Francisco Bank, Limited. At the date of the commencement of this suit and the appointment of the receiver, the bank's claim was $135,819.53, for which it held, by assignment, as collateral security, book accounts of the face value of $108,183.95. Up to last May 21st, the bank had received collections from these accounts amounting to $58,509.62, and was paid, by order of the court, as interest, the further sum of $2,086.61. I am advised by the receiver that the bank has collected on this collateral, since that date, $7,000, and that it will probably collect, in addition to this, a sum sufficient to bring the total proceeds of collections on this account up to $75,000. The question is presented whether, in the distribution of the money on hand, the bank's pro rata shall be based upon its full claim, without deduction for what has been received from collateral, or upon the claim as so reduced. The authorities are conflicting, although the weight of authority seems to support the claim

of the bank that dividends are to be apportioned upon the debt as it originally stood. Notwithstanding this, I have concluded that upon the facts of the case the bank's dividend ought to be upon its debt as reduced by payments already made. The receiver was appointed at the bank's suit, and the business was continued for more than a year upon the insistence of the bank that such a course was for the best interests of the estate, with the result that the assets of the insolvent concern were indirectly used to make good the collateral held by the bank. The persons from whom the pledged accounts were owing were customers of the insolvent drug house. Through the credit given them by the receiver, they were enabled to pay the accounts pledged to the bank, so that the bank has realized nearly 70 per cent. of the face value of the accounts held by it, while the new accounts, which, for obvious reasons, ought to have been of much greater value, could only be made to realize 50 per cent. of their face. Enough appears to show that if the affairs of the insolvent concern had been wound up within a reasonable time, without these credits to delinquent customers, the fund for distribution among all the creditors would have been at least twice as great as it now is. It is due to the bank to say that the general creditors and the Snell, Heitshu & Woodard Company were agreed in urging the course that was taken, and some of these creditors have, no doubt, profited by selling goods to the receiver while the business was being continued; but, allowing for this, the fact remains that the bank has profited by the receivership, at the expense of the general fund, to an extent greater than the amount involved in the present dispute. And, besides, this bank has been paid interest on its account during the receivership, to a large amount, although it now appears that it was not entitled to these payments. No objection was made at the time, all parties seeming to be of the opinion that the bank was entitled to this interest.

COBB v. CLOUGH et al.

(Circuit Court, D. Minnesota, Third Division. June 24, 1897.)

1. EQUITY PLEADING—BILL FOR INJUNCTION—VERIFICATION—DEMURRER.
   The fact that a bill for injunction was not verified in the usual manner employed when the bill is made the basis of a temporary injunction is immaterial on the hearing of a demurrer to the bill, since the demurrer admits all the allegations which are material and well pleaded.
2. PUBLIC LANDS—RAILWAY-AID GRANTS—CHANGE OF TERMINUS.
   In 1875 the legislature of Minnesota granted certain swamp land received from the United States in aid of a railroad. In 1881, and before the road was built, the state constitution was amended so as to require that all swamp lands then held by the state should be sold in the same manner as school lands. Thereafter, with the consent of the legislature, one terminus of the road was changed somewhat so as to require a relocation of part of the line, but without any substantial departure from the original scheme or intention. *Held*, that the amendment did not prevent the grant from attaching to the new location, especially as it appeared that, because of deficiencies within the grant limits, the grant would, in any event, cover all the swamp lands in the region in controversy, so that the lands which would pass were in no wise changed by the change of location.

3. JURISDICTION OF FEDERAL COURTS—SUITS AGAINST STATE OFFICERS—CONSTITUTIONAL LAW.

A suit to enjoin the principal officers of a state from proceeding, under unconstitutional acts of the state legislature, to sell, as school lands, lands claimed by complainants under a prior railroad grant, and from instituting suits to recover the lands from the railroad company and its grantees, is not a suit against the state, so as to be beyond the jurisdiction of the federal courts under the eleventh amendment to the federal constitution.

4. SAME—INJUNCTION.

As, however, the state itself cannot in such case be made a party to the injunction suit, and consequently no decree can be made finally concluding its rights, the injunction, if one is granted, should be so framed that, while forbidding a multiplicity of suits against the railroad company's grantees, it should yet permit the state to bring a suit against the company itself, and perhaps a selected grantee, for the purpose of testing its title.

This is a bill for an injunction against the governor and other officers of the state of Minnesota to enjoin them from selling, conveying, or clouding the title of the land grant of the Duluth & Iron Range Railroad Company, or from bringing suits to cloud the title thereto. The Duluth & Iron Range Railroad Company was made a party defendant, and filed its cross bill, and also made a motion for an injunction. From the original bill and cross bill, which are substantially the same, the following facts appear:

The complainant is the trustee of a mortgage made by the Duluth & Iron Range Railroad Company upon the land grant, and the defendants are the governor, state auditor, and treasurer as a board of land commissioners, and the state auditor as commissioner of the land office, and the governor, state auditor, and attorney general as a committee, under the act of the legislature of Minnesota for the year 1897, to bring suits against the railroad company for a forfeiture of the grant. The facts, as appearing from the bill and admitted upon the hearing, are: On September 28, 1850, congress passed an act granting all the swamp and overflowed lands, made unfit thereby for cultivation, to the state of Arkansas for the purpose of reclaiming the same. By act of congress approved March 12, 1860, this grant of swamp lands was extended to the state of Minnesota. By an act entitled "An act granting certain swamp lands to the Duluth & Iron Range Railroad Company," approved March 9, 1875, the legislature granted to the Duluth & Iron Range Railroad Company 10 sections per mile for each mile of its road completed, and the right to select the deficiency anywhere in the counties of St. Louis, Lake, and Cook. This grant was made for the purpose of aiding the Duluth & Iron Range Railroad Company to construct a railroad from Duluth, by the shortest and most feasible route, to the northeast corner of township No. 60, range No. 12 W., on the Mesaba iron range. And it was further provided: "That when the governor of the state shall be duly notified (by the company aforesaid), of the completion of each and every ten miles of said road, it shall be his duty to have same examined by sworn commissioners, and on their certificate of the completion of each consecutive ten miles in a good and substantial manner as contemplated by this act, he shall notify the secretary of state, who shall forthwith cause swamp land certificates to be issued to the president and directors of said railroad company for the number of acres to which they shall be entitled under this act," etc. The time for the completion of the road was extended twice,—once by the act of 1876, and again by the act of 1883. The act of 1883 extended the time until 1888, and provided that none of the lands should be deeded until the entire road was constructed. It further provided that the corporation might relocate and change the line of its road so as to make the northern terminus thereof at some convenient point to be selected by the corporation in township No. 62 N., of range No. 15 W. In 1881 the constitution of the state was amended by adopting the following provision: "All swamp lands now held by the state, or that may hereafter accrue to the state, shall be appraised and sold in the same manner and by the same officers, and the minimum price shall be the same, less one-third, as is provided by law for the appraisement and sale of

school lands under the provisions of title one of chapter thirty-eight of the General Statutes. The principal of all funds derived from sales of swamp lands, as aforesaid, shall forever be preserved inviolate and undiminished. One-half of the proceeds of said principal shall be appropriated to the common school fund of the state. The remaining one-half shall be appropriated to the educational and charitable institutions of the state, in the relative ratio of cost to support said institutions." The bill then alleges that the railroad company accepted this act, surveyed its line as it is now constructed from Duluth to the iron mines, in township No. 62 N., of range No. 15 W., and filed its map of said survey on the 28th day of May, 1883, and on or before December, 1886, constructed the road, the same being 94.8 miles in length; that the governor appointed commissioners, who examined the road, and reported its completion, and that thereafter the state of Minnesota deeded to the company, at various times between May 2, 1888, and December 24, 1894, about 201,000 acres of land; that the various deeds contained a recital of the laws under which the grant was made, and of a compliance therewith, and of the construction of the road between the points selected, to wit, the city of Duluth and a point at the iron mines in township No. 62 N., of range No. 15 W. It further appears that the railroad company has selected 189,979.73 acres of land that has not yet been deeded, and the total number of acres to which it is entitled is 606,720 acres; that the company has already sold to various parties about 20,000 acres of these lands; that by an act of the legislature approved April 21, 1897, the above land grant, with all lands heretofore deeded to the railroad company, and by it conveyed to other parties, was forfeited to the state of Minnesota absolutely, and the proper officers of the state were directed to sell the same as school lands are sold; and by a further act of the legislature approved April 23, 1897, the governor, state auditor, and attorney general were authorized to institute legal proceedings against any of said parties to recover said lands. The bill alleged that, unless restrained by the order and injunction of this court, the state auditor and governor, and said board of land commissioners, would sell and convey said lands, and the timber thereon, or lease the lands, and thereby cloud the title of the complainant; and that the said governor, state auditor, and attorney general would bring various suits against the Duluth & Iron Range Railroad Company, the trustee of the mortgage, and the various parties, grantees of said railroad company, to recover said lands; and prayed an injunction.

Frank B. Kellogg, for complainant.

W. N. Draper and J. H. Chandler, for defendant Duluth & I. R. R. Co.

The Attorney General, Henry C. Belden, and W. P. Warner, for defendants state officers.

LOCHREN, District Judge. This case has been very fully argued on both sides, and there seems to be no dispute as to the facts. The matters set forth in the bill of complaint are admitted by the demurrers in the case, and this renders immaterial the last question raised by counsel for defendants, as to the verification of the bill. The demurrers admit the statements in the bill to be correct, and therefore, although the bill is not verified in the manner usually done when the bill is made the basis of a temporary injunction, I think it obviates any objection upon that ground. The result of the demurrers is that all allegations stated in the bill which are material and well pleaded are admitted, but, of course, mere conclusions are not admitted. It seems that in the year 1860 congress granted swamp lands to the state of Minnesota for certain objects indicated, among which were internal improvements. In the year 1875 the legislature granted to the Duluth & Iron Range Railroad Company 10 sections per mile, to be selected within 10 miles of the

railroad, to be built by the shortest and most feasible route, between fixed termini, Duluth being the southern terminus, and the other at some point in section 60, range 12, on condition that 20 miles of the road was to be built in 2 years, and the entire road in 5 years. The lands were to be certified and patented to the company as each 10 miles of road was completed and certified to be properly completed by commissioners appointed by the governor. Any deficiency in the 10 sections per mile within the 10-mile limit was to be made up by selections within the counties of St. Louis, Lake, and Cook. On filing the map of the route, all other swamp land within the 10-mile limit was thereby withdrawn from other disposition. The time for building the railroad was extended from time to time by acts of the legislature, and by an act of that body passed in 1883, I believe, the northern terminus of the railroad was changed further west, and a little north, necessitating a change of location of part of the line; and the railroad was finally completed within the time limited by the last act, and certified to be properly built, completed, and to be transacting business over its entire line, by a commissioner appointed by the governor to make examination of these facts. The grant of lands by the act of 1875 was a present grant upon conditions subsequent. No forfeiture for breach of condition was ever declared, either by legislative act or judicial decree; the condition was finally performed, and such performance accepted by the state, through its executive, in whom that power was vested; and some 201,000 acres of the land were patented to the railroad company. After the grant, and before the road was built and the conditions subsequent were performed, the constitution of the state was amended so as to prohibit the granting of swamp lands in aid of railroads. This could not affect the prior grant of 1875, which stood as a valid existing grant and contract; but it is claimed that as the northern terminus of the road was changed, and the line also changed, subsequent to that amendment, the land grant would not attach to the changed line. But, had there been no such amendment of the constitution, it would not be claimed that merely such change of terminus and line would have detached the grant made by the original act. There can be no doubt that, if there had been no change in the constitution, the state, with consent of the company, could have changed the northern terminus and the location of the road, without saying anything further about the grant, and not affect the grant; and it seems to me if this grant to the road made by the act of 1875, which was a present grant at the time, was not affected by the amendment, that it would not be affected by this change in the constitution, so long as it was merely a change in the line, allowing it to remain substantially in the place where it was originally designated, and not departing substantially from the original scheme or intention; although it might be a different case were the change so radical in direction or length as to make it clear that it involved a new and entirely different enterprise.

Moreover, the allegations of the bill are that the deficiency as to the 10-mile limit will cover all swamp lands in the three counties named. If so, the land grant is in no way changed from what it would have been had the road been built between the termini first

named. It was not, therefore, changed so as to affect any lands which were not covered by the act of 1875 before the amendment prohibiting the granting of swamp lands for such enterprises. All these questions, and the right of this railroad company to this land grant, seem to have been decided in its favor by the supreme court of Minnesota in the case of Minneapolis & St. C. R. Co. v. Duluth & W. R. Co., 45 Minn. 104, 47 N. W. 464, referred to by counsel.

The right of the railroad company to these lands, and the right of complainant, as the trustee under the mortgage, with respect to these lands, appears to be clear, not only to the lands which have been formally conveyed by the governor, but also to the other lands covered by the grant, although not so conveyed, nor perhaps even specially designated by selection. They belong to the railroad company beneficially, and in equity, and are covered by the mortgage to complainant, although the bare legal title may still remain in the state. The state has no right in respect to the lands, except to perform its contract by investing the railroad company with the title. I speak, of course, of the case as presented by the bill and admitted by the demurrers. But for the immunity of the state as sovereign, and under the eleventh amendment to the federal constitution, there could be no question that a suit would lie against it directly to restrain its action, if it threatened to dispose of or embarrass the title to these lands, to the prejudice of the railroad company or the complainant.

This action is to restrain the officers of the state, its governor, auditor, and treasurer, who form an executive commission, from disposing of the title to any of these lands, or the timber or minerals, as they were directed to do by the act of the legislature of 1897, and to restrain the governor, auditor, and attorney general from commencing action against the grantees of the railroad company, or persons having contracts with respect to the lands, or the timber and minerals, with the railroad company, as also directed by said act of the legislature, and which would obviously cloud the title of the railroad company to the lands, and bring multiplicity of actions. The serious objection urged by defendants is that, although the state of Minnesota is not nominally made a party defendant, yet this suit against all the chief executive officers of the state, in respect to a matter in which the state by its legislature claims an interest which it has directed these officers to assert and maintain, is in reality a suit against the state. It must be admitted that, if it is not such a suit, it comes perilously near the line. The decisions on this subject are numerous, and, in my judgment, not conflicting. The state can bring suits and assert its rights in court, but cannot be brought into court, to litigate a right claimed against it, without its consent. But a state is bound by the constitution of the United States as much as any citizen, and any enactment of the state impairing the obligation of a contract is void, though its contracts cannot be actively enforced in the courts without its consent. Thus, no action against the state can be maintained, without its consent, to collect an indebtedness of the state or compel it to perform its contracts, or for any kind of positive and affirmative relief. On

the other hand, any enactment of a state legislature impairing the obligation of a contract, or tending to devest vested rights, is absolutely void. In law, being null, it is not the act of the state; and if a state officer, under color of such void enactment, attempts or threatens any acts tending to impair or interfere with contractual or vested rights, it will not be regarded as the act of the state, and such officer will be restrained from such unlawful affirmative action, whether he purposes to act in the name of the state, or in his official or personal name. Thus, proposed prosecutions of a criminal or penal nature or form, which if begun would have to be instituted in the name of the state, have been enjoined in some cases which have been cited on the hearing.

The theory governing these cases appears to be, not so much the theory that the immunity to the states is a shield and not a weapon, as that the state being absolutely bound by the federal constitution, its enactments, in contravention of that instrument, are absolutely void, to the extent that they will not be recognized as acts of the state, nor afford color of defense in protecting officials of the state acting or threatening to act thereunder, and renders the plea of official character of such persons immaterial. Therefore the doctrine of the Minnesota supreme court that the governor and executive officers are not amenable to the process of the courts in respect to the discharge of their official duties has no bearing in a case of this kind; because, if they are liable at all, in respect to matters of this kind, it is because they are passing outside their official duties, and that, while they are attempting to do what is directed by an act of the legislature, they are doing an act which is not supported by any valid law. So it does not seem to me that the doctrine of the Minnesota court has any special bearing in this case. While the federal courts have gone to considerable length to sustain the position that state officers may be restrained from acts impairing contractual or vested rights, the authority to grant injunctions in such cases has been limited to remedial relief. I think the case of Osborn v. Bank, 9 Wheat. 738, cited on both sides, is a signal instance of this kind. In that case a large sum of money (some $98,000) had been taken by state officers from a bank of the United States, under what was held to be a void enactment. An action to recover that money was allowed to be maintained against the officers of the state, although it was admitted that it could not be maintained against the state itself. It was permitted to be maintained against the successors of the officers who took the money. It was claimed that the money had been kept separate from other moneys of the state in the treasury, and therefore could be identified; but it was none the less claimed to be the money of the state, collected by the officers under the laws of the state. There is also the case which has been cited as arising in South Carolina (Tindal v. Wesley, 17 Sup. Ct. 770), which was an action to recover real estate in Columbia, S. C., of an officer of the state,—the secretary of state,—who was in possession of the property. The answer alleged it to be the property of the state, and that it was in defendant's possession as such officer. It was found by the court that the property had

been actually sold by the state to the plaintiff. There was no question that it had once belonged to the state; but the action was maintained, although it was admitted that the state, if it had any claim, might bring an action to assert that claim. I think these two cases perhaps go as far as any that have been cited on either side.

The result is, as it seems to me, that this injunction must be granted. The only question in my mind is with respect to the restraint against bringing any action. I do not think there is any doubt that the injunction should be broad enough to prevent actions being brought against the grantees of the railroad company,—a multiplicity of actions; but I think a single action might be permitted against the railroad company, if desired, in order to bring the matter up in proper form. If it is thought fit to bring a single action in any court, I doubt if I should restrain the bringing of such action against the railroad company and Mr. Cobb. The further hearing of this case, as to the form of the decree to be granted, was then adjourned until the 9th day of July, 1897.

(July 9, 1897.)

After hearing arguments with respect to the form or injunction to be granted, the court rendered the following decision:

I should agree with Mr. Kellogg entirely, if we could bring the state of Minnesota into court, and settle this matter definitely by a decree which would finally determine the interests of all persons who have, or claim to have, any interest in this property. Such course would be consonant with the practice of courts of equity. From the case as presented, it appears, as I stated heretofore, that this land grant was made to the railroad company many years ago,—a grant in præsenti, with conditions subsequent. The conditions, it also appears, were performed, and the lands in part were patented to the railroad company. Now, there is nothing presented casting any doubt upon the title of the railroad company to these lands, except simply questions that arise from a change in one of the termini, and that really makes no difference whatever in the land grant. It would have been the same if the railroad had been built to the first-named termini, instead of as at present. I think no question has been suggested as to the power of the state and the railroad company, acting concurrently, to change these termini, without affecting the grant that was given. The other question arises from the change in the constitution in 1883, and that would not affect the prior grant made to the railroad company by the state, to which the railroad company had a vested right. There has been no suggestion which really casts any doubt at all upon the right of the railroad company to this grant, and the decision of the supreme court of Minnesota, which has been referred to in 45 Minn. and 47 N. W., confirms that title. So that a case is presented of a property right which ought to be protected, as far as a court can protect it, from being disturbed by any action casting cloud upon the title, or interfering with the possessors, by harassing them with a multiplicity of suits. The difficulty with the case is that the state of Minnesota cannot be brought here into court against its will.

No action can be taken which will result in the final determination of the rights of everybody as to these lands. Whatever the final judgment of this court may be, the state of Minnesota is not and will not be bound by it. It hardly seems to me that such action can properly be taken as will in effect restrain, or have any legal effect amounting to an absolute restraint against, the state of Minnesota, so as to prevent it from bringing any action to test its claim, whatever it may be, to these lands. And, as that matter cannot be determined here, I am inclined to think that this injunction should be issued, as indicated by me the other day. I am still of opinion that permission should be granted to the state to choose another forum, if it desires to select one; at any rate, that an opportunity should be given it to test its claim to these lands. I do not think the state ought to be allowed, or that these officers ought to be allowed, to bring a multiplicity of suits against the grantees of the railroad company at this time. It seems to me it will be sufficient to bring one suit against the railroad company, and perhaps Mr. Cobb, and, if it is thought necessary, to join one or more other parties, in order to test the question of their rights as bona fide purchasers under their deeds from the railroad company following the deeds from the state.

INTERSTATE COMMERCE COMMISSION v. NORTHEASTERN R. CO. OF SOUTH CAROLINA et al.

(Circuit Court of Appeals, Fourth Circuit. November 3, 1897.)

No. 178.

INTERSTATE COMMERCE COMMISSION—POWER TO FIX RATES.

The interstate commerce commission has no power, express or implied, to fix maximum rates; and an application to the court to enforce such an order must be dismissed. 74 Fed. 70, affirmed.

Appeal from the Circuit Court of the United States for the District of South Carolina.

This was an application by the interstate commerce commission to enforce an order made by it against the Northeastern Railroad Company of South Carolina and others. The circuit court dismissed the bill, holding that the commission had no authority to make the order in question (74 Fed. 70), and the commission has appealed.

L. A. Shaver and William Perry Murphy, for appellant.

Augustine T. Smythe and George V. Massie, for appellees.

Before GOFF, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

GOFF, Circuit Judge. This case is before us on an appeal from a decree entered by the circuit court of the United States for the district of South Carolina, by which decree the bill filed by the appellant, the interstate commerce commission, was dismissed. The court below based its action on the want of jurisdiction on the part of the interstate commerce commission to make the order, the enforcement

of which was the object of the bill so dismissed. Since this case was argued and submitted, the supreme court of the United States, in deciding the case of Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 17 Sup. Ct. 896, has so disposed of the jurisdictional question involved herein as to impel us to affirm the decree appealed from. The opinion filed in the court below by Hon. C. H. Simonton, Circuit Judge, states the facts so fully, and disposes of the questions involved so clearly, that we adopt and announce it as embodying the views of this court. It is as follows:

"This case comes up upon a motion to dismiss the bill. The Truck Farmers' Association, of Charleston, and others engaged in the same line of business, filed their complaints with the interstate commerce commission against the railroad companies named in the caption. The complaints were that the charge of freight on vegetables and other truck between Charleston and New York and other Northern markets was unreasonable, and so unlawful. The commission, having given due notice to the carriers complained of, entered into a long, laborious, and careful examination of the charges, and, after deliberation upon the voluminous testimony produced before them, filed in writing their findings of fact and their conclusions thereon. They formulated their conclusions in the following final judgment and order: 'Ordered and adjudged that the defendants [naming them], and each of them, do, within ten days after service of this order, wholly cease and desist and thenceforth abstain from charging or receiving any greater compensation in the aggregate for the transportation from Charleston, in the state of South Carolina, to Jersey City, in the state of New Jersey, of the following named and described commodities, whether shipped to New York, N. Y., and delivered to consignees at Jersey City, or shipped to Jersey City, than is hereinafter set forth as follows, to wit: (1) Six cents per quart, $1.92 per crate of 32 quarts, or $3.84 per 100 pounds, as the total charge for the transportation, including cost of refrigeration en route, and all services incident to such transportation, of strawberries from Charleston, aforesaid, to Jersey City, aforesaid. (2) Fifty-nine and one-half cents per standard barrel or barrel crate for the transportation of apples, onions, turnips, squash or cymbling, or egg plant, from Charleston, aforesaid, to Jersey City, aforesaid. (3) A rate or sum for the transportation of cabbages shipped in standard barrels or barrel crates from Charleston, aforesaid, to Jersey City, aforesaid, or New York, N. Y., which is three-fourths of the rate or sum contemporaneously charged by defendants on potatoes shipped in standard barrels or barrel crates between said points. It is further ordered that said defendants be, and they severally are hereby, required to readjust their rates for the transportation of the commodities hereinabove specified from Charleston, aforesaid, to Philadelphia, Pa., Baltimore, Md., and Washington, D. C., so as to bring them in conformity with the law when compared with rates to Jersey City or New York which will be put into effect by said defendants under the terms of this order. And it is further ordered that the report and opinion of the commission on file herein be, and is hereby, made a part of this order, and that a notice embodying this order be sent forthwith to each of the defendants, together with a copy of said report and opinion, in conformity with the provisions of the fifteenth section of the act to regulate commerce, and that a copy of said report and opinion and of this order be also served upon the Southern Railway Company, successor of the defendants the Richmond & Danville Railroad Company and F. W. Huidekoper and Reuben Foster, the receivers thereof, and upon the South Carolina & Georgia Railroad Company, successor of the defendants the South Carolina Railway Company and D. H. Chamberlain, the receiver thereof.' Thereupon the railroad companies prayed a rehearing of the matter, and, after consideration of the application and the argument in support thereof, the rehearing was denied. To the original complaints and investigation the receiver of the South Carolina Railway Company and the receivers of the Richmond & Danville Railroad Company were parties. Pending the investigation and the judgment of the commissioners, the receivers of each of these roads were discharged as such receivers. The property in their hands was sold. The South Carolina & Georgia Railroad Company became the owner of the property of the

South Carolina Railway Company, and the Southern Railway Company that of the Richmond & Danville Railroad Company. Both of these corporations, purchasers, united in and signed the petition for rehearing. The several railroad corporations having been served with the proceedings of the commission, and with its final order, judgment, and decree, the interstate commerce commission filed this bill of complaint. The bill recites, in substance, the above, and then adds: (2) That the defendants have willfully failed and neglected to obey and conform to the requirements of said interstate commerce commission as set forth in the original order of said commission,—Exhibit E hereto, as amended by said order, Exhibit G hereto (orders above quoted),—'and, by so failing and neglecting, have and do continue to violate the provisions of the act to regulate commerce at, to wit, Charleston, South Carolina, at divers other points on the lines or routes operated by them.' The prayers of the bill, among others, are as follows: (3) That this court will issue a writ of injunction, to run during the pendency of this cause, restraining the said defendants herein, and each of them, their officers, agents, or servants, from continuing in their violation and disobedience of the said orders of petitioner, and that on final hearing this court will make said injunction perpetual, or will issue such other proper process, mandatory or otherwise, as is necessary to restrain said defendants from further continuing in such violation or disobedience. (4) That this court will, if it shall think fit, make an order that, in case of any disobedience of such writ of injunction, or other proper process, mandatory or otherwise, each of the defendants guilty of such disobedience shall pay into court, or otherwise, as the court may direct, such sum of money, not exceeding the sum of $500, for every day, after a day to be named in said order, that such defendant shall fail to obey such injunction or other proper process. (5) That this court will grant such other and further relief in the premises as may seem meet and proper.

"The right of the interstate commerce commission to institute these proceedings is derived from the act of congress approved March 2, 1889 (25 Stat. 855, § 5). This is its sole authority therefor, and in its exercise it is bound by, and must confine itself within, the terms of the statute. The section reads as follows: 'Sec. 5. That section 16 of said act is hereby amended so as to read as follows: "Sec. 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey or perform any lawful order or requirement of the commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment of the constitution of the United States, it shall be lawful for the commission or for any company or person interested in such order or requirement to apply in a summary way, by petition, to the circuit court of the United States, sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be." ' It will be observed that the resort to this court is in the case of the violation of, or the neglect or refusal to obey or perform, any lawful order or requirement of the commission. The defendants deny that the orders in question are lawful, and on this base the present motion. The orders of the interstate commerce commission, which they seek to enforce by these proceedings, fix the rate of transportation between Charleston and New York, on strawberries at 6 cents per quart, per crate of 32 quarts, or $3.84 per 100 pounds. They fix the rate of transportation of apples, onions, turnips, squash or cymbling, or egg plant, at 59½ cents per standard barrel or crate. They fix the rate or sum for the transportation of cabbages, in standard barrels or crates, which is three-fourths the rate or sum contemporaneously charged for potatoes shipped in standard barrels or crates, between said points. Are these lawful orders of the interstate commerce commission? Has the commission any authority in law to make such an order? The supreme court of the United States, at its present session, passed upon this question in Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission (decided March 30, 1896) 16 Sup. Ct. 700. The Cincinnati, New Orleans & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company carried freight from Cincinnati into Georgia. The through rate for transportation of less than carloads of buggies, carriages, and other first-class freight, was $1.07 per 100 pounds; and on all such freight carried to

Social Circle the charge was 30 cents more, which, however, was paid exclusively to the Georgia Railroad. Complaint was made to the interstate commerce commission. The commission examined into the matter, and issued its order, in two parts. They held that the charge of 30 cents additional to Social Circle was in conflict with the long and short haul clause, and ordered defendants to desist therefrom. And they add that the said defendants do also, from and after the 20th day of July, 1891, wholly cease and desist from charging or receiving any greater aggregate compensation for the transportation of buggies, carriages, and other first-class articles, in less than car loads, from Cincinnati aforesaid, to Atlanta, in the state of Georgia, than $1 per 100 pounds. Application was made to the circuit court of the United States for the Northern district of Georgia to enforce these orders. The court, after full hearing, declined to grant the application. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 56 Fed. 925. The cause was carried by appeal to the circuit court of appeals of the Fifth circuit. 9 C. C. A. 689. That court adopted and sustained that portion of the order of the interstate commerce commission which related to the rate to Social Circle, but it disapproved and annulled that portion of the order which commanded the defendants to desist from charging for the transportation of freight of like character from Cincinnati to Atlanta more than $1 per 100 pounds. Both parties went up by appeal to the supreme court,—the railroads from so much of the judgment of the circuit court of appeals as relates to the freight charges to Social Circle, and the commission from so much of the decree as denies the relief prayed for in the charges fixed by it on freight from Cincinnati to Atlanta. The cause was elaborately and earnestly argued. The supreme court sustained the circuit court of appeals in both questions. It held that the latter part of the order of the interstate commerce commission was an attempt to fix rates between Cincinnati and Atlanta. On that point the court says: 'Whether congress intended to confer upon the interstate commerce commission the power to fix rates was mooted in the courts below, and is discussed in the briefs of counsel. We do not find any provision of the act that expressly, or by necessary implication, confers such power.' The case at bar seems to be on all fours with this case. The interstate commerce commission asks this court to enforce its orders fixing rates for truck between Charleston and New York. The court can only enforce the lawful orders of the commission. As has been seen, the commission is not warranted by the act of congress to fix rates, and to this extent its order is not lawful. The bill is dismissed."

The decree appealed from is affirmed.

THOMSON-HOUSTON ELECTRIC CO. v. JEFFREY MANUF'G CO. et al.

(Circuit Court, S. D. Ohio, E. D. December 7, 1897.)

No. 793.

TAKING OF DEPOSITIONS—OBJECTIONS TO TESTIMONY—MISCONDUCT OF COUNSEL.

In taking depositions in an equity suit, counsel cannot assume to pass upon questions of the competency, materiality, and relevancy of testimony, and instruct his witnesses not to answer questions put to them on cross-examination; and where a witness, in obedience to such instructions, refuses to answer, his entire deposition will be stricken from the files.

This was a suit in equity by the Thomson-Houston Electric Company against the Jeffrey Manufacturing Company and others for alleged infringement of a patent. Motion to strike deposition from the files.

Betts, Hyde & Betts, for complainant.

H. H. Bliss and John R. Bennett, for respondents.

SAGE, District Judge. Defendants move to strike from the files the entire deposition of witness E. M. Bentley, called and examined as an expert by the complainant on the prima facie case, or to compel him to answer 33 questions put by counsel for the defendants on cross-examination, and which he declined to answer under advice of counsel for the complainant. All these questions were objected to as immaterial, irrelevant, and hypothetical. Counsel for complainant insist that the issue in the case involved in this matter is whether defendants' construction, as proved by Mr. Bulkley, a witness for complaint, is an embodiment of the claim in suit. The suit is upon patent No. 495,443, for traveling contact for electric railways, applied for by Charles J. Van Depoele, and assigned to complainant.

The witness Bentley, in his direct testimony, defines the invention in controversy as follows:

"The device itself is characterized by a long swinging arm, extending obliquely upward from the car to the conductor. * * * The long swinging arm carried at its outer end a contact device, which is made to bear on the underside of the conductor, while its inner end of the same arm is joined to the car, on both a transverse and vertical axis, so that the contact device on its outer end may be swung laterally through a wide arc. and may also be depressed vertically through a considerable distance. This arrangement allows the contact device to * * * follow readily in its variations, vertically and laterally, the line of the conductor. * * *"

In cross-examination he was asked:

"What would you suggest as the proper average height of the conductor wire above the cars?

"A. At present, in street-car work, the conductor is some six or eight feet above the roof.

"29 xq. And what is the length of the extreme play on a vertical line of a trolley wheel, and which you would advise as the best to meet the ordinary requirements?

"A. In some roads the height of the trolley wire varies from fourteen to twenty-four feet, and the trolley wheel, to have a capacity for meeting the extreme condition, should have a vertical play of ten feet."

He was then asked to state the length of defendants' device,—which was used in the tunnel of a coal mine,—as shown upon their exhibit ("Sketch Vintondale Locomotive"), and answered that the arm was only three feet long, and that on that locomotive, if it was three feet and a half between the axles as shown by said sketch, the trolley poles were about three feet long. Further examined as to the structure of defendants' plant, he answered as follows:

"Then, assuming that the coal is of a thickness above the average, we will say six feet, for anything now within our knowledge, it may be true, may it not, that the trolley wheel on that Vintondale locomotive never vibrates more than six inches relative to the top plane of the locomotive, may it not?

"A. Of course, if the trolley wire is so arranged with reference to the track that it never varies more than six inches from its level with relation thereto, the arm would not vibrate more than six inches."

Counsel for the defense then sought to interrogate him with respect to the application of the patent, and of the invention to defendants' mechanism, as follows:

"31 xq. Let us then assume from now on that a commercially successful car constructed on the plan of this illustrated in the patent in suit would require

a trolley equipment which would permit the trolley wheel to vibrate through a distance of ten feet.

"Please take the drawing which I now hand you, which delineates precisely the same parts and arrangement that is shown in the drawings in this Van Depoele patent in suit, except that the trolley wheel is limited to a vibration of six inches, and I ask whether a construction in accordance with this drawing would contain the subject-matter of claims 2, 4, 8, 12, and 16.

"(Counsel for complainant objects to the question as immaterial and hypothetical, and is not an issue raised by any of the pleadings in this case, and instructs the witness that he need not consider any drawings or structure which is not properly proven in this case.)

"A. In view of the instruction of counsel, I decline to consider your drawing.

"32 xq. You have already in the record in this case stated under oath as follows:

"'A long arm mounted on top of the car carrying a grooved wheel at its outer end, and continually pressed upward against the undersurface of the wire, and having capacity of swinging through several feet on a vertical pivot, and of also swinging through a number of feet upon a horizontal hinge or pivot, was the thing which made overhead systems of electric railroads a success for general use.'

"Disliking to indulge in hypothetical questions which cannot be exactly and accurately delineated, I have made this drawing for the purpose of getting a clear definition of your understanding of the invention in controversy, and of the scope of the claims which you have referred to in your direct examination. My question, coupled with this drawing, I believe to be as accurate and specific as it is possible to put it in order to ascertain your meaning when using on this record, as you have, such terms as 'a long arm,' and an arm 'swinging through a number of feet on a horizontal hinge or pivot.' I am desirous, on behalf of the defendants, of ascertaining to what extent these matters enter into the invention in controversy.

"And, with this explanation, I repeat the question, and ask whether, first, this drawing is sufficiently intelligible for you to understand the question.

"(Complainant's counsel requests defendants' counsel to state the number of the question and answer of the witness from which he purports to have made a quotation.

"(Counsel for defendants replies that, if the last note of complainant's counsel is intended to challenge proof of identity as to this witness being the same party who filed two or three different affidavits with the preliminary injunction papers, he replies that he is astonished at any such effort, and supposed that would be waived. In direct reply to the last inquiry, he states that the above quotation was made from the affidavit of one E. M. Bentley, filed in this record, with the papers accompanying the motion for preliminary injunction. To assure himself, he temporarily withdraws the last question, and presents the following:)

"33 xq. Are you the same E. M. Bentley who filed three affidavits in this cause, and which were used at the hearing of the motion for preliminary injunction?

"A. I made, I believe, three affidavits for use in this cause on the motion for preliminary injunction, and I presume they were filed and used.

"34 xq. Please turn to page 176 of the printed record of complainant, prepared for the presentation of the motion for preliminary injunction, and ascertain whether the quotation I have above made from the second affidavit is correct, and whether you made that statement.

"(Objected to, as calling for a merely fragmentary portion of the affidavit referred to, while the whole of the affidavit should be considered, and not merely a small portion thereof.)

"A. You have quoted correctly from my affidavit in this case.

"(Counsel for defendants here introduces in evidence the drawing handed with cross-question 31, and the same is marked 'Defendants' Exhibit, Drawing No. 1, F. M. A., Notary Public, Aug. 11, 1897.'

"(Complainant's counsel objects to the same, as immaterial, irrelevant, and incompetent, and not properly proven.)

"35 xq. Then I again ask you to take this drawing in evidence, now marked 'Defendants' Drawing No. 1,' and ask—First, whether the construction there

indicated is intelligible to you under the definition I gave above, and, secondly, whether a mechanism constructed in accordance therewith would fulfill the requirements presented in your language in your affidavit above quoted.

"(Complainant's counsel again objects to the question, as immaterial and irrelevant and hypothetical, in that the exhibit referred to has not been properly proven, nor is any issue raised thereon by any of the pleadings in this case, and instructs the witness that he need not consider or answer this question.

"A. I must decline to consider your drawing or answer the question.

"(Answers to xq.'s 31 and 34 are now objected to as not responsive, and in due time motion will be made by the defendants to strike the entire deposition from the record, because thereof.

"(Complainant's counsel states that he shall require the defendants to give due notice of said motion, and that he shall consider that, if such motion is not made prior to the beginning of the taking of defendants' proofs herein, he shall consider that the defendants have withdrawn their notice of motion.)

"36 xq. You have in your direct examination stated as follows:

" 'This contact device consists of a long swinging arm. The device itself is characterized by a long swinging arm extending obliquely upward from the car to the conductor, and taking the place of a flexible conductor cord, such as was commonly used. * * * The long swinging arm carries at its outer end a contact device, which is made to bear on the underside of the conductor, while at its inner end the said arm is joined to the car on both a transverse and a vertical axis, so that the contact device on its outer end, consisting ordinarily of a grooved roller, may be swung laterally through a wide arc, and may also be depressed vertically through a considerable distance.'

"And I fail to find in this language anything definite or exact as defining the terms 'long,' 'considerable distance,' etc.

"And, in order that I may get an accurate understanding of your meaning, I again call your attention to this drawing in evidence, marked 'Defendants' Exhibit Drawing No. 1,' and ask whether the subject-matter there shown conforms to your words above quoted.

"The drawing is presented for the purpose of avoiding purely hypothetical questions in mere words, and to assist in seeing exactly the meaning of my question, and is presented with the understanding on my part that it is an exact copy of the drawings which you have been discussing in the patent itself, with the one exception as to the length of the arm.

"(Complainant's counsel makes the same objection as made to the last question, and repeats the same instructions given to the witness as that given in respect to the last question, in view of the fact that the question is still hypothetical, as the exhibit referred to is not at issue in this case, and is not raised by any of the pleadings herein, nor is it properly proven.)

"A. I must again decline to express opinions in regard to the structure of Defendants' Exhibit Drawing No. 1.

"(Answer is objected to, as not responsive, and the notice for striking out is repeated.

"(Complainant's counsel makes the same statement as to notice given in respect to last answer.)

"37 xq. Does this exhibit, Defendants' Drawing No. 1, present matter which is immaterial to this controversy?

"(The same objections and instructions to the witness, and as a question for the counsel and the court to determine.)

"A. In view of the instructions of counsel, I will still decline to discuss the drawing in question.

"(Defendants' objections, and notice repeated.

"(Complainant's statement in regard to said notice repeated.)

"38 xq. Then you refuse to answer without knowing whether my question and the drawing illustrating it present anything material to this controversy; is that correct?

"A. I understand that the question of materiality is one of law, which is outside of my province, and I am following the instructions of complainant's counsel in declining to discuss the matter.

"39 xq. You mean you refuse to answer these questions without knowing whether or not this exhibit, Defendants' Drawing No. 1, clearly shows?

"'An electric railway having in combination a car, a conductor suspended above the line of travel of the car, an arm pivotally supported on top of the car, and provided at its outer end with a contact engaging the underside of the suspended conductor, and a tension spring at or near the inner end of the arm for maintaining such upward pressure contact.'

"I thus quote the eighth claim of the patent, in order to eliminate the necessity of your remarks concerning your being the judge of 'materiality.' My question is this: You have refused to answer these questions without knowing whether this illustrative drawing exhibits the subject-matter of this quoted language or not; am I right?

"A. Yes, sir."

Throughout, counsel for complainant not only noted objections to the questions, but assumed to decide finally and conclusively as to the competency, materiality, and relevancy of testimony sought to be brought out upon cross-examination, and, taking the witness completely under control, instructed and compelled him to refuse to answer. In support of this extraordinary course of procedure, they cite Cleveland Faucet Co. v. Syracuse Faucet Co., 77 Fed. 210, and Consolidated Fastener Co. v. Columbian Fastener Co., 79 Fed. 800. But in each of these cases the testimony objected to was in the record, and was passed upon by the court. I know of no precedent for the proposition that counsel may play the role of chancellor, and, upon their own judgment, close the mouths of witnesses.

In Blease v. Garlington, 92 U. S., at page 7, the supreme court of the United States said:

"The examiner before whom the witnesses are orally examined is required to note exceptions, but he cannot decide upon their validity. He must take down all the examination in writing, and send it to the court with the objections noted. So, too, when depositions are taken according to the acts of congress or otherwise, under the rules, exceptions to the testimony may be noted by the officer taking the deposition, but he is not permitted to decide upon them; and when the testimony, as reduced to writing by the examiner, or the deposition, is filed in court, further exceptions may be there taken. Thus, both the exceptions and the testimony objected to are all before the court below, and come here upon the appeal as part of the record and proceedings there."

What is said of examiners in this extract applies with much greater force to counsel for the respective parties, retained as they are for partisan services, and therefore utterly incapacitated and unfit to exercise judicial functions in the case, however capable they might be if in a situation to be entirely unprejudiced and impartial. For the reasons stated in Blease v. Garlington, courts do not suppress testimony unless it be grossly and flagrantly impertinent and scandalous. The result of suppressing is to expunge the testimony from the record, which would deprive the party affected of opportunity for relief in the appellate court. See Smith v. Newland, 40 Ill. 100; McCabe v. Hussey, 2 Dow & C. 452; Appleton v. Ecaubert, 45 Fed. 281; Adee v. Iron Works, 46 Fed. 39; and Lloyd v. Pennie, 50 Fed. 4.

I will not say that upon an appeal to a federal judge a vexatious, unreasonable, or unconscionable examination of witnesses will not be put a stop to, or that a witness may not, pleading privilege, refuse to answer, and make an appeal to a federal judge for instructions necessary; but I do say that the assumption by counsel of authority such as has been claimed and exercised in this case will not

be tolerated in this court. The motion will be granted. The entire deposition of E. M. Bentley will be stricken from the files, and further testimony for the complainant (its time for testimony in chief having expired) will be allowed only upon the condition of its first reimbursing the defendants their costs and expenses by reason of the taking of said deposition.

AMERICAN STRAWBOARD CO. v. HALDEMAN PAPER CO.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1897.)

No. 499.

1. LEASE—COVENANTS—VALIDITY.
   A covenant in a lease of a paper mill, with privilege of purchase, that the lessee will not during the term, nor for 20 years in case of purchase, make on the premises certain classes of paper, which the lessor is engaged in making elsewhere, is valid, and binds assignees, although they are not mentioned.
2. SAME—ENFORCEMENT.
   Whether, in case of purchase, such covenant, when inserted in the deed, would technically run with the land, or not, it is enforceable in equity against all owners with notice, actual or constructive.
3. VENDOR AND PURCHASER—CONTRACT—RESTRICTING USE OF PREMISES.
   An assignee electing to purchase is bound to accept a deed containing the restrictive covenant. Readiness to perform on his part is lacking, and he cannot recover for a breach of the covenant to convey, when it appears that he persisted in demanding a deed without restriction of use.
4. SAME—BREACH OF COVENANT TO CONVEY.
   Although the restrictive clause in the deed tendered by the lessor be improperly drawn, this is not a breach of the covenant to convey; and no tender of a proper deed is necessary for defense, when the demands and declarations of the lessee show that such tender would be vain.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

Action by the Haldeman Paper Company against the American Strawboard Company for damages for breach of a contract to convey a mill property. There was judgment for plaintiff, and defendant brings error.

By an indenture of lease dated June 27, 1891, the American Strawboard Company, a corporation largely engaged in the manufacture of strawboard and other wood pulp products, and owning and operating a number of strawboard mills, demised to George W. Friend, his heirs and assigns, one of its manufacturing plants known as the Rockdale Mills, for a term of three years, the consent of the lessor being necessary to any assignment of the lease. There was also a provision giving to the lessee an option of purchase to be exercised within one year from October 1, 1891, at the price of $25,000, one-fourth in cash and remainder in equal installments in one, two, and three years, with interest, the deferred payments to be secured by a mortgage and insurance on the premises. Should this option be exercised, the lessor covenanted to convey the property by "good and sufficient warranty deed." Among other covenants by the lessee there was one in these words: "Said second party further covenants and agrees with said first party, its successors and assigns, as part of the consideration of this agreement, and as an inducement to said first party to enter into this agreement, that he shall not and will not, during the term created by this lease, or any extension thereof, or in case of the purchase of said premises as above provided within the period of twenty years from date hereof (except in the capacity of officer, agent, stockholder, or employé of said first party), directly or indirectly, as employer, employé, agent, officer, stockholder, or

otherwise, manufacture on said premises, or engage in or be interested in the manufacture on said premises, of strawboard, straw lumber, sheet strawboard, rolled strawboard, wood-pulp board, pulp-lined board, straw wrapping paper; and the sum of $20,000, to be recovered by and paid to the said American Strawboard Company, its successors or assigns, is hereby fixed and agreed upon as and for liquidated damages, to the payment of which said sum of $20,000 well and truly to be made to the said American Strawboard Company, its successors or assigns, the undersigned binds himself, his heirs, executors, and administrators, firmly by this contract, in case of any violation of this paragraph of this contract, by him. It is further agreed that, in case of the violation of this paragraph of this agreement, as a further remedy said first party may, at its option, avoid this lease, and enter into possession of the demised premises, and also restrain by injunction the violation of this paragraph of this agreement."

On the 6th of July, 1892, this lease was assigned by Friend to the appellee, the Haldeman Paper Company, a corporation engaged in the manufacture of paper. This assignment was in writing, and indorsed upon the original lease, and was as follows: "Be it known that I, the undersigned, George N. Friend, have this day, for value received, sold, assigned, and transferred all my right, title, and interest of every kind and nature in and to the foregoing lease to the Haldeman Paper Company, of Lockland, Ohio and do hereby sell, assign, and transfer to said the Haldeman Paper Company all my said right, title, and interest in and to said lease, the same to have, use, and enjoy the same as I might or could do." The American Strawboard Company consented to this assignment, and granted an extension of the option of purchase in these words: "We hereby consent to the transfer of this lease and the option of purchase to the Haldeman Paper Company, of Lockland, Ohio, and agree to extend said option of purchase to January 1, 1893, granting and giving to them, the Haldeman Paper Company, and their assigns, for the consideration of $1 to us in hand paid, all the right and privileges originally given by us to George N. Friend, under this lease. In witness whereof the American Strawboard Company, by its vice president and secretary, have hereunto set their hands and seals in duplicate this 7th day of July, A. D. 1892."

On December 31, 1892, the Haldeman Paper Company exercised its option of purchase, and paid the cash installment of the purchase money, and offered to execute its notes, and secure same by mortgage and insurance when the property should be conveyed. A draft of a deed was thereupon prepared by the American Strawboard Company, and submitted to the purchaser for approval. This deed contained a covenant by the grantee with the grantor, its successors or assigns, that the premises should not be used by the grantee, its successors or assigns, for 20 years from the date of the deed in the manufacture of strawboard or any other straw products mentioned in the demise to Friend, and a condition that if this covenant was broken the deed should be null and void, and the title revert to the grantor, its successors or assigns, with a right of re-entry. After this form of deed had been submitted to the purchaser for its approval there ensued a lengthy correspondence between the parties which would but incumber this opinion to fully set out. It is sufficient to say that the position taken by the purchaser was that it was entitled to receive a clear warranty deed containing no covenant whatever restricting the use of the premises, while, on the other hand, the American Strawboard Company strenuously insisted upon a deed containing a covenant against the use of the premises for the purposes prohibited by the lease. Such a deed as the Haldeman Paper Company demanded was refused, but a deed in form such as that submitted for approval was the only deed actually tendered by the American Strawboard Company. With this correspondence all effort at an amicable understanding came to an end, and the Haldeman Paper Company commenced this action at law to recover damages for a breach of the covenant "to convey by a good and sufficient warranty deed"; the plaintiff averring that it had performed all and singular the things required of it to be done by the terms of the lease in pursuance of its option of purchase, and that the defendant had refused, though often requested, to deliver to it a good and sufficient warranty deed as provided for in said lease, and had wholly refused to perform any of the conditions and covenants of the lease touching said option of purchase and the

conveyance of said premises in fee simple to the plaintiff. Damages were laid at the sum of $50,000. There was a jury, and verdict for the plaintiff, and judgment thereon for $16,206.25.

Judson Harmon and S. S. Wheeler, for plaintiff in error.

Robert Ramsey, for defendant in error.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

At the conclusion of all the evidence the jury was instructed to find for the plaintiff, and to assess its damages upon the proofs, under the further directions of the court then given. Several requests made by the defendant below were refused, including one to return a verdict in its favor.

The error assigned upon the instruction to find for the defendant in error involves the substance of the whole case. This instruction has been defended upon two distinct grounds: First, that the covenant of the vendor to convey by warranty deed was broken by the tender to the vendee of a form of deed which enlarged the term during which a particular use was prohibited by the provision in the lease, and by the insertion of a condition terminating the estate of the grantee upon breach of that covenant, irrespective of all questions of the right of the vendor to insert therein a covenant restricting the use in the particular and for the term, and under the penalty provided in the lease and option; second, that the purchaser was entitled to demand and receive a clear warranty deed containing no restrictions upon the use of the property whatever, and that the refusal of the vendor to make and tender such a deed constituted a breach of the covenant to convey by warranty deed.

Assuming, for the present, that defendant in error, as assignee of Friend, was affected and bound by the covenant in respect to a restricted use of the premises, and that the vendor had a right to insert that covenant in its deed, it must then be admitted that the deed which the plaintiff in error proposed to execute was not in accordance with the agreement. The form of deed submitted not only enlarged the prohibition of the covenant of the lessee in respect to time, but included a condition terminating the estate of the grantee upon breach of the covenant. The prohibition of a particular use was limited by the lease, in case of a sale, to a term of 20 years from the date of the lease, and also provided that $20,000 should be paid as liquidated damages for a violation of that prohibition. It was therefore not admissible to extend the restriction to a term of 20 years from date of the deed, nor to alter the agreement as to the consequences in event the covenant was breached. But the defendant in error did not base its objection to this deed upon these matters, but distinctly took the ground, in the correspondence which ensued, that it was not obliged to accept a deed which contained any restriction whatever upon the use of the premises, and declared its purpose to refuse any deed which contained any such covenant.

The suggestion that the objection was limited to the condition terminating the estate upon a breach of the covenant finds no support. The letter of February 20, 1893, from Mr. Baird, representing the American Strawboard Company, in reply to the letter of Mr. Richardson, representing the Haldeman Paper Company, of February 17, 1893, specifically inquired whether the objection was to the "conditional clause in the deed." To this the Haldeman Company replied under date of February 22, 1893:

"You are right in your understanding that we object to the conditional clause in the deed, for the reason it is not the kind of a deed specified in the lease. All conditions, restrictions, and covenants concerning same are in the lease itself, and there is no reason why they should be put in the deed when the clause of the lease especially provides that the American Strawboard Company will convey the property with a good and sufficient warranty deed. We are unwilling to accept any other kind of a deed than a deed of general warranty, as provided for in the terms of the lease. If you will have this deed prepared and executed, and advise when you are ready, we will be prepared to meet you wherever you desire to close up this purchase. We remain," etc.

The clear meaning of this language is that the objection was not to the form in which this covenant had been inserted, or to its insertion as a condition rather than as a mere covenant, but to the inclusion of any restriction upon the use, whether by way of condition or covenant.

Several other letters subsequently passed between the parties, but this demand for a clear warranty deed, and this declaration of unwillingness to accept any deed which contained any restrictions, conditions, or covenants, was never modified.

The last communication addressed by the American Strawboard Company, relating to the form of deed, bears date April 21, 1893, and was in reply to a letter from the attorneys representing the Haldeman Paper Company, in which they had again referred to the presence of "a condition" not justified by the option. In reply that company, among other things, said:

"That deed contains a stipulation and condition that strawboard shall not be manufactured on the premises conveyed for the period of thirty years. This is in exact accordance with the option as we construe it, and as we understand it was understood both by the American Strawboard and the Haldeman Paper Company. The American Strawboard Company has prepared and executed a deed containing that condition, and has offered to deliver it to the Haldeman Paper Company. The Haldeman Paper Company has refused to accept the deed as prepared, advising me that they base their refusal upon your advice. I am ready at any time to close this matter up, if you will accept the deed as drawn, or a deed containing a stipulation that strawboard, straw lumber, sheet strawboard, roll strawboard, wood-pulp board, pulp-line board, straw wrapping paper shall not be manufactured on the premises conveyed for the period of thirty years from the date of conveyance. I am instructed to say to you that the American Strawboard Company will not make a conveyance which does not contain that stipulation. We are after the substance, and do not care as to the form in which the idea may be expressed. The American Strawboard Company would not have given an option on that plant for any such price if it had been proposed to manufacture strawboard in it. If your clients do not intend to manufacture strawboard at this plant, I cannot see why they should object to the condition being inserted as I have drawn it."

This correspondence, taken as a whole, makes it clear that the Haldeman Paper Company was firm in its determination to receive no deed which contained the stipulation of the option of purchase re-

stricting the use of the property. It is true that in the letter last referred to the term of this covenant is mentioned as "thirty years from date of conveyance," but this was a manifest mistake of the draftsman of the letter. No attention was called to this by the Haldeman Company, and their refusal to go on with the contract was not based upon any enlargement of the term of prohibition, but upon the broader ground, that the covenant of the option of purchase should have no place in the warranty deed which was demanded. In view of this uncompromising attitude, as to the legal rights of the Haldeman Company, it would have been an idle ceremony to have offered a deed embodying any restriction upon the use of the property whatever.

This closed the negotiations, and the Haldeman Company insisted below, and insists here, that, irrespective of the right of the American Strawboard Company to incorporate in the deed a covenant in the language of the option, the failure of that company to tender such a deed constituted a breach of the covenant "to convey by a good and sufficient warranty deed."

To this we cannot agree. Two things are essential to a recovery by the defendant in error in this action: First, that it shall aver and show that it had performed all it was bound to do precedent to its demand for a deed, and that it was willing and ready to enter into all such covenants and do all other things required by the contract of sale; and, second, that the defendant has failed and refused to convey by such a deed as it was obligated to execute. The correspondence which ensued after the owner had submitted a form of deed demonstrates that the purchaser was not ready and willing to accept any deed which included the covenant touching the use of the property, and advised the vendor, in advance of any tender of a proper deed, that it would accept nothing but a clear warranty deed, free from all covenants restricting the use of the premises. An action for a breach of contract will not lie when nonperformance by the defendant has been caused by the plaintiff. "It is a sound principle that one who prevents a thing being done shall not avail himself of the nonperformance he has occasioned." Dodsworth v. Iron Works, 31 U. S. App. 292–300, 13 C. C. A. 555, and 66 Fed. 486.

If the defendant in error was obliged to accept a deed restricting its use of this property as owner, to the extent provided by the option of purchase, this attitude of unwillingness to accept such a deed as the seller had a right to make saps the very foundation of its action for a breach of covenant. The plaintiff in such a suit must not only aver, but prove, a readiness and willingness to enter into all such covenants and agreements as it was bound to do by the contract. If, therefore, all consideration of the form in which a covenant restricting the use should be inserted in the deed was prevented by the unequivocal refusal to accept any deed which included such a covenant in any form, the plaintiff cannot rely upon the failure of the seller to tender a deed in proper form. A difference might apply if the vendor was endeavoring to enforce this contract without showing the tender of a proper deed. Lumber Co. v. Alley, 43 U. S. App. 169–177, 19 C. C. A. 599, and 73 Fed. 603; Smoots' Case, 15 Wall. 36.

This case must therefore turn upon the question as to whether the defendant in error was bound to accept a deed which included the covenant found in the lease to Friend, its assignor.

The covenant in question is not one in general restraint of trade, and involves no such business as directly concerns the public welfare. The restraint imposed is partial, and not general, and manifestly is no larger than necessary for the protection of the owner and lessor against a particular use of the property, for a limited time, in a business which directly competed with the business conducted by it. Every such contract must be governed by its own circumstances. If the restraint be partial and reasonable, it is a valid engagement. Navigation Co. v. Winsor, 20 Wall. 64; Gibbs v. Gas Co., 130 U. S. 396–409, 9 Sup. Ct. 553; Stines v. Dorman, 25 Ohio St. 580–583.

Waiving the question as to whether such a covenant in a deed conveying the fee would constitute a covenant technically running with the land, it is clear that this stipulation or qualification in a lease is not collateral to the land and personal to Friend. It was manifestly not intended to restrain Friend from engaging in the prohibited line of manufacture generally, for he is left free to make strawboard anywhere and everywhere, save only upon these leased premises. It is obviously a stipulation intended to prevent the leased mill from being used during the lease in a particular business. The restriction is therefore not upon Friend personally, but upon the property. Whether this qualification of the lessees' interest be regarded as inserted for the particular benefit of the lessors' reversion in that particular property, or for the benefit of other property owned by the lessors, or for the general benefit of a business conducted elsewhere, it is a covenant which concerns or relates to the land, and, as such, follows the leasehold estate into the hands of an assignee. The mode of enjoying the land is affected, and this determines the assignable character of the covenant.

That "assigns" is not used in the words of this covenant is not of moment. It is well settled by the weight of authority that a covenant by a lessee against the use of the premises in a particular way, or in a particular trade, attaches to the subject of the demise, and runs with the leasehold, whether the assignee be named or not. The covenant concerned "a thing in esse," and related to the use of the demised premises, and is therefore not collateral to the land. It did not relate to something which was not "in being at the time," and clearly falls within the first and sixth resolutions of Spencer's Case, 5 Coke, 16; Vyvyan v. Arthur, 1 Barn. & C. 410; Tatem v. Chaplin, 2 H. Bl. 133; Fleetwood v. Hull, 23 Q. B. Div. 35; Tayl. Landl. & T. §§ 260–262, 416; Norman v. Wells, 17 Wend. 136; Catt v. Tourle, 4 Ch. App. 657; Clegg v. Hands, 44 Ch. Div. 503–518; Tulk v. Moxhay, 2 Phil. Ch. 774; White v. Hotel Co. [1897] 1 Ch. 767; Railway Co. v. Bosworth, 46 Ohio St. 81, 18 N. E. 533.

The covenant in question is distinguished from Mayor, etc., of Congleton v. Pattison, 10 East, 130, where the lessees of a silk mill covenanted to employ only persons residing in the parish. That covenant was held to be personal, because it did not affect the nature, quality, or value of the thing demised or the mode of enjoying it, and could only

collaterally affect the lessors as owners of other lands in the parish by a possibility of increasing the poor's rate upon them through the bringing into the parish of laborers who might become a public charge. This was held to be so remote a benefit as to constitute the covenant one collateral to the land demised. The general principle is that if the covenant relate to the mode of enjoying the leased lands, whether for the benefit of the reversion, or of other lands of the lessor, or of a business conducted elsewhere by him, it is a covenant which, in the language of the old cases, "touches" or "concerns" the demised premises.

In Vyvyan v. Arthur, cited above, a lessee covenanted that during the term the produce of the demised land should be ground at the mill of the lessor situated on his other lands. The covenant was held to be one touching the land, the benefit of which passed to an assignee of the reversion in the leased land, who was also, as heir of the lessor, seised in fee of the lessor's mill.

In Norman v. Wells, 17 Wend. 136, there was involved a covenant in a lease of a mill site on a particular stream, whereby the lessor covenanted that he would not establish any other mill on the same stream during the term on his other lands, or let any site on the same stream as a site for a mahogany mill. This was held to be a covenant running with the land demised, and an action by an assignee of the lease for a breach of the covenant by the establishment of a rival mill on the same stream, under a lease by the lessor without any restriction, was maintained.

In Tatem v. Chaplin, 2 H. Bl. 133, a covenant in the lease that the lessee, his executors and administrators, should constantly reside on the land, and fixing a penalty of five pounds for every month he or they should not so reside on the demised premises, was held to be a covenant annexed to the leasehold estate, and appurtenant to the thing devised, and binding on the assignee of the lease, though he was not named therein.

In Fleetwood v. Hull, supra, a covenant in a lease of a public house that the lessee would manage the business of an inn or tavern in such proper manner as to afford no ground whatever whereby the license should or might be suspended or revoked, was held to be one running with the land, and enforceable by the assignee of the reversion.

Clegg v. Hands, 44 Ch. Div. 503, was an equity case. The covenant under construction was one in a lease of a public house by the lessee, his executors, administrators, and "permitted assigns," whereby the lessee covenanted with the lessors, their heirs, executors, administrators, and assigns, that he would not during the term, "directly or indirectly, buy, sell, or dispose of upon the premises any ales or stout, other than such as shall have been bona fide purchased of the said lessors," etc. The lessors afterwards sold the reversion in the public house and benefit of the covenant and also their brewery to Clegg, and retired from business. The purchaser closed the purchased brewery, and carried on business as brewer at a different brewery. The lessee did not take beer from Clegg, and suit was brought by the lessors and Clegg, as co-plaintiffs, to restrain the defendant from selling any beer other than such as should be purchased from

Clegg directly or through the original lessors. The contention was that the covenant was not one running with the land. The court held that it was not a personal, unassignable covenant, but one running with the land. Cotton, Ld. J., said:

"It is a contract relating to the way in which the business at a particular house is to be carried on. Therefore it is a contract relating to the public house, just as much, in my opinion, as a contract as to the mode in which the cultivation of a particular bit of land is to be carried on relates to the land. It effects the value of the reversion, it effects the house, and, in my opinion, it is a contract running with the land."

This case was also decided upon another ground, which we will have occasion to refer to in a subsequent part of this opinion.

White v. Hotel Co. [1897] 1 Ch. 767, is a case very much in point. White, a wine merchant, owned an hotel, which he leased for 30 years, at a rental of £1,500 per annum. The lessee covenanted with the lessor, his heirs and assigns, that he would not during the term sell on the premises any other foreign wines than should have been supplied by the lessor, his successor or assigns, and the lessor agreed that so long as this covenant should be observed he would allow the lessee an abatement of £75 from each quarter's rent. The lessor died during the term. His executors sold his wine business to A. & B., and the lessee assigned the lease to the defendants, who claimed that, so long as they continued to buy wines from the persons who bought the lessor's wine business, they were entitled to an abatement of the rent. It was held that, although the covenant to buy wines did not in terms include the assignee of the lease, the burden of it was with the tenant's interest under the lease, and that, although neither White nor his executors were in the winc business or benefited by purchases made from those who had bought that business, the assignee of the lessee, being bound by the covenant, was entitled to the benefit of the proviso for abatement of rent.

We reach the conclusion that the Haldeman Paper Company, as assignee of Friend, became bound by the covenant in the lease in the same manner and to the same extent that its assignor had been bound. When it exercised its option of purchase, the relation of lessor and lessee ceased to exist, and that of vendor and vendee was created. This brought into force all the provisions of the lease which related to the subject of a sale of the property to the lessee, and the rights and liabilities of the Haldeman Paper Company were precisely those which would have existed in respect of Friend, had he exercised his option of purchase. The lease contract contains many provisions in the nature of covenants, restrictions, and conditions which obviously have application only to the relation of lessor and lessee, and should find no place in the deed. These we have not deemed it necessary to set out, inasmuch as there has been no controversy over their application. Those paragraphs of the agreement which in any way relate to the contract of sale are found in the statement of the case. That the covenant in respect to a restricted use of the premises was intended to extend to any purchaser of the property who became such by an exercise of the option of purchase contained in the lease is most obvious. The clause giving to the lessee, "his heirs and assigns," the

option or privilege of purchasing upon the terms heretofore stated, is followed by the covenant of the lessee with the lessor, "its successors and assigns," "as part of the consideration of this agreement, and as an inducement to the said first party to enter into this agreement, that he shall not and will not, during the term created by this lease, or any extension thereof, or in case of the purchase of said premises as above provided for within the period of twenty years from date hereof, * * * directly or indirectly, as employer, employé, agent, officer, or stockholder or otherwise, manufacture on said premises, or engage in or be interested in the manufacture on said premises, of strawboard, wood-pulp board," etc.; "and the sum of $20,000, to be recovered by and paid to the said American Strawboard Company, its successors or assigns, is hereby fixed and agreed upon as and for liquidated damages, to the payment of which said sum of $20,000, well and truly to be made to the said American Strawboard Company, its successors or assigns, the undersigned binds himself, his heirs, executors, and administrators, firmly by this contract, in case of any violation of this paragraph by him." "It is further agreed that, in case of the violation of this paragraph of this agreement, as a further remedy said first party may, at its option, avoid this lease, and enter into possession of the demised premises, and also restrain by injunction the violation of this paragraph of this agreement."

If this covenant was a valid one, and was enforceable against the admitted assignee of Friend, why shall it be excluded from the deed which the lessor and vendor must deliver? The contract of sale distinctly provides for its extension to any purchaser under the option of the lease. It is therefore as much one of the terms of sale as any other of the provisions of that contract. It was one of the inducements for a sale, and distinctly constituted a part of the consideration for the property. That the Haldeman Company, as a purchaser under the terms of the option, is personally bound by this stipulation, whether it be regarded as a simple agreement concerning the use of the property or a covenant technically running with the land, is hardly debatable.

Whether it is a covenant which will pass with the land to a grantee of the Haldeman Company under a deed which does not contain it, so as to give to the American Strawboard Company, or its successors, a right of action in a court of law for a breach of the covenant by such an assignee, is another question,—one not necessary to be now decided, inasmuch as the only point involved by this writ of error is whether or not the vendor was entitled to insist upon its insertion in the deed. The doubts and difficulties which surround the enforcement of covenants of this kind arise chiefly when it is sought to maintain an action at law against or in favor of assignees, claiming through grantors under deeds which do not contain the restrictions found in the title deeds of their vendors. But here we are not called upon to determine whether the burden of this covenant will pass by operation of law to an assignee taking by deed free from such a covenant. Whether this is a covenant which will pass with the land to a grantee of the Haldeman Company or not, it is a valid and an enforceable covenant, in both law and equity, as between the American Strawboard Company

and the Haldeman Paper Company, and this alone affords a sufficient reason for its insertion in the deed as one of the terms of the agreement of purchase and sale. Why shall the purchaser be heard to object to the inclusion of this term of the agreement in the deed of conveyance? It is not inconsistent with the covenant to convey by a good and sufficient warranty deed, for the bargain includes this very restriction on the use, and the warranty will not include a qualification expressly mentioned in the deed itself.

To omit this covenant from the deed upon the theory that it is unnecessary, being already in the lease, would only throw the whole matter in doubt; doubt as to whether the lease, though recorded, is notice to one who shall buy without actual notice and upon the faith of a deed containing no such restriction, and doubt as to whether the omission of the stipulation from the deed was not according to the ultimate agreement of the parties. If this restriction be incorporated in the deed, a purchaser of any interest will be affected by constructive notice that the seller held the property under a valid agreement that it should not be used in a particular business. Under such circumstances, a court of equity, irrespective of whether the agreement was such as would technically pass with the land, would compel its observances by one who acquired the property with notice, actual or constructive. It is now well settled that one who purchases property with notice that the seller held the property under a valid agreement with a third person, whereby he was prohibited from using the property in a particular way, will, in a court of equity, he held to hold the property subject to the same restrictions which bound the seller. In the now leading case of De Mattos v. Gibson, 4 De Gex & J. 276-282, this equitable principle was most admirably stated by Lord Justice Knight Bruce, who said:

"Reason and justice seem to prescribe that, at least as a general rule, when a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for a valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."

This doctrine was applied in Tulk v. Moxhay, 2 Phil. Ch. 774, in a case where a covenant was contained in a deed which was assumed to be one which did not run with the land. The land affected by the covenant had passed to a grantee who bought with notice of the covenant in the deed of his grantor, but held under a deed which made no mention thereof. Lord Chancellor Cottenham, among other things, said:

"It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased. Of course, the price would be affected by the covenant. and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assigns being allowed to escape from the liability which he had himself undertaken. That the question does not depend upon whether the covenant runs with the land is evident from this: that if there was a mere agreement, and no

covenant, this court would enforce it against a party purchasing with notice of it; for, if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased it."

Concerning Keppell v. Bailey, 2 Mylne & K. 547, the lord chancellor said that Lord Brougham "could never have meant to lay down that this court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that be the result of his observation, I can only say that I cannot coincide with it." Wilson v. Hart, 1 Ch. App. 463, involved a covenant by the owner of a freehold house with the plaintiff, who was a previous owner, that the building should not be used as a beer shop. The house was afterwards let to the defendant, who had no express notice of this restriction. The question as to whether the covenant ran with the land was reserved, the court holding that, if it did not, the defendant was bound by it in equity, as a purchaser who does not inquire into his vendor's title is affected with notice of what appears upon it, and that this applies as well to a yearly tenant as to the purchaser of a greater interest. Luker v. Dennis, 7 Ch. Div. 227, was a case of a brewer's covenants. The lessee of a public house covenanted with the owner and lessor, who was a brewer, that he and his executors and assigns would purchase from the lessor all the beer consumed at that public house and also at another of which the lessee had a lease under another landlord. It was held that the covenant, whether one running with the lease or not, at law, was binding on an assignee of the second public house, who had notice of the covenant. Keppell v. Bailey, 2 Mylne & K. 517, so far as it held that a restrictive covenant as to the use of land which does not run with the land, at law, is not binding in equity upon an assignee with notice, was declared to have been overruled by later cases. Catt v. Tourle, 4 Ch. App. 654, already referred to upon another point, was this: The plaintiff, a brewer, sold land to the trustees of a building society, who covenanted with the vendor that he, his heirs and assigns, should have the exclusive right of supplying beer to any public house erected on the land. The defendant, who was a member of the society, and a brewer, acquired a portion of the land with notice of the covenant, and erected on it a public house, which he supplied with his own beer. The covenant was held valid, and the defendant restrained from acting in contravention of it, Selwyn, Ld. J., among other things, saying that "it was needless to consider the question which has been so much discussed, whether covenants of this nature run with the land; * * * that the defendant, having constructive notice of it, was bound by it in equity." Keppell v. Bailey, 2 Mylne & K. 517, so much relied upon in the argument of counsel for the defendant in error, is, by the later opinions we have cited, completely overthrown, so far as Lord Brougham decided that a court of equity would not enforce a covenant which did not run with the land, at law.

Stines v. Dorman, 25 Ohio St. 580, is an instructive case, and much in point, inasmuch as the property herein involved is situated in Ohio. The facts of that case were these: Dorman purchased from one Blakly an hotel known as the "Tremont House," and in part payment

therefor Dorman sold to Blakly the Commercial House, situated in the same town, and theretofore used as an hotel. The deed of Dorman to Blakly contained a covenant that the property bought by Blakly should not be used by the grantee, his representatives or assigns, as an hotel or public boarding house so long as the Tremont House should be used for such purposes. Blakly sold to Blood, inserting a like covenant, and Blood conveyed to Stines, the deed omitting this restriction, and the latter opened the house as a public hotel. Dorman sought by injunction to restrain Stines from so using the property. The court said:

> "It is unnecessary to determine whether the stipulation contained in the deed in question is to be regarded technically as a covenant running with the land. However this may be, it has, in equity, the effect of such covenant as against the grantee and his assigns. The stipulation relates to the mode in which the premises conveyed are to be enjoyed, and qualifies the estate. This limitation on the use enters into the consideration of the conveyance; and, if not unlawful, it ought, upon plain principles of justice, to be enforced."

This recognition and enforcement in equity of agreements or covenants by which a lessee or owner of lands is restricted in their use, in the interest of other lands owned by the covenantor, or of a business conducted by such covenantor, has found general recognition in courts of equity of this country, and the doctrines applicable to such covenants, easements, or servitudes is thoroughly established in accord with that of the English courts. Jones, Real Prop. § 780; Barrow v. Richard, 8 Paige, 351; Trustees v. Lynch, 70 N. Y. 440; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335; Whitney v. Railway, 11 Gray, 359; Morris v. Manufacturing Co., 83 Ala. 565, 3 South. 689; Coughlin v. Barker, 46 Mo. App. 54; St. Andrews' Lutheran Church's Appeal, 67 Pa. St. 512.

The conclusion we reach is that the vendor had a right to insert in the conveyance the stipulation restricting the uses and enjoyment of this property. It was one of the considerations leading to the sale, and an express term of the agreement. Being valid, irrespective of its technical character, as a covenant running with the land, the purchaser has no right to stand upon the demand for a deed excluding it. The parties to a contract of purchase and sale of land are entitled to have carried into the deed every stipulation which affects the rights and obligations of either under the agreement of sale. In re Birmingham, etc., Land Co. [1893] 1 Ch. 352. This manifestly sound principle is not affected by the question as to whether the stipulations when inserted will constitute a technical covenant running with the land. It was error to instruct the jury to find for the defendant in error. It was also error to refuse the instruction asked to find for the plaintiff in error. The evidence in respect to the ground upon which defendant in error refused to accept the deed tendered, and in respect to its demand for a deed free from all covenants and restrictions touching the enjoyment of the property, was such as that the jury could not have reasonably found that the plaintiff in error had so breached its covenant to convey as that this action would lie. Under such a state of the evidence it was the duty of the court to have instructed the jury to find for the plaintiff in error. The judgment will be reversed, with directions to grant a new trial.

EQUITABLE LIFE ASSUR. SOC. v. McELROY et al.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1897.)

No. 787.

1. LIFE INSURANCE—REPRESENTATIONS—CONCEALMENT.
   The intentional omission, by an applicant for life insurance, to disclose to the company every fact material to the risk (especially the fact of a sudden and dangerous illness) which comes to his knowledge at any time before the contract is finally closed, even though subsequent to his original representations and medical examination, is a fraud which vitiates the contract.

2. SAME—ORAL CONTRACT OF INSURANCE—PRESUMPTIONS.
   In view of the custom of life insurance companies to contract by written policies, there is a strong presumption, where no policy has been issued and no premium paid, that there was no contract, and no intention to contract, otherwise than by a policy made and delivered upon the simultaneous payment of a premium. Caldwell, Circuit Judge, dissents.

3. SAME—PREPAYMENT OF PREMIUMS—WAIVER.
   Unless a life insurance company does or omits some act whereby the assured has just ground to believe, does believe, and acts on the belief, that the corporation will make, continue, or restore a contract without the payment of a premium, there is no estoppel and no waiver.

4. SAME—LAPSE OF POLICY—REVIVAL—NEW CONTRACT.
   Where a life insurance policy has lapsed and become void, it cannot be revived without a new contract between the parties.

5. TRIAL—DIRECTING VERDICT.
   It is the duty of the trial court to direct a verdict in favor of the party who is clearly entitled to it, where the evidence is such that a verdict for his opponent must be set aside by the court.

6. LIFE INSURANCE—CHANGE OF PARTIES.
   The parties to a contract of life insurance are as important as the subject-matter, and parties cannot be imported or substituted upon one side without the consent of those on the other.

7. SAME—TENDER OF POLICY—CONDITIONAL ACCEPTANCE.
   Where a life insurance policy is tendered, an acceptance on condition that the beneficiaries be changed does not, until approved by the company, close the contract, even though the assured could have accepted it as it stood, and then assigned it to the proposed beneficiaries.

8. TRIAL—INSTRUCTIONS—ASSUMED STATE OF FACTS.
   It is error to charge the jury upon an assumed state of facts, to which no evidence applies.

9. CONTRACTS—PROPOSAL AND ACCEPTANCE.
   Mere delay in accepting or rejecting a proposal does not make a contract.

10. SAME.
   The acceptance of an offer, if not communicated to the proposer, does not make a contract.

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

L. C. Krauthoff (J. V. C. Karnes and Daniel B. Holmes on brief), for plaintiff in error.

Gardiner Lathrop (H. M. Beardsley on brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This was an action upon a policy of insurance upon the life of James E. McElroy, issued by the Equitable Life Assurance Society of the United States, the plaintiff in error, on June 29, 1894, to Della Irene McElroy, James Edward McElroy, and Myrtle Beckham McElroy, the defendants in error. The insurance company answered to the complaint of the defendants in error upon that policy that on June 29, 1894, negotiations were pending between McElroy and the company relative to the insurance of his life, but no contract had been made, and no premium had been paid; that on June 26, 1894, he was taken seriously ill with appendicitis; that on June 28, 1894, expert physicians and surgeons decided that a dangerous surgical operation offered the only chance of saving his life; that he was taken to a hospital, and such an operation was performed upon him on that day; that on June 29, 1894, Helen C. Doty, the private secretary of McElroy, who knew these facts, of which the company was ignorant, appeared in its office in New York, concealed the whereabouts of McElroy, his illness, and the operation that had been performed upon him, represented that he was in good health, but was absent in Boston, and had left funds with her to pay the premium for, and to consummate the contract of, insurance, paid a part of the premium on that day and the remainder on the next day, and thereby induced the company to issue the policy in suit, which it would not have done if it had been informed of the facts. McElroy died about 4 o'clock on the morning of June 30, 1894, from the effects of the disease and the operation. The case was tried to a jury, and there were a verdict and judgment against the company for the full amount of the policy. The writ of error challenges this judgment, and the alleged errors on which counsel place their chief reliance are the refusal of the court to instruct the jury to return a verdict in favor of the assurance society, and some portions of its charge relative to the legal effect of the facts established by the proof. A statement of these facts is essential to an understanding of the questions presented by the assignment of these errors.

The facts which stood admitted or established by uncontradicted testimony or by the evidence introduced by the defendants in error at the close of the trial were these: On December 30, 1892, the assurance society issued its policy No. 627,641 on the life of McElroy, for $100,000, payable to James E. McElroy, his executors, administrators, or assigns, in 30 equal annual installments after his death, in consideration of the annual payment, in advance of a premium of $1,669 on or before the 30th day of December in every year during the continuance of the contract. This policy was a tontine installment policy, and provided that at the end of the tontine period, which was on December 30, 1912, the society would commute or discount and pay to McElroy, if living, any installment at the rate of 3½ per cent. compound interest per annum, and would give him the option to receive the installments as they fell due, or in a single payment at the rate of discount stated. The policy gave the same option to his executors, administrators, or assigns if he was dead when the first installment became due. McElroy failed to pay the second premium on this policy, which fell due on December 30, 1893.

George E. Tarbell was third vice president of the society, and an intimate friend of McElroy. At the latter's request, he extended the time for the payment of this premium until January 30, 1894, but McElroy did not pay it, and the policy lapsed and was forfeited on that day. McElroy applied to Tarbell for a further extension, but was refused, because the rules of the society prohibited an extension of more than one month. During the spring of 1894, Tarbell repeatedly solicited McElroy to have his policy reinstated, and McElroy often urged Tarbell to become a director in a telephone corporation which he was promoting, but neither granted the request of the other. On May 8, 1894, Tarbell again urged McElroy to have his policy reinstated, and he replied that he did not know whether he should carry any insurance or not, but that, if he did, it would not be more than $50,000. Tarbell told him that he would be compelled to submit to another medical examination before his policy could be reinstated in any event, urged him to return his old policy and to take the examination, and assured him that taking the examination would put him under no obligation to take the insurance. On May 10th he was examined and certified by the surgeon of the society for restoration. On June 13th or 14th he brought his old policy to Tarbell, and said he had not decided how much insurance he would take. Tarbell told him that, if he would make up his mind and give him his check, he could put his insurance into effect. He declined to do so, and said he was not ready to determine that matter definitely, but that, if he took any insurance, he would probably take $50,000; and Tarbell told him he would have the policy reduced to $50,000, and take it down to him, and he replied that he would discuss the matter then. On June 14, 1894, the chief medical director of the society approved the report of McElroy's examination on May 10, 1894; and, by direction of Tarbell, a new policy on the life of McElroy, for $50,000, was written. This policy bore the same number, had the same tontine period, and was payable to the same parties, as the old policy; but it provided for the payment by the society of only $50,000, in installments one-half as large as those in the old policy, in "consideration of the payment in advance of $434, and of the semiannual payment of $434 * * * on or before the 30th day of June and December in every year during the continuance of this contract." Tarbell then wrote McElroy: "I have asked Miss Amendt to hand you policy No. 627,641, which, as per your request, we have reduced to $50,000, with the premium payable semiannually. Kindly give her your check for the same, $434, and she will have a renewal receipt sent to you;" gave this letter and the policy to his private secretary, Miss Amendt, and instructed her to hand the letter to McElroy, and, if he paid the premium, to deliver the policy to him. On June 15, 1894, she took them to him, delivered the letter, and told him what her instructions were. He read the letter, and said, "I don't want to do anything about that policy until I can see Mr. Tarbell." She urged him to pay the premium and take it. Then he read the policy, and said he wanted it made out differently; that he wanted $30,000 payable to his wife, and $10,000 to each of his children. Miss Amendt had no authority to change the policy in this way, and she

took memoranda of the names of the new parties, and told him she would take the policy back, and see if she could have it written as he desired, and that she would then bring it back, and deliver it to him, so that he could have the insurance. He replied, "No," never mind about that, that he wanted to see Tarbell. She took the policy and her memoranda back to the office, and placed them in her desk. Tarbell was then out of the city. When he returned, a few days later, she related the conversation she had with McElroy to him; but nothing further was done in the matter until after Miss Doty, McElroy's private secretary, appeared, on June 28, 1894, told them that McElroy was away, and had left funds with her to pay the premium, and asked for the policy. On June 26, 1894, McElroy was taken seriously sick with appendicitis. On the morning of June 28, 1894, the surgeons decided that his situation was grave, and that an operation offered the only chance for his recovery. He then called Miss Doty to his room, signed a number of blank checks, and told her to get the policy in suit, and pay the premium on it, but not to tell the officers of the society that he was sick. He was then taken to the hospital; the operation was performed; and he died from its effects, about 4 o'clock in the morning of June 30, 1894. Immediately after her interview with him, Miss Doty went to the office of the society, where she found Tarbell and Miss Amendt. She knew of the illness of McElroy, and that he had been taken to the hospital for the operation. She told them that McElroy was away, and had left instructions with her to pay the premium and get the policy, and asked if it was ready. Miss Amendt replied that it had not been touched, because she had not been feeling well, and she had let it go by. She said she was in a hurry for the policy, and asked if she could have it that day. She was told that it would be written as soon as possible, but that it would probably not be ready until the next day. Thereupon Tarbell directed the policy to be changed so that the beneficiaries should be Della Irene McElroy, Myrtle Beckham McElroy, and James Edward McElroy, Jr., instead of James E. McElroy, his executors, administrators, and assigns; and this was done. The next morning, June 29th, Miss Amendt telephoned to Miss Doty that the policy was ready, and Tarbell would bring it over to McElroy. She replied that McElroy was still away. Thereupon Miss Amendt took the policy to her, received McElroy's check for $434, told Miss Doty that there was $13.02 interest owing on this installment, and that another installment would be due the next day. She gave Miss Doty the receipt of the society for "$434, being the semiannual premium due on the 30th day of December, 1893, upon policy No. 627,641, on life of Jas. E. McElroy." On June 30, 1894, after McElroy's death, Miss Doty went to the office of the society, told Tarbell that McElroy was in Boston, that she did not know when he would return, but that he might go to Chicago before he came back, paid the $13.02 interest on the December installment, and the $434 which fell due on that day, and obtained the receipts of the society for "$13.02, interest on premium due Dec. 30, 1893," and for "$434.00, being the semiannual premium due the 30th day of June, 1894, upon policy No. 627,641, on the life of Jas. McEl-

roy." Miss Doty did not know that McElroy was dead when she had this interview. On July 2, 1894, two attorneys of the defendants in error visited the offices of the society, and interviewed Tarbell and Miss Amendt. They were permitted to testify, for the purpose of impeaching those witnesses, that Tarbell said at that interview that he reduced the policy from $100,000 to $50,000, and told Miss Amendt to take it down and deliver it to McElroy, and that Miss Amendt said that, when she presented the policy to McElroy, he said it was all right, except that he wanted the beneficiaries changed.

Upon this state of facts, the court refused to instruct the jury to return a verdict for the plaintiff in error, but charged them in effect (1) that if there was no completed contract to insure the life of McElroy before he was dangerously ill, on June 28, 1894, it was the duty of Miss Doty to inform the society of his illness, and if, by her conduct or words, she gave Tarbell to understand that McElroy was in good health, and in that belief he sent the policy to her, when he would not have done so if he had known the facts, the policy was fraudulently obtained, and there could be no recovery upon it; but that (2) if the society and McElroy had closed an agreement of insurance of the life of the latter before June 28th, and the delivery of the policy and payment of the premium were only the performance of that contract, the defendants in error might recover, notwithstanding the concealment of the fatal illness of McElroy.

There can be no doubt of the soundness of the first of these propositions, nor of the invalidity of the policy if the contract of insurance was not complete and binding upon both parties to it before Miss Doty appeared on the scene, on June 28, 1894. When she called for the policy, she knew that McElroy was dangerously ill, and had been sent to a hospital to undergo a serious operation. She had been instructed not to tell the officers of the society that he was sick, but she testified that she should not have done so if she had received no instructions. She therefore intended to conceal that fact from them in any event, because she knew, as every one knows, that the company would never have insured that life if it had known how plainly its end was approaching. She told Tarbell and Miss Amendt that McElroy was away; that he had left funds to pay the premium, and instructed her to do so and get the policy. The statement was one of those half truths that was far more dangerous and misleading than a downright falsehood, and it perfectly accomplished its purpose of deceit. She testified that she meant, not that McElroy was away from the city, but that he was away from his office. Why did she not say so? How different was the effect of the statement she made from that of the whole truth! How different from the effect of a plain statement of the facts that he was away from his office, at the hospital, where he was undergoing a critical surgical operation, to which he was compelled to submit by the virulence of an attack of appendicitis under which he was suffering, and that, in contemplation of that operation, he had called her to his bedside, signed blank checks, and instructed her not to tell the officers of this society that he was sick, but to pay the premium, and get a policy on his life! The sub-

ject-matter of this contract was the life of James E. McElroy. When these negotiations commenced, in May, 1894, he was 36 years old. His examination showed his life to be a first-class risk. The probabilities were that he would live more than 20 years, and that the society would receive for its $50,000 its semiannual premiums for 19 years. A sudden and fatal illness attacked him, and the probable length of his life was reduced to a few days, so that the probability was that the society would receive but $881.02 for its $50,000. The statements of Miss Doty that he was away, that he was in Boston, and that he would probably return by Chicago, her omission to tell that he was dangerously ill, and that he had signed blank checks in contemplation of a serious operation, that he was undergoing that operation, and that he had instructed her not to tell the officers of this society that he was sick, but to pay the premiums and get the policy, were respectively made and omitted for the purpose and with the intent of inducing this society to make this contract to pay $50,000 for $881.02, in ignorance of the facts which made that result almost inevitable, and on the faith of the medical examination of May 10, 1894, and the previous good health of McElroy. They were intentionally made and omitted to cheat this society into making this contract and issuing its policy, and they did so; but they will receive no reward at the hands of any court.

Fraud vitiates all contracts. But misrepresentations or concealments of the facts relative to the health of those whose lives are insured are peculiarly fatal to contracts of life insurance, because the companies necessarily rely upon the statements and acts of the assured in making their contracts. Companies cannot know and surgeons cannot discover by the appearance and examination of subjects many insidious and often fatal diseases, the symptoms of which are felt by their victims. Hence the companies require them to answer many questions as to their habits, their health, their symptoms, the longevity of their ancestors, and the causes of their decease. When these have been answered, and the examining surgeon has certified to the good health of the subject and the character of the risk upon his life, these answers and this certificate become the basis of the contract. In other words, the honesty, good faith, and truthfulness of the person whose life is insured form the actual foundation of the agreement of life insurance. It is for this reason that contracts of life insurance are said to be uberrimæ fidei, and any material misrepresentation or concealment is fatal to them. When the representation of good health and the certificate of the surgeon have been made, and the contract is not immediately closed, but negotiations for it continue, and proposals and counter proposals are made, but for some time none are accepted, the representation and certificate continue and condition all the proposals and the ultimate contract, when it is closed. They are all made in reliance upon the continued truth of the representation and certificate, and in the belief that there has been no material change in the health or the probability of the continued life of the subject. The nature of this contract, the insurance of a man's life, the perfect familiarity of the man himself with

the condition of its subject-matter, his own life, the ignorance of the insurance company concerning it, and its necessary reliance in making the contract upon his good faith, honesty, and truthfulness, impose upon him the duty of disclosing to the company every fact material to the risk which comes to his knowledge at any time before the contract is finally closed. An intentional omission to discharge that duty perpetrates a plain fraud upon the company, which necessarily avoids the contract. The policy in this case cannot be sustained in the face of the intentional concealment by McElroy and his agent, Miss Doty, of the radical change in the condition of its subject-matter after the negotiations were commenced, and before they were closed,—from a condition of robust health and probable long life, upon which they were based and were proceeding, to one of dangerous illness, of a critical surgical operation, and of imminent death. The intentional concealment of this change, and the misleading representation of continued good health and actual business life, inflicted a flagrant fraud upon this company, which is fatal to the contract of insurance, unless it was completed before McElroy was attacked with appendicitis. Insurance Co. v. Wolff, 95 U. S. 326, 333; Insurance Co. v. Ewing, 92 U. S. 377, 380; Loewer v. Harris, 6 C. C. A. 394, 57 Fed. 368, 373; Dungan v. Insurance Co., 46 Md. 469, 498; Marshall v. Insurance Co., 58 N. Y. Super. Ct. 406, 11 N. Y. Supp. 700; Grand Lodge v. Cressey, 47 Ill. App. 616; Carter v. Boehm, 3 Burrows, 1905; Morrison v. Muspratt, 4 Bing. 60, 62; Huguenin v. Rayley, 6 Taunt. 186; Buny. Ins. (3d Ed.) 37, 38, 51, 52; Insurance Co. v. Lawrence, 2 Pet. 25, 49; McLanahan v. Insurance Co., 1 Pet. 170, 185; Nippolt v. Insurance Co., 57 Minn. 275, 278, 59 N. W. 191; Bates v. Hewitt, L. R. 2 Q. B. 595, 604; Tate v. Hyslop, 15 Q. B. Div. 368, 377; Blackburn v. Vigors, 12 App. Cas. 531. No valid contract of insurance, therefore, was made or closed after June 27, 1894, and the only question at the close of the trial was whether or not such a contract had been made before that day.

The society insisted, and still insists, that there was no evidence of such an agreement in the case; but the court instructed the jury, in effect, that they might conclude that there was such a contract if they found from the evidence (1) that prior to June 15, 1894, Tarbell and McElroy had agreed that the old policy for $100,000 should be reduced to $50,000, and revived for that amount; (2) that the difference between the contract to pay the $50,000 to Della Irene McElroy, Myrtle Beckham McElroy, and James Edward McElroy, Jr., which McElroy demanded on June 15, 1894, and the agreement to pay the $50,000 to James E. McElroy, his executors, administrators, and assigns, which he refused to take and pay the premium for on that day, "was a matter of no substance to the insurance company"; (3) that Tarbell, when this proposed change in the contract was reported to him, assented to it by some overt act; and (4) that "the company would have so complied therewith prior to the last sickness of McElroy but for the inability of the clerk or secretary or other clerk of the company or some other business cause in the office obstructing to do so timely." In support of this charge it is insisted that con-

tracts of insurance may be made orally as well as in writing; that they may be based upon mutual promises on the one part to insure, and on the other to pay for the insurance; that the time for the payment of the premium may be extended or deferred by agreement; and that its payment at the fixed or usual time may be waived. But the question in this case is not so much what may be done as what was done. There is no doubt that an oral contract of insurance may be made, but the custom of life insurance companies is to contract by written policies, and, until such a policy is delivered, the presumption is that there were negotiations, but no contract, and no intention to contract, before the delivery of the policy.

A company may make an oral contract of insurance without the payment of the premium, in consideration of the promise of the assured to pay it; but, in order to constitute such a contract, the company must agree to accept the promise of the assured, instead of its performance, as the consideration for the insurance. In the conduct of the business of insurance against fire in our cities such contracts are not uncommon. Indeed, it is quite customary for fire insurance companies to make their contracts, and to extend a short term of credit to the assured for their premiums. But no such custom exists in the conduct of the business of life insurance. The almost invariable custom there is for the companies to make no contract, and to incur no liability to insure the life of any man, until a premium has been paid. Accordingly, where no policy of life insurance has been issued, and no premium has been paid, there is a strong presumption that there was no contract, and no intention to contract, otherwise than by a policy made and delivered upon the simultaneous payment of a premium. Kendall's Adm'r v. Insurance Co., 10 U. S. App. 256, 2 C. C. A. 459, and 51 Fed. 689, 691; Heiman v. Insurance Co., 17 Minn. 153, 157 (Gil. 127); Markey v. Insurance Co., 103 Mass. 78; Hoyt v. Insurance Co., 98 Mass. 539, 543; Markey v. Insurance Co., 118 Mass. 178, 194; 1 May, Ins. (3d Ed.) § 56. A company may waive the payment of a premium when it is due, but the basis of waiver is estoppel; and unless the company does or omits some act whereby the assured has just ground to believe, does believe, and acts on the belief, that the corporation will make, continue, or restore a contract without the payment of a premium, there is no estoppel, and there can be no waiver. Unsell v. Insurance Co., 32 Fed. 443, 445; Thompson v. Insurance Co., 104 U. S. 252, 261; Equitable Life Assur. Soc. v. Hietts' Adm'r, 19 U. S. App. 173, 185, 7 C. C. A. 359, and 58 Fed. 541; Beach, Ins. §§ 757, 758.

We come, then, to the consideration of the evidence of this oral contract, under the general presumption, based on the custom of the business of life insurance, that there was no contract of insurance, because there was no policy and no payment of premium. The circumstances surrounding this particular case raise the same presumption. If a contract of life insurance binds the insured to pay the stipulated premium, as counsel for the defendants in error contend, McElroy had once agreed to pay this society $1,669 annually for 20 years. But he had broken his contract. He had made default in his

second payment. The society had extended the time for its payment 30 days, but his default continued. He begged for a further extension, but the society refused to give it, and the policy for $100,000 lapsed on January 30, 1894. If the plaintiff in error was willing to promise to insure McElroy for his promise to pay premiums, here was its opportunity. It declined it, and it is almost incredible that after this refusal it would make a contract to insure his life for $50,000 in consideration of the bare promise of one who had already made default in his obligations to pay the new premiums at some indefinite time in the future. Thus, the general presumption that there was no oral contract is seconded by a strong presumption to the same effect from the circumstances surrounding the case. The defendants in error were called upon to produce clear and convincing proof to overcome these presumptions.

Much stress is laid in the argument upon the fact that the policy in suit was called by the witnesses, and is, in effect, the old policy for $100,000 reduced 50 per cent., and restored with a change of beneficiaries and of amounts and times of payment of the installments of premium. But the fact remains that it evidences a new contract of insurance, which did not exist between January 30, 1894, and May 8, 1894, and which could not be brought into existence without a new agreement of the parties. The question here is whether or not there is any evidence that such an agreement was made before June 28, 1894, and it is immaterial to that issue whether it was to be evidenced by a new policy or a restored policy. A new contract was essential to the insurance of the life of McElroy by either method, and we have searched this record in vain to discover some evidence that these parties made or intended to make such a contract without a delivery of a policy and the simultaneous payment of the premium. On the other hand, the contract relations between McElroy and the society ceased on January 30, 1894. Tarbell repeatedly solicited him to restore the old policy, and he repeatedly declined. He finally induced him to return his old policy, and to submit to a medical examination, by the assurance that taking the examination would put him under no obligation to take any insurance. On June 13 or 14, 1894, when he returned his old policy, Tarbell urged him to give his check then for the first premium on the new policy, and let him put his insurance into effect; but he refused to do so, and declared that he was not ready to determine the matter definitely; and when Tarbell told him he would have the old policy reduced to $50,000, and bring it down to him, he replied that he would discuss the matter then. The new policy, when written, recited that it was made in consideration "of the payment in advance of $434, and of the semiannual payment of $434 * * * on or before the 30th day of June and December in every year during the continuance of the contract." Tarbell directed Miss Amendt to deliver this policy only upon payment of the $434 in advance. She told McElroy she was so instructed when she presented the policy and Tarbell's letter to him on June 15th, and in that letter Tarbell wrote him, "Kindly give her your check for the same, $434, and she will have a renewal receipt sent to

you." McElroy rejected the policy, refused to pay the premium, and declared that he wanted the beneficiaries changed from himself, his executors, administrators, and assigns, to the defendants in error. Miss Amendt took the policy back to the society, to see if she could have this change made, and there the negotiations rested until Miss Doty appeared, on June 28th, with her story of McElroy's absence and her request for the policy. This evidence is undisputed, and it seems to us to show that there was no contract to insure, and no intention to make any such contract until the premium was paid. The parties themselves were evidently of this opinion at the time. McElroy thought so, or he would not have told Miss Doty to conceal his illness, pay the premium, and get the policy on June 28th. Miss Doty thought so, or she would not have concealed his sickness, and declared that he was away, that he was in Boston, and would probably return by Chicago, while she was procuring the policy and paying the premiums. And Tarbell and Miss Amendt thought so, or they would not have made the simultaneous receipt of the first installment of the premium a condition precedent to the delivery of each of the policies. The result is that the general presumption based on the custom of the business of life insurance, the presumption from the circumstances of this particular case, the terms of the policy tendered, the construction placed upon the transaction by the parties to it at the time, and the undisputed evidence, all tend to show that there was no contract to insure the life of McElroy, and no intention to make such a contract, before the premium was paid and a policy was delivered, on June 29, 1894, and there is no evidence to the contrary.

Nor is there any evidence of any waiver in this case. The basis of waiver, as we have said, is estoppel or acts from which the contracting party may legitimately infer a waiver. But the society did nothing and said nothing whereby McElroy had any ground to believe, and it did nothing that induced him to believe, that his life was or would be insured without the simultaneous payment of a premium and the delivery of a policy. On the other hand, it forfeited his former policy on account of his failure to pay the premium. It requested him to pay the first premium on the new policy on June 13th or 14th, when he handed back his old policy, and notified him that this payment was necessary to enable Tarbell to put his insurance into effect. On June 15th it declared to him, by the recital in the policy tendered, by letter, and by the statement of Miss Amendt, that the payment of the premium was a condition precedent to the delivery of the policy and the closing of the contract. Look at the case in any aspect, and there is no evidence in it which warrants a finding that there was before June 29, 1894, any contract between these parties or any waiver by the plaintiff in error of its right to refuse to make such a contract; and the court should have instructed the jury to return a verdict in favor of the society. It is the duty of the trial court to direct a verdict in favor of the party who is clearly entitled to it, where the evidence is such that a verdict for his opponent must be set aside by the court. Railway Co. v. Davis, 10 U. S. App. 422, 3 C. C. A. 429, and 53 Fed. 61; Gowen v. Harley, 12 U. S. App. 574,

585, 6 C. C. A. 190, 197. and 56 Fed. 973, 980; Railway Co. v. Moseley, 12 U. S. App. 601, 604, 6 C. C. A. 641, 643, and 57 Fed. 921, 922; Reynolds v. Railway Co., 32 U. S. App. 577, 16 C. C. A. 435, 437, 438, and 69 Fed. 808, 810; Motey v. Granite Co., 36 U. S. App. 682, 20 C. C. A. 366, and 74 Fed. 155, 157.

Moreover, we are not prepared to concede the proposition contained in the charge of the court below that it was the province of the jury to hold this society bound by the contract with Della Irene McElroy, Myrtle Beckham McElroy, and James Edward McElroy, Jr., if they were of the opinion that the difference between that contract and its proposed agreement with "McElroy, his executors, administrators, and assigns," which McElroy rejected, "was of no substance to the company." The subject-matter of a policy of life insurance is the life insured. The parties to it are the insurance company, on the one hand, and the beneficiaries, on the other. The parties to a contract are as important as the subject-matter, and parties cannot be imported or substituted upon one side of a contract without the consent of those on the other. Bank v. Hall, 101 U. S. 43, 51; Ferdon v. Canfield, 104 N. Y. 139, 142, 10 N. E. 146; Thomas v. Thomas, 60 Hun, 382, 383, 15 N. Y. Supp. 15; McElwee v. Insurance Co., 47 Fed. 798. The question at issue was not what contracts, other than that it offered, the society might have made without more damage to itself, but what contract it in fact made. It offered to make a contract with McElroy, his executors, administrators, and assigns, to insure his life on certain conditions. It is true that McElroy might have accepted that contract, and then have assigned it to the defendants in error; but he did not, and the proposition cannot be entertained for a moment that a court or a jury may bind the proposer of a rejected contract to an agreement of the same terms with any parties to whom the rejected contract might have been assigned, if, in their opinion, the difference between the agreements is of no substance to the proposer. Courts and juries cannot make contracts for the litigants before them. Every party has the right to make or to refuse to make the contracts offered to him, and the exercise of that right is not limited by the soundness of the reasons which induce him to act. If he proposes an agreement, and it is rejected, and a modified contract is offered to him, he has the absolute right to accept or reject the counter proposition, either with or without reason, and whether the difference between the two propositions seems to a jury to be material or immaterial. He has the right to determine that question for himself. The rejection of his first proposition leaves him under no obligation to make any contract. It leaves him free to refuse to make even the original contract which he offered, and free to refuse to make every other contract proposed to him. These propositions are fundamental in the law of contracts; and it follows that when McElroy refused to pay the premium on and rejected the policy tendered to him by the plaintiff in error on June 15, 1894, and demanded a change in the beneficiaries, he left the society entirely free to make or to refuse to make any contract relative to his life, whether the difference between the two proposed contracts ap-

peared to the jury to be of substance or of shadow. No one but the society itself could so determine and act upon that question as to bind it by an agreement. Eliason v. Henshaw, 4 Wheat, 225, 229, 230; Carr v. Duval, 14 Pet. 77, 82; Kleinhans v. Jones, 15 C. C. A. 644, 68 Fed. 742, 749.

Nor can we sanction the instruction that if the jury found that after Miss Amendt communicated to Tarbell the fact that McElroy refused to take the policy tendered to him on June 15th and wanted the beneficiaries changed, and before June 28, 1894, he assented to the change by some overt act, and the company would have complied with McElroy's wishes prior to the last sickness of McElroy but for the sickness or inability of some clerk or servant or some other business cause, then they might find the existence of the contract before the illness of McElroy. We have searched this record in vain for the evidence of any overt act of Tarbell which signified his assent to the new proposal of McElroy before Miss Doty came, on June 28th, to ask for the policy. It is error to charge the jury upon an assumed state of facts to which no evidence applies, because it withdraws their attention from the real issues on trial, and tends to fix it upon issues that are not presented by the case. Insurance Co. v. Stevens, 36 U. S. App. 401, 18 C. C. A. 107, and 71 Fed. 258; Railroad Co. v. Houston, 95 U. S. 703; Railroad Co. v. Blessing, 14 C. C. A. 394, 67 Fed. 277, 281; Railway Co. v. Spencer, 36 U. S. App. 229, 18 C. C. A. 114, 115, and 71 Fed. 93, 94. Moreover, delay in rejecting or accepting a proposal does not make a contract. No acceptance of McElroy's counter proposition appears to have been made, and it is certain that no notice of such an acceptance was ever given to him before his fatal illness. Even if the proposition was accepted, still there was no contract, because no notice of the acceptance had been given. The acceptance of an offer not communicated to the proposer does not make a contract. Kendall's Adm'r v. Insurance Co., 10 U. S. App. 256, 2 C. C. A. 459, and 51 Fed. 689, 693; Jenness v. Iron Co., 53 Me. 20, 23; McCulloch v. Insurance Co., 1 Pick. 278; Thayer v. Insurance Co., 10 Pick. 325, 331; Borland v. Guffey, 1 Grant, Cas. 394; Beckwith v. Cheever, 21 N. H. 41, 44; Duncan v. Heller, 13 S. C. 94, 96; White v. Corlies, 46 N. Y. 467. The judgment below must be reversed, with costs, and the case must be remanded to the court below, with instructions to grant a new trial; and it is so ordered.

CALDWELL, Circuit Judge (dissenting). The opinion of the court lays down propositions to which I cannot yield my assent. There is no rule of law which declares that every man is perfectly familiar with his health and physical condition. Many men are afflicted with fatal maladies who are profoundly ignorant of the fact. It is not the invariable practice of insurance companies to refuse to issue a policy until the premium has been paid; credit is frequently given. If the contract of insurance was complete before the evidence of the contract—the policy—was delivered, and before the sickness and death of the insured, it is immaterial what was said and done by the insured's stenographer at or before the time of the delivery of the

policy and the payment of the premium. Nothing she said or did could affect the validity and binding force of the previously completed contract, if one existed. The question of fact whether there was a completed and binding contract for insurance prior to the delivery of the policy and the payment of the premium was submitted to the jury upon voluminous and conflicting testimony, under instructions which are not subject to any just exceptions. The jury found there was such a contract. This verdict of the jury is overthrown by the court on the strength of presumptions which are unknown to the law. There is no presumption of law that all contracts for insurance are in writing. It is well settled that a verbal contract of insurance is not within the statute of frauds, and that it is as binding and effectual as a written one; and in a suit upon such a contract the rule of evidence is the same that it is in a suit upon any other lawful contract, viz. the party setting it up must prove it by a preponderance of the evidence. The plaintiffs in this case discharged all the burden imposed upon them by the law when they proved the contract to the satisfaction of the jury. The law raised no presumptions against them or the weight of the evidence. The exact nature of the "presumption" relied on as one of the grounds for setting aside the verdict of the jury is not defined by the court. Whether it is one of fact or one of law, and whether it is conclusive or may be rebutted, and, if open to rebuttal, the nature and degree of the evidence required to overthrow it, are questions not discussed in the opinion of the court. If the policy was not delivered, and the premium was not paid, before the sickness or death of the insured, these facts did not preclude the plaintiffs from showing, as they did to the satisfaction of the jury, that there was a valid verbal contract for the insurance, and that time was given for the payment of the premium; and, as the insurance might lawfully have been effected in this way, there is no presumption of law that it was not so done. Lisbon v. Lyman, 49 N. H. 553. To hold otherwise is to confound the distinction between facts and circumstances and presumptions.

CAMPBELL et al. v. IRON-SILVER MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. November 22, 1897.)

No. 923.

1. CONSTITUTIONAL LAW — RETROSPECTIVE LEGISLATION — NEW TRIALS AS OF RIGHT.
   The Colorado act amending the previous law so as to allow but one, instead of two, new trials, as of right, in ejectment suits (Laws 1895, pp. 141, 142), is not retrospective legislation, void under the state constitution, as applied to an action then pending, in which one new trial is had, as of right, long after the date of the act. The amendment therefore controls subsequent proceedings in pending suits, except in cases wherein a verdict was standing, which a party was entitled to have set aside, as of right, when the act took effect.
2. SAME—VESTED RIGHTS.
   A statute giving two new trials as of right in ejectment suits confers, not a vested right protected by constitutional guaranties, but a mere privilege,

pertaining to the remedy, which may be legally taken away by the legislature, as to pending suits, except in cases wherein a verdict is standing which a party is entitled to have set aside when the act takes effect.

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

Peter Campbell and others, the plaintiffs in error, sued the Iron-Silver Mining Company, the defendant in error, on July 5, 1884, in a proceeding by ejectment. The suit was first tried, and the plaintiffs recovered a judgment, on May 21, 1885. This judgment was reversed by the supreme court of the United States on April 28, 1890. Mining Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. 765. The case was again tried on April 3, 1893, pursuant to the order of reversal, and the plaintiffs recovered a second verdict and judgment. Before the succeeding term, the defendant paid the costs, and applied for a new trial as of right, under the provisions of section 272 of the Colorado Code of Procedure, hereafter quoted. This application was denied by the circuit court, but, upon a writ of error prosecuted to this court, the judgment below was reversed on May 7, 1894, and the case was remanded for a new trial, pursuant to the Colorado statute. Mining Co. v. Campbell, 27 U. S. App. 65, 10 C. C. A. 172, and 61 Fed. 932. The case was again tried in the circuit court, pursuant to the order of this court, on June 16, 1896; and upon such third trial of the case the jury rendered a verdict in favor of the defendant company, and upon such verdict a judgment was duly entered. The plaintiffs then paid the costs before the succeeding term of the circuit court, and thereupon filed their motion to obtain a new trial as a matter of right, under the statute. This latter motion was overruled by the circuit court, and the case has been brought before this court by a writ of error, to obtain a review of the action of the trial court in denying the application of the plaintiffs for a new trial as a matter of right. Section 272 of the Colorado Code of Procedure, which was in force when this action was instituted, and which remained in force, without amendment, until July 12, 1895, is as follows: "Whenever judgment shall be rendered against either party under the provisions of [this] chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and upon application of the party against whom the same was rendered, his heirs or assigns, the court shall vacate such judgment and grant a new trial in such case; *and neither party shall have but one new trial in any case as of right without showing cause.* * * *" On April 13, 1895, the aforesaid section was amended by an act of the legislature of the state of Colorado, which took effect July 12, 1895. Laws Colo. 1895, pp. 141, 142. The amendment consisted in striking out the clause of the section which has been italicized, and inserting in lieu thereof the following language: "But only one new trial shall be granted in any case as of right without showing cause."

E. F. Richardson (T. M. Patterson, H. N. Hawkins, and Clinton Reed, on the brief), for plaintiffs in error.

Joel F. Vaile (Edward O. Wolcott, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges.

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

It will be observed from the foregoing statement that one new trial was had in the case at bar, as of right, on June 16, 1896,—nearly a year after the amendatory act of April 13, 1895, was passed and became operative. The case falls, therefore, within the language of said act; and the general question to be determined is whether the act of April 13, 1895, should be construed as applicable to pending cases, or as solely applicable to suits for possession of real property

brought after the act took effect. It is contended by the plaintiffs, in substance, that the act in question is not applicable to suits which were pending at the date of its passage, because, if thus applied, it would have a retroactive effect in violation of article 2, § 11 of the Colorado constitution, which prohibits the enactment of laws that are "retrospective in their operation"; and, second, because the amendatory act, if held applicable to pending suits, and particularly to the case at bar, would destroy vested rights. Both of these contentions would have great weight if it appeared that an adverse verdict had been rendered, and was standing on July 12, 1895, when the amendment took effect, and if the amendment was invoked to prevent the plaintiffs from having that verdict set aside without showing cause. In that event it might well be claimed that the amended act, if thus applied, would have a retrospective operation, and take away a right already vested under the prior law. But the conditions last mentioned did not exist when the act in question took effect, and it was then problematical whether they ever would exist. A new trial as of right was had on June 16, 1896, and it is that trial, which occurred 11 months after the amendment, that is invoked to prevent another trial except for cause shown. The act, as applied to the case in hand, operates upon a state of facts which came into existence subsequent to its passage; and, as thus applied, it would seem to be no more retrospective, or unjust or unfair in its operation, than it would be if applied to a suit brought after its passage to recover the possession of real property upon a cause of action which existed when the act took effect. Mellinger v. City of Houston, 68 Tex. 37, 45, 46, 3 S. W. 249.

It is urged, however, that the statute in force when this suit was filed, to wit, section 272, above quoted, which allowed one new trial to each party on the payment of costs, without showing cause, created a vested right, of which a litigant could not be deprived by an amendment of the statute after a suit had been brought. With reference to this contention, it may be said that section 272 is found in the Colorado Code of Civil Procedure, and is unquestionably a provision relating to the remedy for the enforcement of a certain civil right. It confers a privilege on litigants, in a certain class of civil suits, which the legislature was at liberty either to grant or to withhold. It is to be observed, further, that the privilege in question does not appertain to suits brought for the enforcement of private contracts, but applies solely to a class of actions which sound in tort; and for that reason it is apparent that the withdrawal of the privilege by the legislature could not, in any event, operate to impair the obligation of a contract. Now, the rule is well settled, by a great number of adjudications, that no one has a vested interest in any particular remedy for the enforcement of a right. The remedies which one legislature may have prescribed for the redress of private wrongs, a subsequent legislature can change or modify at pleasure, and make the new remedy applicable to pending controversies, provided a substantial or adequate remedy is left, and provided, further, that the legislature is not prohibited from making the new remedy applicable to pending suits by some provision of the organic law. In this respect there is an im-

portant distinction between statutes creating rights and those which afford remedies. Von Hoffman v. City of Quincy, 4 Wall. 535, 553; Mason v. Haile, 12 Wheat. 370, 378; Morley v. Railway Co., 146 U. S. 162, 13 Sup. Ct. 54; Willard v. Harvey, 24 N. H. 344, 352; Read v. Bank, 23 Me. 318, 321, 322; Hughes v. Russell, 43 Ill. App. 430, 433; Insurance Co. v. Flynn, 38 Mo. 483, 484; Harrison v. Smith, 2 Colo. 625; Smith v. District Court, 4 Colo. 235; Callahan v. Jennings, 16 Colo. 471, 474, 27 Pac. 1055; Ex parte McCardle, 7 Wall. 506; Story, Const. (5th Ed.) § 1385, and cases there cited; Endl. Interp. St. § 281. It is true that the courts have, on some occasions, refused to apply statutes which dealt with the remedy for the redress of private grievances to existing controversies, and have held them solely applicable to actions thereafter brought. But it will be found, we think, on an examination of most of this class of cases, that the refusal to apply to existing suits statutes which were plainly applicable thereto, and which merely changed or modified the course of procedure, was based either on the ground that, if so applied, they would operate unfairly, and cause loss or inconvenience to the parties, or on the ground that the right involved had become so far established by acts done and performed in reliance on the prior law, and its continuance in force, that it would savor of injustice to take away such right by making the new law applicable to the pending controversy. Railway Co. v. Woodward, 4 Colo. 162; Newsom v. Greenwood, 4 Or. 119; Bates v. Stearns, 23 Wend. 482; Mellinger v. City of Houston, 68 Tex. 37, 3 S. W. 249. See, also, Hyman v. Bayne, 83 Ill. 256. It cannot be said that the mere bringing of a suit entitles the party who brings it to have the same conducted at every stage according to the course of procedure which was prescribed by law when the suit was commenced. Actions are always brought in view of the known power of the legislature to change or modify rules of procedure at pleasure, and a litigant cannot consistently claim that, because the legislature takes away some privilege which was accorded to litigants when the suit was instituted, he is thereby deprived of a vested right. No privilege is usually regarded as of more value to a litigant than the right of appeal, in case he is defeated at nisi prius; yet it is held in Colorado, and in other jurisdictions as well, that if, pending the suit, an appellate jurisdiction which existed at the commencement of the action is taken away, and the parties are thereby deprived of the benefit of an appeal, they have no right to complain. Harrison v. Smith, 2 Colo. 625; Smith v. District Court, 4 Colo. 235; Railroad Co. v. Grant, 98 U. S. 398; Gowen v. Bush, 36 U. S. App. 543, 18 C. C. A. 572, and 72 Fed. 299. We conclude, therefore, that the act of April 13, 1895, was intended to control subsequent proceedings in pending cases as well as proceedings in suits which might be thereafter brought, except in those cases where a verdict was standing which a litigant was entitled to have set aside, as of right, when the act took effect. At all events, we can perceive no sufficient reason for holding the act inapplicable to a case like the one at bar, where a trial was had, as of right, months after the statute had become operative. In a number of the cases heretofore cited, statutes regulating procedure were held applicable to pending cases by virtue of their general provisions; and in Re

Claasen, 140 U. S. 200, 11 Sup. Ct. 735, it was decided that a statute granting a writ of error from the supreme court of the United States to the various circuit and district courts was applicable to a pending case in which a verdict of conviction had been returned before the statute was enacted, although, previous thereto, no writ of error in criminal cases had been allowed. The statute in question, as applied by the trial court to the case at bar, did not deprive the plaintiffs of a vested right, but, at most, only took away a privilege which in a certain contingency, that might never happen, they would be entitled to assert, and for that reason the right was inchoate or incomplete. The judgment of the circuit court is therefore affirmed, and, as the case has been considered and decided on the merits, the motion by the defendants below to dismiss the writ of error will be overruled, without expressing any opinion as to the merits of the motion.

NEW YORK LIFE INS. CO. v. BAKER.

(Circuit Court of Appeals, Eighth Circuit. November 1, 1897.)

No. 903.

1. INSURANCE—FALSE REPRESENTATIONS—WAIVER AND ESTOPPEL.

Where statements in the application are made warranties, and the policy contains no stipulation that a false statement shall render the policy void, false statements merely render the policy voidable at the option of the company; and, upon learning of the falsity of such statements, the company may waive the breach, and insist on performance of the contract by the insured, or it may, by its conduct, estop itself from taking advantage of a known breach.

2. SAME—WAIVER AND ESTOPPEL BY CONDUCT.

Where, after full knowledge of facts rendering a policy voidable at its option, and after the policy had become a death claim, the company continued to treat it as a subsisting claim, and induced plaintiff to take out letters of guardianship of the minor children of insured, in order to complete proofs of loss, and at a later date entered into negotiations to induce plaintiff to settle for less than the face of the policy, during which it first claimed that the policy was void, and retained the premium, and took no steps to repay it for a year after acquiring full knowledge of its alleged right to rescind, such acts amounted to both a waiver and an estoppel in pais. 77 Fed. 550, affirmed.

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

This was a suit on a life insurance policy issued by the New York Life Insurance Company, the plaintiff in error, which was brought by Ida M. Baker, the defendant in error, as guardian of her three minor children, Cecil Baker, De Loyd Baker, and Lamont Baker. The policy sued upon was issued by the aforesaid company on the life of Ward L. Baker, for the benefit of the aforesaid minors, in the sum of $5,000; and the same was executed and delivered on or about July 13, 1893. The insured died on December 22, 1893; having paid one annual premium, in the sum of $180.50. The defendant company answered the complaint, denying all liability on said policy, and pleading substantially the following facts: That, before the issuance of the policy, Ward L. Baker, the insured, made a written application therefor to the defendant company, which application was referred to in the policy, and, by the terms thereof, was expressly made a part of the contract of insurance; that said application thus made a part of the policy contained an agreement on the part of the insured that the

statements and representations contained in said application, together with the statements contained therein which were made to the defendant's medical examiner, should be the basis of the contract between the defendant company and the insured; that the insured thereby warranted said statements to be full, complete, and true, whether written by his own hand or not; and that such warranty should form a consideration for the policy which might be issued thereon. The defendant company further alleged, in substance, that certain statements contained in said application, which were made by the insured, Ward L. Baker, in response to various questions propounded to him by the defendant company's medical examiner, were false, and that the policy subsequently issued on the faith of said application was, for that reason, utterly void. The questions and answers thereto to which said averments relate were as follows: "Question. Give full particulars of any serious illness you have had since childhood? Answer. Have had none. Question. When where you last confined to the house by illness? Answer. Not since childhood. Question. What is the name and residence of your physician? Answer. Have none. Question. What other physicians have you consulted? Answer. None." To the foregoing plea the plaintiff below filed a reply wherein it was alleged, in substance, that, by virtue of the company's conduct and dealings with the plaintiff subsequent to the occurrence of the loss, the company was estopped from denying the validity of the policy sued upon, or the plaintiff's right to recover thereon. The case comes to this court for review on a special finding of facts. The facts thus found in the trial court, so far as they have a material bearing on the questions presented for decision, are as follows:

In the latter part of February, or fore part of March, 1893, preceding the issuance of the policy sued upon, Ward L. Baker, the insured, contracted a cold, of the variety usually called the "grippe," which was accompanied with a cough. In consequence thereof, he was confined to his house, but not to his bed, for a period not exceeding two or three days. In the early part of March, 1893, he consulted a physician by the name of Dr. Bailey, at Glenville, Neb., at the doctor's office, with regard to such ailment. Dr. Bailey diagnosed Baker's ailment to be the grippe, and during that month prescribed for him on two occasions at the doctor's office, renewing the prescription once or twice. Dr. Bailey did not treat, prescribe for, or consult with said Baker after March 15, 1893. As warm weather came on, Baker's health improved; and after two or three days' confinement to the house he attended regularly to his business until the latter part of September, 1893, from which time he was afflicted with his last sickness. On June 6, 1893, said Ward L. Baker was examined by said Dr. Bailey for admission to the Ancient Order of United Workmen, was reported by him as a fairly-good risk, and was admitted into said order, joining the lodge instituted at his home, at Glenville, Neb. On March 11, 1895, about one year and three months after the insured died, and not before, the defendant company made a written tender to the plaintiff below, Mrs. Ida M. Baker, of the amount of money paid by said Ward L. Baker as the first premium on said policy, with legal interest thereon from the date of said payment to the date of said tender, accompanying said tender with a written statement that, on account of misrepresentations made in procuring said policy, the same had never gone into effect. It was further found by the trial court: That Ida M. Baker is the widow of Ward L. Baker, deceased. That said decedent left a last will and testament, whereby said Ida M. Baker was appointed executrix of his estate, and testamentary guardian of his children. That said will was duly proved and admitted to probate in the county court for Clay county, Neb., in the month of January, 1894. That during said month Ida M. Baker qualified as executrix of said estate, and has ever since been engaged in administering the same. That by his last will and testament the deceased left some property to Cecil, De Loyd, and Lamont Baker, his minor children, besides what they may be entitled to under the life insurance policy in controversy in this suit. That in the month of March, 1894, the defendant company was told at its offices in the city of New York, and knew, that said Ward L. Baker, deceased, was in May and June, 1893, in a weak condition, and not at all well; that he was suffering from night sweats, and from a cough, and had consulted a physician, and had been prescribed for, in the month of May, and that he was then taking medicine for said ailment; and that the said Ward L. Baker had been sick during the latter

part of the winter and spring of 1893 with the grippe. The trial court also found that on July 28, 1894, Ida M. Baker received from the defendant company a letter in the words and figures following:

"New York Mutual Life Insurance Company, 346-348 Broadway.

"New York, July 25th, 1894.

"Mrs. Ida M. Baker, Glenville, Clay County, Neb.—Dear Madam: Proofs of death and claim under policy No. 550,571, life of your husband, Ward L. Baker, deceased, in favor of children named, who are minors, do not include a certified copy of the letters of their guardianship, issued to you. Please, therefore, forward to the company said certified copy, at your earliest convenience. The proofs of your qualifications as executrix of his will, and the copy of the same, showing you are the testamentary guardian of his children, is not sufficient.

"Very respectfully, yours, Dwight Burdge,

"Supt. Policy Claims Dep't."

It further found that no guardian of the persons or estates of the said Cecil, De Loyd, and Lamont Baker had been appointed prior to the receipt of the aforesaid letter; that after the receipt thereof, and on application of Ida M. Baker, to wit, on August 7, 1894, letters of guardianship of said minors, who were then all under the age of 14, were duly issued to her by the county court for Clay county, Neb.; that in reply to said letter the plaintiff below, in the month of August, 1894, mailed to the defendant company, in the city of New York, a certified copy of her letters of guardianship of said minor children, which she had procured to be issued to her as aforesaid; that said certified copy of said letters of guardianship was received by the defendant company in due course of mail; that in the latter part of the month of October, 1894, the defendant company sent an agent from the city of New York to Omaha, in the state of Nebraska, for the purpose of compromising and settling the claim against it on the aforesaid policy, to the end that litigation in regard thereto might be avoided; that said agent of the defendant company, after his arrival in Omaha, had an interview with the duly-authorized attorneys of said plaintiff, and, in the course of said interview, denied that said plaintiff, as guardian of her minor children, or otherwise, had any valid claim against the defendant, and denied that the defendant was under any liability whatsoever by reason of making said policy; that said agent of the defendant company then and there offered to the plaintiff the sum of $1,000 in full settlement of all claims and demands under said policy; that such offer was rejected by the plaintiff on or about the 1st day of December, 1894, whereupon this suit was instituted; that the defendant company never notified the plaintiff, or any other person acting in her behalf, that it elected to treat the contract of insurance as avoided, and never disclaimed or denied its liability thereon, except as last above stated, in the month of October, 1894; and that it did not tender to the plaintiff the premium which had been paid on said policy by said Ward L. Baker until March 11, 1895. In view of the aforesaid facts, the trial court rendered a judgment in favor of the plaintiff below. 77 Fed. 550. To reverse said judgment, the record has been removed to this court by a writ of error.

James H. McIntosh, for plaintiff in error.

H. C. Brome (Arthur H. Burnett, on the brief), for defendant in error.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

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

It is contended in behalf of the insurance company that because of the statements made to its medical examiner by Ward L. Baker, the insured, to the effect that he had not been confined to his house by illness since childhood, and had no physician, and had not consulted a physician, the policy sued upon never took effect as a contract, but

was at the outset, and so remained, utterly void and of no effect. As a corollary from this proposition, it is strenuously insisted that the doctrine of estoppel or waiver, which was invoked by the plaintiff below, has no application to the case, and that the defendant company may insist upon the invalidity of the contract, notwithstanding the fact that it treated the policy as a subsisting obligation for months after the company was advised of the facts which rendered the policy void, and in the meantime not only retained the premium which had been paid, but put the plaintiff to some trouble and expense in taking out letters of guardianship, on the pretense that such action on her part was necessary to complete the proofs of loss, and duly comply with the provisions of the policy. Before considering the propositions last stated, it will be well to say that the case, as presented by the record, does not impress us with the belief that the deceased, Ward L. Baker, intentionally perpetrated a fraud on the insurer. It will be observed that the question immediately preceding the one in which he was asked, "When were you last confined to your house by illness?" required the insured to give full particulars of any *serious* illness he had had since childhood. In view of the juxtaposition of these questions, it would be very natural for any one to infer that by the term "illness," as used in both questions, some serious illness was intended. Therefore it is entirely probable that when the insured stated, in effect, that he had not been confined to his house by illness since childhood, he meant that he had not been so confined by any serious illness, and did not then regard the sickness which had confined him to his house for two or three days in March, 1893, as of a serious character. The answers made by the insured to the two other questions of which complaint is made are also susceptible of a reasonable explanation, consistent with the utmost good faith on the part of the insured. It is most probable, we think, that the insured construed the first of these questions to mean who was his regular family physician, and that he answered, with substantial accuracy, that he had none. It is also a reasonable inference that he construed the other question, which was asked in the same connection, to mean what other physician besides his regular family physician he had consulted for any illness or ailment that was of a serious nature, and that he answered truthfully, according to his understanding of the question, that he had consulted no one; being of the opinion at the time that the ailment for which he had consulted Dr. Bailey a few times in the month of March, 1893, was not of a serious character. This view of the case, that the deceased had practically recovered from the illness with which he was afflicted in March, before the policy in suit was taken out, and that he did not regard it as of any importance, or intend to deceive the insurer, is very much strengthened by the fact that the defendant company's medical examiner on June 24, 1893, certified, after a personal examination of the insured, that he was a "first-class risk," and by the further fact that he was approved for insurance in the Ancient Order of United Workmen on June 6, 1893, by the same Dr. Bailey who had attended or prescribed for him in March, 1893, when he was supposed to be afflicted with the grippe.

It is not necessary, however, to decide on the present occasion, and we do not decide, that the interrogatories and answers ought to be construed in the manner above indicated, and that in view of such construction the findings made by the trial court fail to show that any false statements were made by the insured. For the purposes of this decision, it may be conceded that two statements made by the insured in his application—the one, that he had not been confined to his house by illness since childhood, and the other, that he had not consulted a physician—were technically untrue. Nevertheless, we hold that the conduct of the defendant company after it had discovered in what respects these two statements were untrue amounted to a waiver of its right to refuse payment on that ground. We fully agree with the view of the learned trial judge that the falsity of the statements complained of did not render the policy void, in the sense that an illegal contract, or one that cannot be performed, is void. The falsity of the statements complained of merely rendered the contract voidable at the election of the insurer. The policy itself contained a provision that it should be incontestable after it had been in force for one whole year, if it should become a death claim, and that the company would not contest its payment, provided the conditions of the policy as to the payment of premiums had been observed. This provision was an express declaration by the company that the policy, though originally vitiated by fraud or untrue statements, should nevertheless become valid after the lapse of one year; and it is entirely inconsistent with the claim now preferred by the defendant company, that a false statement contained in the application was so far fatal that the contract never could become binding or operative. Moreover, the policy in suit contains no stipulation, such as is sometimes found in such policies, to the effect that a false statement made by the insured in his application should render the contract void. We conclude, therefore, that although the statements contained in the application were warranties, in such sense that the materiality of the statements cannot be contested, yet the falsity of a statement did not render the policy void ab initio, and that it was competent for the defendant company to waive a known breach of warranty, and insist upon a performance of the contract by the insured, or to estop itself by its conduct from taking advantage of a known breach of warranty in a suit upon the policy. Selby v. Insurance Co., 67 Fed. 490; Frost v. Insurance Co., 5 Denio, 154; May, Ins. § 497.

We are also of opinion that the trial court reached a correct conclusion in holding that the conduct of the defendant company amounted to a waiver of the defense pleaded in its answer, and estopped it from availing itself of such defense. As early as the month of March, 1894, it became aware of all the facts which rendered the policy voidable at its election; but, notwithstanding such knowledge, it continued to treat the same as a subsisting obligation for more than seven months thereafter, and in the meantime dealt with the plaintiff below upon that basis. At the instance of the defendant company the plaintiff was induced to take out letters of guardianship to complete the proofs of loss, which doubtless put her to consider-

able trouble and expense. At a later period the defendant entered into negotiations with a view of inducing her to settle the claim for less than the face of the policy, and it was during the course of such negotiations that the claim was first advanced that the policy was void. In the meantime the premium was retained, and no offer was made to repay it until March, 1895,—a year after the company acquired full knowledge of its alleged right to rescind. We think that the acts in question amounted both to a waiver and an estoppel in pais. Good faith and fair dealing required the company to be more prompt in asserting its right to treat the policy as void, and in taking the necessary steps to rescind the contract. Moreover, after it became aware that the policy was invalid, it was not entitled to exact from the plaintiff a technical compliance with the provisions of the policy relative to proofs of loss, which would involve her in trouble and expense, unless, on its part, it had resolved to pay the loss when such proofs were supplied. To this effect are the authorities: Titus v. Insurance Co., 81 N. Y. 410, 419; Insurance Co. v. Norton, 96 U. S. 234, 241; Gray v. Association, 111 Ind. 531, 11 N. E. 477; Hollis v. Insurance Co., 65 Iowa, 454, 459, 21 N. W. 774; Society v. Hiett's Adm'r, 19 U. S. App. 173, 185, 7 C. C. A. 359, and 58 Fed. 541; Webster v. Insurance Co., 36 Wis. 67; Marthinson v. Insurance Co., 64 Mich. 372, 31 N. W. 291. The judgment of the circuit court is therefore affirmed.

TOLEDO, P. & W. R. CO. v. CHISHOLM.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1897.)

No. 881.

1. RAILROAD TRACK ON PUBLIC THOROUGHFARE — RIGHT OF PUBLIC — TRESPASSER.

   Where a bridge track is laid on ground previously constituting a public street and levee, one having occasion to use such public thoroughfare, who goes upon such track, is not a trespasser, unless by the ordinance by virtue of which the bridge and track were located the public was deprived of the use of that part of such thoroughfare.

2. SAME—ORDINANCE GRANTING RIGHT OF WAY—PUBLIC USE.

   An ordinance granting the right to locate one end of a bridge, approaches thereto, and a bridge track, on grounds dedicated as a public street and levee, which requires such track to be laid 60 feet from the lots fronting on the levee, leaving the street of a uniform width of 60 feet, and that a passageway for teams shall be maintained under the embankment at the end of the bridge, does not indicate a purpose to deprive the public of all use of the ground on which such track is laid.

3. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

   Where one not a trespasser was killed on the track by a train, it was not incumbent on his administrator to show that he was in the exercise of ordinary care, after proving such negligence of the employés operating the train as would account for his death without fault on his part.

4. SAME.

   Where coal cars standing on a spur track could be most easily and conveniently inspected from a railroad track upon which the public had the right to go, it was not negligence to go upon the track for that purpose, provided such place is not dangerous, when ordinary care is exercised in the performance of such work, and trains are run with due regard to the safety of persons who may be upon the tracks.

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

W. J. Roberts and Felix T. Hughes, for plaintiff in error.
James C. Davis, for defendant in error.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge. This suit is founded on the Iowa damage act (McClain's Code Iowa 1888, §§ 3730, 3731), and involves a consideration of the liability of the Toledo, Peoria & Western Railroad Company, the plaintiff in error here and the defendant below, for the death of Daniel M. Chisholm, who was run over and killed by one of its trains in the city of Keokuk, Iowa, on the evening of November 3, 1894, at about the hour of 7 o'clock. The accident took place on the bridge track in said city, which leads to the bridge across the Mississippi river connecting the city of Keokuk, Iowa, with the town of Hamilton, Ill. As this track leaves the west or Iowa end of the bridge, it is laid on an embankment for some distance, and curves to the southwest, and eventually connects with the track of the Chicago, Burlington & Quincy Railroad Company, which passes through the city of Keokuk from north to south along the levee. Immediately south of the bridge track, and on a somewhat lower level, is a short spur track, on the south side of which were certain coal sheds and an office, which at the time of the accident were used by the firm of Chisholm, Evans & Co. for the purpose of carrying on the coal business in which that firm was engaged. The deceased was a member of said firm at the date of the accident, and the spur track last referred to was used by the firm for the purpose of receiving and delivering coal at its coal sheds. It had been the habit of the members of said firm to walk along the bridge track from time to time, which was on a higher level, for the purpose of overlooking cars which stood on the spur track, and ascertaining the numbers thereof, and whether they were full or empty; and the testimony produced at the trial fully warranted the inference that the deceased had left his office, on the south side of the spur track, a few moments before the accident occurred, and had either gone upon, or in very close proximity to, the bridge track, for the purpose last stated,—of inspecting certain coal cars which were standing on the spur track,—when he was struck and killed by a passing train belonging to the defendant company, which was running east across the river to the town of Hamilton, Ill. The train in question consisted of two cars drawn by an engine, which was moving backward, with the tender in advance. There was evidence tending to show that there was no light at the rear end of the tender, although it was after dark, that the bell of the engine was not sounded, that the train was running at the rate of 12 or 15 miles an hour, and that in all of these respects it was being operated within the corporate limits of the city of Keokuk in violation of a city ordinance. We are not called upon, however, to consider whether the defendant was guilty of negligence, since, in view of the evidence and the finding of the jury upon that issue, the fact that it was culpably negligent must be assumed.

The question of chief importance presented by the assignment of errors is whether the trial court erred in instructing the jury, as it did, in substance, that the deceased had the right to go upon the bridge track for the purpose of inspecting cars on the spur track, and that he could not be regarded as a trespasser if he went upon the track for that purpose. It is insisted by the defendant company that this direction was wrong; that, in view of its location, the deceased had no right to go upon the bridge track; that if he went there, even to inspect cars standing on the spur track, he was nevertheless a trespasser; that while in such situation the defendant company owed him no duty; and that it cannot be held liable except for an injury which was willfully inflicted. We cannot assent to these propositions. It admits of no controversy that the bridge track is laid on ground which at one time, at least, formed a part of Water street, or a part of the public levee of the city of Keokuk. In the case of Haight v. City of Keokuk, 4 Iowa, 199, 211, 212, it was held, in substance, that the strip of ground marked "Water Street" on the original plat of the city of Keokuk which was filed for record in August, 1840 (the same being an irregular tract of land lying between Orleans street and Cedar street, and fronting on the Mississippi river, which tract includes the land where the bridge track is now laid), had been dedicated to the public for use as a street or levee; that it was subject to a public easement, and to control by the municipal authorities of the city, the same as the other streets of said city; that people might travel over the strip of land in question, and make such use of it as is ordinarily made of public streets and levees. This case was subsequently referred to with approval in Barney v. Keokuk, 94 U. S. 324, and, so far as we are advised, it has never been overruled. The result is that the bridge track must be regarded as laid in a public thoroughfare, and the right of all persons to go across, upon, or along said track, when they have occasion to use the thoroughfare where the track is laid for any lawful purpose, must be conceded, unless the public were deprived of that right by the terms of an ordinance adopted by the city of Keokuk, under and by virtue of which the Keokuk & Hamilton Mississippi Bridge Company and the Hancock County Mississippi Bridge Company were authorized to locate the Iowa end of their bridge at a certain point within the city of Keokuk, and to build the necessary railroad and wagon approaches thereto. The only provisions of said ordinance to which our attention has been directed by counsel, as bearing upon the question whether it deprives the public of the right to go upon said track, are the following, to wit:

"Sec. 2. There is hereby granted to said bridge companies, subject to the terms and conditions contained in this ordinance, the right to locate and erect the Iowa end of said bridge within said city of Keokuk at a point at or near the foot of Blondeau street, upon the levee, and to build the necessary railway and wagonway approaches to said bridge across and along the levee, including the necessary piers in said river, and the embankments and shore abutments; also, the right to lay a single railroad track from said bridge across and along the levee to a point at the foot of Main street, on the levee, so as to connect with the track of the Des Moines Valley Railroad Company at the last-named point.

"Sec. 3. The grant of rights and privileges contained in this ordinance is made to said bridge companies upon the express conditions following, to wit: (1)

That said bridge shall be constructed, operated, and maintained, not only as a railroad bridge, but as a highway, wagon, and pedestrian bridge, and said bridge shall be built and constructed in accordance with a plan, elevation, cross sections, and specifications of said proposed bridge, drawn and made by Thomas Curtis Clark, civil engineer * * *; said plan, among other things, providing for a bridge twenty feet and eleven inches in the clear between the trusses; a double wagon track, paved with Nicholson pavement, and a pedestrian way five feet in the clear on each side of the bridge on the outside. (2) That said bridge shall be maintained as a highway, and shall be open for the passage of teams and as a highway at all times when not occupied by railroad trains crossing, and boats passing through the draw; and said bridge companies shall maintain, operate, and manage said bridge at all times so as to afford the greatest practicable facilities to the highway travel, and shall not use said bridge as a railroad bridge, for switching or making up trains, but only for the passage of trains and returning engines. * * * (4) That said bridge and the approaches to the same shall be so built and maintained as not unnecessarily to obstruct or impair the public use of the levee, or to interfere with the drainage of the levee; and the railroad track approaching said bridge along the levee shall be planked between the rails, and the approaches to said bridge shall be provided with crossings over the same wherever such crossings shall be practicable, and a strong and substantial passageway of not less than twenty feet wide in the clear, and of sufficient height to allow the free passage of wagons, drays, and other vehicles, shall be constructed and maintained under the embankment forming the approach to said bridge at a point most convenient for the public use of the levee, and the passage of teams between the portion of the levee below said bridge; the exact location of said passage to be fixed by the city engineer under the direction of the city council. The walls of the embankment and of the curvature of the approaches to said bridge shall be laid in good masonry, to be approved by the mayor of the city and the engineer of the said bridge companies. (5) That said railroad track, from a point near the foot of Main street, on the levee, approaching said bridge, and also the approaches to said bridge, shall be located at least sixty-six feet from the front of the lots lying on Water street; that is to say, Water street shall be of a uniform width of sixty-six feet, and no part of said railroad track, or of the approaches to said bridge, shall be located on the same."

In support of its contention that the aforesaid ordinance operated to prohibit the public from going upon or using that part of the levee which is now occupied by the bridge track, much stress is laid by the defendant company on that provision of the ordinance which directs that the bridge track shall be located at least 66 feet from the front of the lots lying on Water street, and that Water street shall be of a uniform width of 66 feet; also, on that provision which requires a passageway for teams and vehicles to be maintained underneath the embankment at the west end of the bridge. We think, however, that these provisions of the ordinance do not indicate an intention on the part of those who framed it to devote any part of the levee to the sole use of the bridge companies, and to exclude the public therefrom. It is doubtful, to say the least, whether the municipality had the power to vacate a part of the levee, and devote it to the exclusive use of the bridge companies. But, waiving that question, we do not find in the ordinance any evidence of such a purpose. The provisions of the ordinance last referred to were evidently inserted to prevent travel on the street or levee from being unduly obstructed by the location of a railroad track thereon, and by the building of an approach to the bridge; but they fall far short of declaring that the bridge companies should be at liberty to treat the space on which their track was directed to be laid as their private right of way, and

that the public should be excluded therefrom. The ordinance seems to have been framed with a careful consideration for the rights of the public, and without any apparent intent to deprive the public of any of its former privileges. When considered as a whole, it shows very clearly, we think, that a joint use of the levee by the public and by the bridge companies for the movement of their trains was intended, and that such regulations were prescribed as would enable the public to use the same with ordinary safety, and the least inconvenience. In this connection, it is worthy of notice that the views already expressed relative to the rights of individuals to treat the bridge track as a part of the levee, and to go upon the track for any lawful purpose, is in full accord with the practice which was pursued in that regard after the bridge was constructed. It was proven on the trial of the case that pedestrians had been in the habit of walking along the bridge track to and from the bridge, precisely as they were accustomed to walk over other railroad tracks which were located on the levee, and that such practice had been pursued for some years before the accident occurred, with the implied consent of the bridge companies, or whoever had control of the bridge track. At all events, it was not shown that the bridge companies, or any one else, had ever objected to such practice, or denied the right of persons on foot to approach or leave the bridge in that way. We conclude, therefore, that the deceased was entitled to go upon the bridge track for any lawful purpose, provided he exercised due care and circumspection, and that the defense interposed by the defendant company, to the effect that he was a trespasser while he was upon said track, and that it owed him no duty while in that position, was properly overruled.

Complaint is also made of that portion of the charge which deals with the question of contributory negligence. The substance of the objection to this part of the charge seems to be that the court should have instructed the jury that the burden rested upon the plaintiff below to prove that the deceased was not guilty of contributory negligence, since the evidence showed that he must have been on, or very near to, the bridge track, when he was struck by the passing train. It is claimed that his being in such a position raised a presumption that he was negligent. It is further said that the charge of the trial court did not sufficiently direct the jury's attention to the duty of the deceased to be on the lookout for trains, if he found occasion to go upon the bridge track. We think that neither of these propositions is tenable. If the deceased had the right to go upon the bridge track for any lawful purpose, and in so doing was not a trespasser, then we can perceive no reason for holding that it was incumbent on the plaintiff to show that the deceased was not guilty of a want of ordinary care, after such negligence on the part of the company had been proven as was adequate to account for the accident without any fault on the part of the deceased. The law does not presume negligence, but it presumes, until the contrary is shown, that every one in a given situation will act, and has acted, prudently, and with a due regard for his own safety. In so far as we can discover, no reason existed in

the present case for indulging in a different presumption, and requiring the plaintiff to prove affirmatively that the deceased was not at fault. Coasting Co. v. Tolson, 139 U. S. 551, 557, 558, 11 Sup. Ct. 653; Railroad Co. v. Gladmon, 15 Wall. 401; Railroad v. Horst, 93 U. S. 291; Hough v. Railway Co., 100 U. S. 213; Railroad Co. v. Mares, 123 U. S. 710, 720, 721, 8 Sup. Ct. 321. With reference to the other proposition, it is sufficient to say that the deceased was doubtless under an obligation to make use of his senses of sight and hearing, if he went upon the bridge track, or into such close proximity thereto that he was liable to be struck by a passing train; and so the jury were, in substance, instructed by the trial judge. As we read the charge, the jury were directed to inquire and determine, in view of all the evidence, whether the deceased had looked and listened, and had exercised that degree of caution which might reasonably be expected of a person in his situation at the time of the accident. We think, therefore, that the instructions given on this branch of the case were sufficiently specific and comprehensive. The case is somewhat peculiar, in that no one was an eyewitness of the disaster; but facts were proven from which the jury were at liberty to infer what was the proximate cause of the accident, and whether the deceased exercised due care, and with the finding of the jury on these issues we are not at liberty to interfere.

It is further insisted by the defendant company that the trial court should have instructed the jury, as it was asked to instruct it, in substance, that, if the deceased might have inspected the coal cars which were standing on the coal track otherwise than by going on the bridge track, then he was bound to have done so, and that his going upon the bridge track for that purpose was, per se, negligence. We are of opinion, however, that this was not a sound proposition of law, as applied to the case in hand. The coal cars in question, as the evidence tended to show, could be inspected more conveniently and expeditiously by walking along or near to the bridge track, than in any other manner. They were usually inspected in that way, and that method of inspecting them was not necessarily dangerous, but could be done without any considerable risk to life or limb, provided the deceased exercised ordinary care, and provided, further, that trains passing over the bridge were operated with a due regard for the safety of persons who might be on the bridge track. Under such circumstances, it cannot be said that the deceased was in duty bound to inspect the coal cars in some other and more inconvenient way, and that the defendant company, notwithstanding its negligence in operating its train, is absolved from all liability because the deceased did not adopt the safest method of making the inspection.

Some other errors, of less importance than those already considered, have been assigned; but none of them, in our judgment, are tenable, or of sufficient moment to deserve special notice. The case seems to have been fairly tried, and no errors are disclosed by the record which would warrant a reversal. The judgment of the circuit court is therefore affirmed.

CARSON CITY GOLD & SILVER MIN. CO. v. NORTH STAR MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. October 18, 1897.)

No. 341.

1. PATENTED MINING CLAIMS—CONSOLIDATED CLAIMS—EXTRALATERAL RIGHTS—CONCLUSIVENESS OF PATENT.

The issuance of a patent for a claim made up of several claims acquired by purchase is conclusive that the parties named therein as grantees were the owners, not only of the surface ground described, but of any vein included therein, to the extent that its apex is found within the exterior boundaries, and of all rights and privileges incident thereto; that the several locations included in the patent had been properly made in accordance with law, including a discovery of the lode; and that the amount of work required by law had been performed thereon.

2. SAME—EXTRALATERAL RIGHTS.

The owner of a claim patented under the act of 1866, and made up by the consolidation of several claims acquired by purchase, is entitled to extralateral rights in respect of any lode or vein whose apex is found within its exterior boundaries, without regard to the location of the interior lines which formed the boundaries of the original claims. 73 Fed. 597, affirmed.

3. SAME.

A patent for a consolidated claim, issued under the act of 1866, is not void merely because the ground patented exceeds the 300 feet in width allowed by Rev. St. § 2320, in the case of any one location, but varies in width from 650 to 1250 feet. Lakin v. Dolly, 53 Fed. 333, and Lakin v. Roberts, 4 C. C. A. 438, 54 Fed. 462, distinguished.

4. SAME—IRREGULAR SHAPE OF CLAIM—EXTRALATERAL RIGHTS.

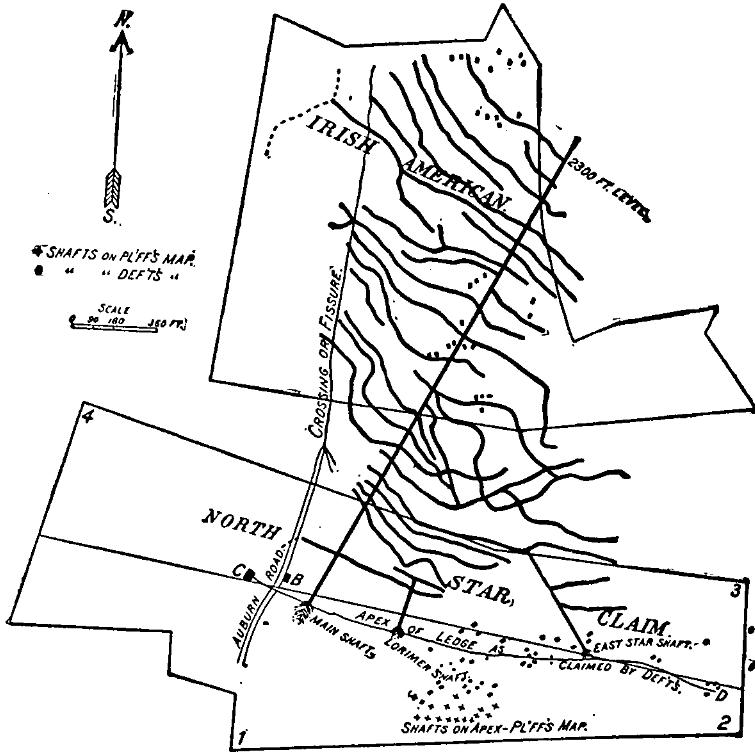
A patent issued upon an application filed under the act of 1866 entitles the owner to extralateral rights in any vein or lode whose apex is found within the patented boundaries, without regard to whether such boundaries are in form of a parallelogram. If the end lines of such a claim converge in the direction of the dip of the vein, the owner of an adjoining claim cannot complain of the lack of parallelism, since the effect is to limit the extralateral rights so as to give the patentees less of the vein or lode in depth than they have at the surface.

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

This is an action of trespass brought by the plaintiff in error, as owner of the Irish-American mining claim, situated in Nevada county, Cal., against the defendant in error, which, as the owner of the North Star claim, has followed and worked its lode upon its descent under the surface of the Irish-American claim. Both claims are patented, and each claim, as patented, is a consolidation of a number of small claims, many, if not all, of which were located long prior to the enactment of any mining law by congress, and was patented in the irregular shape, and of the unusual size, represented upon the diagram hereinafter inserted. The questions presented by the writ of error are based upon the alleged insufficiency of the findings of the circuit court to support the judgment rendered in favor of the defendant in error. The cause was tried before the court without a jury. The court found, among other things, that: (3) On or about December 7, 1877, the government of the United States, in pursuance of the provisions of chapter 6, tit. 32, of the Revised Statutes of the United States, issued and delivered its patent to one Michael McDonough, conveying the mining ground and claim situate in Grass Valley mining district, county of Nevada, and state of California, known as and called the "Irish-American Mine," described as follows: Lot 68 in township 16 N., range 8 E., and lot 53 in township 15 N., range 8 E., Mount Diablo meridian,—in the official plats of the

mineral surveys of the government of the United States. That said patent was issued subject to the following conditions and stipulations, to wit: "First, that the grant hereby made is restricted to the land hereinbefore described as lots Nos. 53 and 68, with twenty-three hundred and seventy-six and sixty-six hundredths linear feet of the Irish-American quartz mine, vein, lode, ledge, or deposit, for the length aforesaid, throughout its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits, throughout their entire depths as aforesaid, the top or apex of which lies inside the exterior lines of said survey; second, that the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same, in its downward course, be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting such other vein, lode, ledge, or deposit." (4) That on the 26th day of June, 1894, the plaintiff in this action became the owner of said Irish-American mine, as described in finding 3, by mesne conveyances from said patentee, and ever since said last-named date has been, and now is, the owner, in possession, and entitled to the possession, of, all and singular, said property. (6) That at all times mentioned in plaintiff's complaint, and for more than 30 years prior to the commencement of this action, the defendant, North Star Mining Company, its predecessors and grantors, were the owners in possession, and entitled to the possession, of all that certain mine and mining claim situate in Grass Valley mining district, Nevada county, state of California, known as and called the "North Star Mine," a particular description of the metes and bounds of said claim being contained in said finding, containing "sixty-five (65) acres and fifteen-hundredths ($^{15}/_{100}$) of an acre of land, more or less." (8) That said North Star mine of defendant is situated in a southerly direction from the Irish-American mine of plaintiff, the north boundary of said North Star mine being at an average distance southerly from the south boundary of said Irish-American mine 430 feet. The end lines of said North Star mine are as follows: The course called for in the description contained in finding 6, between stakes N. S. No. 1 and N. S. No. 2, N., 15° E., 14.97 chains, is the west end line of said North Star mine; and the course connecting stake N. S. No. 4 with N. S. No. 5, S., 30′ W., 10 chains and 30 links, is the east end line of said claim. Said end lines are not parallel, but converge in the direction of the dip of the North Star ledge, hereinafter mentioned. That within the surface boundaries of said North Star mine, as hereinbefore described, there is a ledge of rock in place, known as and called the "North Star Ledge"; and, to the extent hereinafter specified, said ledge has its top or apex wholly within said surface boundaries. That the general course or strike of said ledge is N., 81° 15′ W., or S., 81° 15′ E., and the top or apex thereof traverses approximately the center of said (patented surface area of said North Star) mine. On its eastward course it crosses said east end line at a point thereon distant 200 feet northerly from the stake marked "N. S. No. 5," referred to in the description contained in finding 6. On its westward course, said top or apex of said ledge, so far as hitherto developed and established, continues to a point 2,200 feet from the east end line, measured on the course or strike N., 81° 15′ W., which said point, for the purpose of identification and reference, is hereby designated as the western terminus of said top or apex of said ledge. (9) "That the title of said defendant to said North Star mine and said North Star ledge is as follows: On September 15, 1869, and for many years prior thereto, the North Star Gold-Mining Company, the immediate predecessor in title of said defendant, was, as against every one save and except the government of the United States, the owner of said North Star ledge, with the right to follow the same to any depth on its downward course into the earth. That on said September 15, 1869, and under and by virtue of the provisions of an act of congress entitled 'An act granting the right of way to ditch and canal owners over the public lands and for other purposes,' of July 26, 1866, said North Star Gold-Mining Company made application to the government of the United States to enter and receive a patent for said ledge, together with so much of the surface ground adjoining the same as was reasonably necessary for the purpose of working said ledge, and as was authorized by the local rules and regulations of miners which were then in force in the locality where said ledge was situated. That thereafter, in pursuance of

said application so made, and on August 11, 1875, the government of the United States issued its patent to said North Star Gold-Mining Company, conveying, all and singular, said North Star mine, as described in finding 6, together with said North Star ledge, throughout its entire depth, together with all other veins, lodes, ledges, and deposits, throughout their entire depth, the tops or apices of which lie inside of the exterior lines of said mine as hereinbefore described. (That said North Star claim was originally composed of a number of smaller claims, which were consolidated into one patent, as the North Star claim, and that the lines, exact locality, or area of such original claims were not shown upon the trial, except so far as the patented lines of the North Star patent establish, or tend to establish, such facts.) That thereafter, and on or about June 16, 1884, said North Star Gold-Mining Company sold and conveyed all of said property to the defendant herein, which thenceforward has continued to be, and now is, the owner thereof." (10) That said North Star ledge descends into the earth in a northerly direction, and at an angle of about 25° from the horizon, and, in its downward course, passes outside of the planes drawn vertically through the north side line of said North Star mine, and enters the land adjoining, and reaches, penetrates, extends into, and underlies the said Irish-American mine, the property of the plaintiff herein. (11) That upon said ledge, at a place therein within the boundaries of said North Star mine, defendant and its grantors and predecessors in title have sunk an inclined shaft, and extended the same to the present depth of 2,600 feet or thereabouts, and by means of said shafts and drifts, levels and stopes extended therefrom, in said ledge, have for more than 30 years last past been engaged in extracting and removing from said ledge ore and mineral-bearing rock therefrom. That for more than 25 years next preceding the commencement of this action, with the full knowledge of the owners of said Irish-American mine described in said plaintiff's complaint, the defendant and its grantors have been in possession of and working said North Star ledge, and extracting and removing ore and mineral-bearing rock therefrom, underneath the surface of said Irish-American mine, by means of said inclined shafts, drifts, levels, and stopes. That all of said work and extraction and removal of ore and material by said defendant and its grantors have been upon said ledge (which has its apex wholly within the lands and premises of defendant) hereinbefore described, and all of the mineral deposits heretofore or now appropriated by any of said underground works of said defendant are parts of said ledge. That the defendant never at any time entered upon the lands or premises described in plaintiff's complaint as the "Irish-American Mine," or any portion thereof, except upon and in the lawful pursuit of and following its said North Star ledge on its downward course as it penetrates into said premises described in said complaint, underneath the surface thereof, as hereinbefore set forth. That substantially all of the excavations, openings, drifts, and other works made by the defendant underneath the surface of said Irish-American mine lie between vertical planes drawn through the east end line of said North Star mine, as hereinbefore described, and said line produced indefinitely in its own direction, and another similar plane, parallel to said east end line, crossing said North Star mine at the point fixed in finding 8 as the western terminus of the top or apex of said ledge; said point being at a distance of 2,200 feet N., 81° 15′ W., along the general course of the vein, measured from the point on said east end line where said ledge crosses the same as set forth in said finding 8. (13) The court finds that there is a fissure, or at least a distinct line or change in the geological formation of the country, called in this case a "crossing," which runs nearly north and south through the mine; that its underground course is approximately indicated by the westerly ends of the several levels and workings; that its location upon the surface is not clearly located; that while the workings on the 1,800-foot level extend west of it very little, if any, ore has been found there, and the workings of the mine, with some unimportant exceptions, sustain plaintiff's contention that this crossing marks the western limit of the ledge. (14) The court finds that the course and relative position of the various levels and workings of the mine, so far as shown by the testimony, are approximately represented in the copy of defendant's exhibit 8, which is hereto attached as a part of this finding, and is as follows:



Upon the foregoing facts the court found, as conclusions of law: (1) "That the defendant had a right to pursue and follow its North Star ledge on its downward course to any depth underneath the surface of said Irish-American mine within vertical planes drawn through its east end line of said North Star mine and said line produced indefinitely in its own direction, and a similar parallel plane crossing said North Star mine at a point designated in these findings as the 'western terminus' of the top or apex of said ledge, which point is distant 2,200 feet north, 81° 15′ W., measured from the point on said east end line where said North Star ledge crosses the same on its onward course: provided, however, that in no event shall the defendant be permitted to pursue its ledge west of a perpendicular plane extended through the west end line of said North Star mine and said line produced indefinitely in its own direction." (2) "That the entry by defendant underneath the surface of said Irish-American mine was lawful, and in virtue of the right and ownership of said defendant in said North Star mine and said North Star ledge; that no trespass has been committed upon the property rights of plaintiff; and that said plaintiff has suffered no damage by reason of any of the acts or things done or suffered by said defendant." (3) "That the defendant is entitled to a judgment for its costs."

Dickson, Ellis & Ellis, for plaintiff in error.

Curtis H. Lindley and Henry Eickhoff, for defendant in error.

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

HAWLEY, District Judge (after stating the facts). Do the findings of facts sustain the conclusions of law arrived at by the court? Is the defendant entitled, under the facts as found by the court, to any extralateral rights? Was it necessary for the defendant to prove the lines of its various locations comprising the area covered by the patent, or was it sufficient for it to show the existence of a vein or lode, with the dip and strike of that vein or lode within the surface boundaries of the North Star claim as patented? It is argued by plaintiff that section 2322, Rev. St. U. S., refers exclusively to the extralateral rights pertaining to a single location; that the idea of extralateral rights arising out of a number of consolidated locations was not within the contemplation of congress when said statute was adopted. This statute reads as follows:

"The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

It is not denied that the defendant might purchase all the various locations comprising its patented area of 65 acres, covering one or more lodes or veins, and that, being the owner thereof, it might obtain from the United States a patent covering all the ground embraced in the original locations. But plaintiff contends:

"That no applicant for a patent, by pursuing this method, leaving out all boundary lines, end lines, and side lines of the various locations composing the consolidated claim, by obliterating on paper all traces of boundaries of the locations, and thereby all evidence of extralateral rights, can thereby secure extraordinary rights which he did not possess before. * * * It is the location, and the manner of it, through which the extralateral right is derived. That location may ripen into a patent, and its lines be finally fixed and determined in and by the patent; and if correctly laid upon the surface, and evidenced by the patent, and a vein passes through the end lines of it, or, say, one end line, he may have, as to that vein, extralateral rights. * * * If the boundaries of the several locations comprising the aggregate amount applied for and patented do not appear in the patent, but only the exterior boundaries of the entire aggregated tract, then surely the patentee, if he claim the extralateral right as to any vein, the apex of which is found within the surface of his aggregate tract, should be held to establish by proof where some location was, and how it was laid upon the ground, or be denied the extralateral right."

Can this contention be sustained? The precise point here involved has never been discussed in any of the decided cases to which

our attention has been called. We are of opinion that the defendant was not required to show the separate lines of any of the original locations embraced within the surface boundaries of its patented claim. It was enough for it to show that a lode running in an easterly and westerly direction, and having its apex within the surface boundaries of the patented ground of the North Star, extended, in its dip downward, into the workings of the Irish-American ground owned by the plaintiff in error, and that all its acts complained of by the plaintiff were in extracting ore from such lode "extended downward vertically," within its side-line planes, beneath the patented lines of the Irish-American ground. It is true that the burden was upon the defendant to show by a preponderance of evidence that the ore which it extracted from beneath the patented surface ground of the plaintiff belonged to the lode or vein, the apex of which was within the surface lines of its own patented ground. Duggan v. Davey, 4 Dak. 110, 122, 26 N. W. 887, 891; Leadville Co. v. Fitzgerald, Fed. Cas. No. 8,158; Doe v. Mining Co., 54 Fed. 935, 937; Consolidated Wyoming Gold-Min. Co. v. Champion Min. Co., 63 Fed. 540, 551. But this burden is met and overcome by the undisputed facts, found by the court, that the defendant was the owner of and in possession of the entire apex of the lode within the boundaries of the North Star patented mine, and its continuity and identity in its dip downward vertically beneath the Irish-American ground. It was unnecessary to go further, by proving the lines of one or more or all of the locations as originally made. When the patent was issued the owner thereof became entitled, not only to such lodes as had been previously located, but to all other "veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." If, therefore, any lode, as located, or any other lode thereafter found within the surface location, runs in an easterly and westerly direction between the end lines lengthwise, and on its downward dip extended into the earth beneath the Irish-American claim, this would be sufficient to authorize the judgment in favor of the defendant. The extralateral right conferred by the statute is but an incident of a valid lode location.

There are certain presumptions in favor of patents regularly issued by the government for mining ground, which have more or less application to the question at issue here. These presumptions must not be overlooked. When the patent to the North Star mine was issued, it was conclusive that the parties named therein as grantees were the owners, not only of the surface ground, but of 3,140 linear feet in length of any lode, if so much thereof should be found within said surface boundaries, and of all rights and privileges incident thereto; that the several locations included therein had been properly made in accordance with the law, including a discovery of the lode; and that the amount of work required by law had been performed thereon. Then comes the statute which secures to the patentee, not only

the surface ground, with a lode and vein having its apex therein, but gives to him the extralateral right to follow such lode or vein downward into the earth as therein expressed. Such is the natural deduction to be drawn from the principles announced in the following, as well as other, cases: Smelting Co. v. Kemp, 104 U. S. 636, 646; Steel v. Refining Co., 106 U. S. 447, 1 Sup. Ct. 389; Tucker v. Masser, 113 U. S. 203, 5 Sup. Ct. 420; Davis' Adm'r v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628; Kahn v. Mining Co., 2 Utah, 175, 198; Talbott v. King, 6 Mont. 76, 104, 9 Pac. 434; Chambers v. Jones, 17 Mont. 156, 162, 42 Pac. 758; Mining Co. v. Campbell, 17 Colo. 267, 272, 29 Pac. 513; Mining Co. v. Lee, 21 Colo. 260, 40 Pac. 444; Doe v. Mining Co., 54 Fed. 935, 940; Book v. Mining Co., 58 Fed. 106, 128; Eureka Consol. Min. Co. v. Richmond Min. Co., 4 Sawy. 302, 319, Fed. Cas. No. 4,548.

In Talbott v. King the court said:

"The issuance of the patent conclusively proves all these precedent acts and facts which the land department must find to exist before the patent can rightfully issue. The act of the department, therefore, in issuing a patent, is an adjudication, and, like a judgment, is final as to all matters necessarily included in and determined by it. What, then, does a patent to a mining claim prove? (1) That the lands bounded and described therein are mineral lands; (2) that a discovery and location within said boundaries has been made according to law; and (3) that the necessary amount of work has been performed thereon, and that all preliminary and precedent acts necessary in order to authorize and justify the issuance of the patent have been performed as the law requires. The issuance of a mining-claim patent proves that there was a discovery and location according to law."

In Smelting Co. v. Kemp the court said:

"A patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority; that is, when it has jurisdiction, under the law, to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far, that if in any circumstances, under existing law, a patent would be held valid, it will be presumed that such circumstances existed."

In that case the defendant contended that a patent could not be issued for a placer mining claim which embraced over 160 acres, and the court held that the patent might include as many adjoining locations as the patentee had purchased, and that the proceedings to obtain a patent therefor were the same as when the application covered but one location. Among other things, the court said:

"There is nothing in the reason of the thing, or in the language of the acts, which prevents an individual from acquiring by purchase the ground located by others, and adding it to his own. * * * His claim may include as many adjoining locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes, or, in other words, will constitute his mining claim, and be so designated. Such is the general understanding of miners, and the meaning they attach to the term. * * * If one individual should acquire all such contiguous claims by purchase, no sound reason can be suggested why he should not be equally entitled to enter them all by one entry, as when they were held by the original parties. * * * It was therefore very natural, when patents were allowed, that the practice of presenting a single application with one survey of the whole tract should prevail. It was at the outset, and has ever since been, approved by the department, and its propriety has never before been questioned."

This language is certainly as applicable to the location of lode claims as to placer claims.

In Mining Co. v. Campbell, supra, the court declared that there could be no higher evidence of title than a patent from the United States, and that, in favor of the validity and integrity of such an instrument, it must be presumed that all antecedent steps necessary to its issuance were duly taken. As was said by Mr. Justice Field in the Eureka Case:

"A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency, it is ironclad against all mere speculative inferences."

And in Chambers v. Jones, supra, the court held that, after the issuance of a patent to a mining claim, the sufficiency of the location notice cannot be questioned.

These general principles are amply sufficient to sustain the ruling and decision of the lower court. Any other conclusion might result in making invalid many patents heretofore issued upon consolidated locations. Especially would this be true if plaintiff's contention should be sustained, that every presumption must be construed against the patent. A patent from the government would be of but little, if any, use or effect, if the duty devolved upon the patentee, whenever the validity of his claim is called in question, to prove that each separate location was properly made in strict conformity with the law. One purpose, object, and effect of procuring a patent is to at once and forever settle this question, and set at rest all further contests in relation to such matters. As was said by the court in Doe v. Mining Co., 54 Fed. 935, 940:

"If questions relating to the boundaries of the location, the marking of them, the discovery of a vein, lode, or ledge within them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the claim, as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based."

Of course, patents may be set aside on the ground of fraud, or in cases where it appears upon the face of the patent that it was issued in a case not authorized by law. But in this case the plaintiff expressly denies making any attack upon the patent, and admits its validity, binding force, and conclusiveness, as to all the ground within the surface boundaries of the patented lines. If good for the veins and lodes found within the surface boundaries, does not the statute, in direct terms, give the right to follow such veins and lodes in their downward course? If there was but one location upon which a patent was obtained for a piece of surface ground 1,500 feet in length and 600 feet wide, 300 feet on each side of the lode, would it be necessary for the owner of the ground, after introducing his patent, to prove up his original location, the lines and bounds thereof, in order to entitle him to receive all the rights and privileges given him by the statute? Certainly not. His patent, with the additional fact of proving the existence of a lode, with its course and dip, would be all that the law requires. Now, if the patent is for a lode 3,000 feet

in length, would it be necessary to show that there were two locations, and the lines and bounds of each? Should this right be denied on the ground that it is possible to draw imaginary lines, so as to show that, if the locations were made in the way imagined, the lode would cross the end or side lines in such a way as to prevent the defendant from having any extralateral rights beneath the plaintiff's surface ground? Are courts compelled to give heed to such arguments, and indulge in such wide fields of speculation? If any presumptions are to be indulged in, should not the court presume that the several locations were made in such a manner as to include the lode lengthwise, as it is actually proven to be, within the surface lines of the patented location?

So far, in the discussion of the question herein involved, it has been assumed that the several mining locations were made in the manner and form prescribed by the acts of congress of 1872, by taking up a piece of ground described by metes and bounds, in the form of a parallelogram. But the locations were not made under the provisions of the act of 1872. It is alleged in the answer:

"That continuously for more than forty years last past this defendant, and its grantors and predecessors in title, have been, and defendant now is, the owner, in the possession of, and entitled to the possession of, 3,140 linear feet of that certain lode or ledge of rock, in place, carrying gold and silver, situate, lying, and being in the township of Grass Valley, Nevada county, state of California, formerly known as and called the 'French Lead,' and now known as and called the 'North Star Ledge.' "

The locations must therefore have been made prior to any acts of congress, and were governed solely by the rules and regulations adopted by the miners of the district where the lode in question was situated. They were not required to be made in the form of a parallelogram, taking up any specific quantity of surface ground. The lode was the principal thing which the miners sought, discovered, and located, with all its dips, spurs, and angles. The location was made for a given number of feet of the lode, and the locators were entitled, under the local rules, laws, and customs of miners, to the number of feet claimed on the lode, in whatever direction or course it was found. There was no question raised as to any side lines, for there were none. The locators were allowed a number of feet of surface ground on each side of the lode, sufficient for the convenient working of the same. As was said by the court in Golden Fleece G. & S. Min. Co. v. Cable Consol. G. & S. Min. Co., 12 Nev. 312, 328:

"The claim was defined by the terms of the notice, and not by posts and monuments erected on the surface of the earth. The notice claimed so many feet of the vein, with the adjacent surface. If subsequent developments demonstrated that the course or strike of the vein differed from that mentioned in the notice, the locator was still allowed to follow the vein to the extent claimed, because there was no difficulty in reconciling the description in the notice with the deflection in the vein from its apparent course at the discovery point, and because the claim in fact was of so much of the vein, wherever it might run. As the surface ground allowed by the miners' rules was a mere incident to the vein, and was to be adjacent to it, and was never marked by posts or monuments, any more than the vein itself, it followed, as a matter of course, that when the true course of the vein was discovered the surface ground was located in conformity to it."

See, also, Walrath v. Mining Co., 63 Fed. 552, 556.

These regulations and customs of the miners were sanctioned and approved by the legislatures of the states, sustained and enforced by the courts, until 1866, when congress took the first step authorizing the sale of the public mineral lands, by enacting a law declaring that such lands were free and open to exploration and occupation by citizens, and others who had declared their intention to become such, subject only to such regulations as were or might be prescribed by law, and the local rules, regulations, and customs of miners, not in conflict with the constitution or laws of the United States. Nothing is contained in the act of congress which in any manner interferes with the validity of the previously acquired rights of the miners under the local rules, customs, etc. On the contrary, it was expressly provided:

"That whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant or association of claimants to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations, to any depth although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." 14 Stat. 251.

It was in this condition of the law that the grantors of the defendant, in September, 1869, applied for a patent for 3,140 linear feet of said North Star ledge, which application remained unacted upon until after the passage of the act of May 10, 1872, and until August 11, 1875, when the government of the United States issued its patent granting to the North Star Gold-Mining Company the land set forth in the diagram, to wit, 3,140 linear feet of said North Star quartz ledge, throughout its entire depth, together with all other veins and lodes, ledges and deposits, throughout their entire depth, the tops or apices of which lie inside the exterior lines of the patented ground. Upon these facts, it cannot, in the light of reason, or upon the authority of any decided case, consistently be said that the defendant having title to the North Star lode under this patent is not entitled to any extralateral rights, because it did not prove the boundaries of one or more of the original locations of the ground included in the diagram. In the light of all the findings, we have the right to presume, in the absence of any proof to the contrary, that the original locations were made along the lode lengthwise, and that when the patent was applied for a survey of the surface ground was made, and the surface boundaries were marked upon the claim, which consisted of several locations, the lode claim, as thus patented, was thereby limited in extent to the survey of the surface ground, and the owner of the claim, as thus patented, had no right, under the act of 1866 or of 1872, to follow the lode lengthwise beyond the surface lines of the patented claim. But for so much of the lode as has its apex

within the surface limits, as found within the end lines of the patented ground, the extralateral rights were granted to the patentee in express terms. It therefore follows that when the defendant introduced its patent, proved the course of the lode lengthwise within the surface limits of the patented ground, and that all the ore which it had extracted from beneath the surface ground of the Irish-American claim was taken from said lode, as set forth in the findings, it clearly, and beyond all question, established its right to the ores thus taken out. No further proofs were required.

2. It appears from the patent, and is shown in the diagram, that the mining ground patented varies in width from 650 to 1,250 feet, and it is therefore claimed by plaintiff in error that the patent is void upon its face; and Lakin v. Dolly, 53 Fed. 333, and Lakin v. Roberts, 4 C. C. A. 438, 54 Fed. 462, are cited and relied upon in support of this contention. Every case must be considered with reference to its own peculiar facts. The Lakin Cases did not involve any construction of the law appertaining to the extralateral rights of the lode patented to the Mammoth Gold-Mining Company. The lode, neither in its length or depth, was involved. It was only the surface ground that was in dispute. The patent in those cases embraced two separate mining locations, and conveyed 4,100 feet of a gold-bearing quartz lode, with 252.95 acres of land. The lode, as located and fixed on the surface of the ground, was in a straight line along the northwest boundary of the patented tract, and was within 50 feet of said line. The surface tract covered by the patent, except said 50 feet, was on the southeast side of said lode, and extended about three-quarters of a mile therefrom. Under the rules and regulations of the mining district where said lode was situated, the locator was entitled to only 100 feet of ground on each side of the lode; and, under the laws of the United States (Rev. St. § 2320), the amount of surface is restricted to 300 feet. The question there was whether, by virtue of the surface ground, the owner of the mining claim could include real estate within the surface boundaries situated more than 300 feet distant from the lode. Upon the facts the court held that under the provision of section 2320, Rev. St. U. S., the land department had no jurisdiction, power, or authority to issue a patent to a quartz lode for any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode, and that any patent that is issued for more than that amount of surface ground is absolutely null and void as to the excess over 300 feet, and that the patent might be collaterally attacked in a court of law. It will thus be seen that there were no principles of law involved in those cases which have any application whatever to the case at bar. In this case the plaintiff in error does not claim any right whatever to the surface boundaries of the North Star claim, as patented; and it is a well-settled and elementary principle of law that the possession of this surface ground by the defendant in error is sufficient evidence of title, as against any one not showing any higher or better right thereto. Moreover, even if the principles of the Lakin Cases could be considered, remotely or otherwise, as having any application to the present

case, still the defendant in error would be entitled to the vein or lode, which was proved and established in this case, and to the surface ground for 300 feet on each side of the center of the lode; and this is all that is required to give the party the extra rights which are provided for by the statute.

3. The plaintiff in error contends that, if the patented area of the North Star is to be considered as a location, its end lines are not parallel, as found by the court, and that under section 2320, Rev. St., the defendant in error possesses no extralateral rights under it. The act of 1866, under the provisions of which the patent in this case was applied for, and under which the rights of defendant in error accrued, did not require parallelism of end lines. Walrath v. Mining Co., 63 Fed. 552, 556. Under this act, "however tortuous might be the course of the lode, the claimant had a perfect right to follow it up, and prepare his diagram so as to include it, together with the surface ground on each side thereof allowed by local laws. There is no language in the act that requires the diagram to be in the form of a parallelogram, or in any other particular form." Wolfley v. Mining Co., 4 Colo. 112, 116. Moreover, the end lines, as marked on the diagram, converge in the direction of the dip; giving the patentees less of the vein or lode, in depth, than they had at the surface. The object of the act of 1872 in requiring parallelism of end lines was intended to give to the claimant of the lode as much of the lode or vein in its downward course as he has at the surface, but no more. It appears from the findings that the defendant in error was only allowed 2,200 feet of the apex of the lode, because it was cut off on the west by a "crossing," as shown on the diagram. The restriction of its rights in these particulars cannot be complained of by the plaintiff in error.

From any legal standpoint from which the facts of this case can be considered, it is apparent that the judgment of the circuit court in favor of the defendant is correct. The judgment of the circuit court is affirmed, with costs.

LEHMAN v. CITY OF SAN DIEGO.

(Circuit Court of Appeals, Ninth Circuit. October 18, 1897.)

No. 307.

1. Municipal Corporations—Authority to Issue Bonds.
   Act March 7, 1872, conferring upon the city of San Diego the power "to borrow money upon the faith and credit of the city," does not confer any power to issue negotiable bonds. 73 Fed. 105, affirmed.

2. Same—Method of Issuing Bonds—Bona Fide Holders.
   A municipality having decided to issue its bonds, an ordinance was passed prescribing that the board of trustees should, by resolution, fix the amount of the bonds, and direct to whom and how they should be delivered. Doubts having arisen as to the validity of this ordinance, the legislature passed an act legalizing, ratifying, and confirming it. *Held*, that valid bonds could only be issued by a compliance with the legalized ordinance, and that bonds issued without the passage of such resolutions by the board of trustees were void, even in the hands of innocent purchasers. 73 Fed. 105, affirmed.

3. SAME.

Bonds which upon their face purport to have been issued in conformity with an act specified, but which in fact were not issued until after the repeal of said act, being antedated, so as to appear to have been issued prior to such repeal, and which were signed by persons as president and clerk who were not such officials at the date on which the bonds purport to have been issued, are void in the hands of bona fide holders.

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

This was an action at law by A. Lehman against the city of San Diego to recover upon certain bonds purporting to have been issued by the defendant. The circuit court directed the jury to return a verdict for defendant (73 Fed. 105), and the plaintiff brought the case to this court on writ of error.

S. O. Houghton, for plaintiff in error.

H. E. Doolittle, City Atty., and T. L. Lewis, Dep. City Atty., for defendant in error.

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

HAWLEY, District Judge. This is an action brought by the plaintiff in error to recover the principal and interest alleged to be due and owing to him on four municipal bonds, numbered 150 to 153, inclusive, of $1,000 each, issued by the defendant in error, bearing date January 1, 1873, payable 20 years after date, to Frankenthal & Co., or the legal holder thereof; and also to recover the interest due on four other bonds issued by the defendant in error, numbered 146 to 149, inclusive, dated October 4, 1875, payable to W. W. Bowers, or the legal holder thereof. The plaintiff claims to be an innocent purchaser of said bonds and coupons. Upon the trial in the circuit court the judge instructed the jury, "as matter of law, that all of the bonds and coupons sued upon are void in the hands of the plaintiff, and you are therefore instructed to return a verdict for the defendant." It is claimed by the plaintiff that this instruction is erroneous.

Were the bonds and coupons sued upon issued without authority of law? The authority for their issue is claimed to be derived under and by virtue of the thirteenth subdivision of section 10 of the act of the legislature of the state of California approved March 7, 1872, which conferred upon the board of trustees of the city of San Diego the power "to borrow money upon the faith and credit of the city; but no loan shall be made without the consent to such loan of a majority of the real estate owners of the city residing therein previously obtained." St. Cal. 1871–72, pp. 285, 289. The bonds and coupons are negotiable instruments, and were issued for the sole purpose of assisting in carrying out a contract which was made between a "citizens' committee of forty" of the city of San Diego and Col. Thomas A. Scott, relative to the construction of the Texas & Pacific Railway to the city.

In Brenham v. Bank, 144 U. S. 173, 12 Sup. Ct. 559, the court passed upon and decided the principles of law which are directly

applicable to this case. There the bonds under consideration were issued by the city of Brenham, payable to bearer, under the assumed authority of an act of the state of Texas giving to the city council the power to borrow, for general purposes, not exceeding $15,000 on the credit of the city. The court held that the city had no authority to issue negotiable bonds, and that a bona fide holder of them could not recover against the city either on the bonds or their coupons. In the course of the opinion, the court said:

"The confining of the power in the present case to a borrowing of money for general purposes on the credit of the city limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at the rate of ten per centum per annum, semiannually, for at least ten years. It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and, under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case."

The court reviewed all of the previous cases upon the subject, and declared that Rogers v. Burlington, 3 Wall. 654, and Mitchell v. Burlington, 4 Wall. 270, wherein a different doctrine had been announced, were overruled by the later cases of Police Jury v. Britton, 15 Wall. 566, 570, 572; Claiborne Co. v. Brooks, 111 U. S. 400, 406, 4 Sup. Ct. 489; Concord v. Robinson, 121 U. S. 165, 167, 7 Sup. Ct. 937; Kelley v. Milan, 127 U. S. 139, 150, 8 Sup. Ct. 1101; Norton v. Dyersburg, 127 U. S. 160, 175, 8 Sup. Ct. 1111; Young v. Clarendon Tp., 132 U. S. 340, 10 Sup. Ct. 107; Hill v. Memphis, 134 U. S. 198, 203, 10 Sup. Ct. 562; and Merrill v. Monticello, 138 U. S. 673, 686, 687, 11 Sup. Ct. 441,—and, at the close of the opinion, said:

"As there was no authority to issue the bonds, even a bona fide holder of them cannot have a right to recover upon them or their coupons."

In Ashuelot Nat. Bank of Keene v. School Dist. No. 7, Valley Co., 5 C. C. A. 468, 56 Fed. 197, 199, the circuit court of appeals for the Eighth circuit, in construing certain provisions of the statute of Nebraska (Laws 1869, pp. 115–120), which provided that "any school district shall have power and authority to borrow money to pay for the sites of schoolhouses, and to erect buildings thereon, and to furnish the same, by a vote of a majority of the qualified voters," and of the act of 1873 (Gen. St. 1873, p. 883), providing for the registering of all "school-district bonds voted and issued pursuant to" the act of 1869, followed the principles announced in Brenham v. Bank, supra, and held that the provisions of the statutes of Nebraska did not confer any authority to issue negotiable securities; and that such securities issued by the school districts were void, even in the hands of an innocent purchaser. See, also, Coffin v. Board of Com'rs, 6 C. C. A. 288, 57 Fed. 137, 141.

It is contended by the plaintiff in error that if the provision in the charter of the city of 1872 before quoted, with the consent of the majority of the real-estate owners, which was obtained, did not confer upon the trustees of the city the power to issue negotiable

bonds, the authority is found in the act of the legislature of the state of California approved February 24, 1874, entitled "An act to legalize certain bonds of the city of San Diego, and to provide for the payment of the interest thereon and for the redemption thereof." St. Cal. 1873–74, pp. 155–157.

Sections 1 and 2 of said act read as follows:

"Section 1. Charter Ordinance number seven, passed by the board of trustees of the city of San Diego, on the sixteenth day of September, A. D. eighteen hundred and seventy-two, and the election held in said city in accordance with the provisions of said ordinance, on the twenty-seventh day of September, A. D. eighteen hundred and seventy-two, are hereby legalized, ratified, confirmed, and declared valid, to all intents and purposes.

"Sec. 2. Charter Ordinance number twenty-two, passed and approved by the board of trustees of the said city of San Diego on the third day of February, A. D. eighteen hundred and seventy-three, is hereby legalized, ratified, confirmed, and declared valid, to all intents and purposes; and all bonds already issued, or that may hereafter be issued, under and in accordance with the provisions of said Ordinance number twenty-two, are hereby declared to be legal and valid obligations of and against said city, and the faith and credit of said city is hereby pledged for the prompt payment of the same annual interest of said bonds so issued, or to be issued, under the provisions of said Ordinance number twenty-two, and for the redemption thereof, according to the tenor and effect of said bonds, and the coupons thereto attached."

Ordinance No. 7, referred to in said act, provided for the holding of an election to determine whether or not the bonds should be issued, for the purpose of carrying out the agreement made by the citizens' committee with Scott, not to exceed the amount of $150,000, to bear date of the day of issuance, and to be made payable 20 years after date.

Section 1 of Ordinance No. 22 declares that the bonds shall be issued.

Section 2 provides:

"That said bonds be issued and bear date as of the first day of January, A. D. 1873, and be made payable at the office of the treasurer of said city in twenty years from and after said date, and to be redeemable at the option of the said board of trustees, or their successors in office, at any time after the expiration of three years from the said date of issuance."

Sections 4 and 5 read as follows:

"Sec. 4. That said bonds be issued (at the option of the said board of trustees) in denominations of not less than five hundred nor more than one thousand dollars, and to such person or persons and at such time or times as such board of trustees may, by resolution, direct.

"Sec. 5. That said bonds, and the coupons attached thereto, be signed by the president and the clerk of the said board of trustees, as such officers, and upon the signing of said bonds the corporate seal of said city shall be affixed to each bond, by the said clerk, and the said clerk shall then deliver said bonds thus signed and sealed to such person or persons and at such time or times as said board may, by resolution, direct."

There was no resolution of the board fixing the denomination of the bonds issued to Bowers, or directing to whom or when the bonds should be issued, as required by section 4 of Ordinance No. 22; and there is nothing in the record to show that section 5 was complied with in the delivery of the bonds.

The act of the legislature of 1874, which undertook to legalize, ratify, confirm, and declare valid all of the provisions of Ordinances

No. 7 and No. 22, did not attempt in any manner to change the terms and conditions as to the issuance of the bonds. The ordinances, as thus ratified, constituted the mode and the measure of the power of the board of trustees, and could not be departed from. This principle is clearly enunciated in McCoy v. Briant, 53 Cal. 247, where the same question was involved. There the court, after stating that the first question to be determined was whether the bonds issued to Bowers would be void in the hands of a bona fide holder for value, declared that the authority to issue the bonds was derived exclusively from ordinances numbered 7 and 22 of the trustees of the city, which were subsequently ratified and validated by the act of the legislature approved February 24, 1874. After quoting from the provisions of these ordinances as to the manner in which the bonds should be issued, and referring to the fact that no resolution of said board of trustees was ever passed authorizing said bonds to be issued to Bowers, or designating the denomination of the same, the court said:

"In this case, the ordinances, as ratified by the act of the legislature, prescribed definitely and precisely the mode, and the only mode, in which the bonds could be issued and delivered, to wit, by a resolution of the board of trustees directing when and to whom the bonds were to be issued and delivered. Nor can this requirement be regarded as merely directory, a violation of which would not impair the validity of the bonds. On the contrary, it was intended as a precaution against an abuse of its power by the board of trustees, and to prevent a fraudulent or unauthorized delivery by the clerk to a person not entitled to receive the bonds. Under the terms of the ordinance, no bond could be issued or delivered except upon a resolution of the board appearing upon its minutes or the record of its proceedings, thus furnishing a most important safeguard against fraud and an abuse of power. Every person dealing in the bonds is bound, at his peril, to inquire whether they were issued in the mode prescribed; and, as the mode is the measure of the power, the bonds would be void in the hands of a holder for value without actual notice, if issued in any other mode. We are therefore of opinion that the bonds in controversy would be void in the hands of a bona fide holder, and would not be a valid charge against the city."

It necessarily follows from the views above expressed that the bonds issued to Bowers were void for two reasons: (1) Because there was no power given by the charter of San Diego of 1872 to the board of trustees to issue them; (2) the ordinances of the city, as ratified by the act of the legislature of 1874, were not complied with.

With reference to the bonds and coupons issued to Frankenthal & Co., there was a resolution passed by the board of trustees authorizing the bonds to be issued to Frankenthal & Co., designating the denomination of the same and the time of their issue. These bonds bear date January 1, 1873, in pursuance of the resolution which was adopted authorizing their issuance; but the proofs show that they were not in fact issued until 1877, after the legislature of the state had passed an act, approved April 1, 1876, to reincorporate the city of San Diego, and to provide another charter for it. This act declared that the act "approved March 7, 1872, and all acts and parts of acts in conflict with any portion of this act, are hereby repealed." St. Cal. 1875-76, pp. 806, 815. It thus appears that the bonds which, upon their face, purport to have been issued "in conformity with an act of the legislature of the state of California, entitled 'An act to

reincorporate the city of San Diego,' approved March 7, 1872," were not in fact issued until after that act had been repealed, and that the persons who signed the same as president and clerk were not such officers of the board of trustees at the date on which the bonds purport to have been issued. In the light of the facts, disclosed by the record, it is manifest that the officers who signed the bonds acted without authority of law. It is well settled that bona fide purchasers of municipal bonds must take the risk of the official character of those who execute them. An examination of the records of the board of trustees of the city of San Diego would have disclosed the fact that the officers of the board who signed the bonds bearing date January 1, 1873, were not officers of the board at that date, and would have discovered the fact that the bonds were antedated after the act of 1872 had been repealed.

In Anthony v. Jasper Co., 101 U. S. 693, 698, municipal bonds were signed and issued in October, 1872, upon a subscription made in March, 1872, to the stock of a railroad company, and bore date the day of the subscription. The presiding justice who signed the bonds did not become such until October, 1872. There, as here, it will be observed that the person who was in office when the bonds were actually signed signed them, but they were, as here, antedated to a day when he was not in office. In that case there was a false date inserted in the bonds, in order to avoid the effect of a registration act which took effect between the antedated date and the actual date of signing. In the present case the false date seems to have been inserted so as to comply with a former order of the previous board, and make it appear to the public that the bonds were signed, as the language on their face implies, in compliance with the provisions of the law of 1872, when in truth they were not signed until after that law had been repealed. The bonds in the Jasper Co. Case were held void. The court said:

"In order to recover in this case, it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law. He did prove that they were signed by the presiding justice and clerk of the court, and were sealed with the seal of the court. This, before the act of March 30, 1872, would have been enough, but after that more was necessary. The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted; and he cannot bind his principal under powers that have been taken away, by simply antedating his contracts. Under such circumstances, a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. After the power of an agent of a private person has been revoked, he cannot bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, cannot charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership. Antedating under such circumstances partakes of the character of a forgery, and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. In Bayley v. Taber, 5 Mass. 285, it was held that when a statute provided that

promissory notes of a certain kind, made or issued after a certain day, should be utterly void, evidence was admissible on behalf of the makers to prove that the notes were issued after that day, although they bore a previous date."

In Coler v. Cleburne, 131 U. S. 162, 173, 9 Sup. Ct. 720, the bonds were not signed by an officer who was in office when they were signed, but by a person who was in the office on the antedated day on which they bore date. The court said that the principles declared in Anthony v. Jasper Co. were applicable to the changed state of facts, and, upon the authority of that case, held the bonds invalid.

We are of opinion that the instructions given to the jury in the present case were correct. The judgment of the circuit court is affirmed, with costs.

FOURTH NAT. BANK OF ST. LOUIS, MO., v. CITY OF BELLEVILLE, ILL.

(Circuit Court of Appeals, Seventh Circuit. November 18, 1897.)

No. 413.

REVIEW ON ERROR—CASE TRIED TO THE COURT WITHOUT A JURY.

An assignment of error upon a general finding made by the court in an action at law, tried without a jury, raises no question for review.

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

This was an action at law by the Fourth National Bank of St. Louis, Mo., against the city of Belleville, Ill., to recover on 13 railway aid bonds issued by that city. The case was tried to the court, a jury being waived by stipulation in writing, and the court found the issues for defendant, and entered judgment accordingly. To review that judgment, the plaintiff sued out this writ of error.

G. A. Koerner, for plaintiff in error.

J. M. Hamill, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

PER CURIAM. This was a suit at law, which, upon written stipulation of the parties, was tried by the court, without the intervention of a jury. The court found generally in favor of the defendant, the city of Belleville, and judgment was thereupon rendered in its favor. There was no special finding of facts and no statement of conclusions of law. Error is assigned only upon the general finding of the court. There is, therefore, nothing for this court to review. Martinton v Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321; Boardman v. Toffey, 117 U. S. 271, 6 Sup. Ct. 734; Jenks' Adm'r v. Stapp, 9 U. S. App. 34, 3 C. C. A. 244, and 52 Fed. 641; Skinner v. Franklin Co., 9 U. S. App. 676, 6 C. C. A. 118, and 56 Fed. 783; Distilling & Cattle Feeding Co. v. Gottschalk Co., 24 U. S. App. 638, 13 C. C. A. 618, and 66 Fed. 609; Phipps v. Harding, 34 U. S. App. 148, 17 C. C. A. 203, and 70 Fed. 468; Woodbury v. City of Shawneetown, 34 U. S. App. 655, 20 C. C. A. 400, and 74 Fed. 205; Seymour v. White Co., 34 U. S. App. 658, 20 C. C. A. 402, and 74 Fed. 207. The writ of error is dismissed.

UNION PAC. RY. CO. v. TRAVELERS' INS. CO.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1897.)

No. 874.

CONTRACT—CONSTRUCTION—MEASURE OF DAMAGES FOR BREACH.

A railroad company leased to another ground at a station on which the lessee contracted to erect a building 152 feet long, 42 feet wide, and two stories high, in which he agreed to furnish the company rooms for station purposes, and to maintain a first-class hotel. The company covenanted not to permit the use of its other property to the injury of the hotel, and that it would stop all its passenger trains passing at seasonable hours for meals a sufficient time to allow the passengers to take meals. The contract was observed by both parties for 15 years, during which time the lessee had increased the capacity of the hotel until it contained 55 sleeping rooms. After that time the company ceased to stop the only passenger train passing at a seasonable hour for meals a sufficient length of time for the passengers to take meals. *Held*, that the agreement to stop the trains did not go to the whole consideration of the contract, so as to entitle the lessee on its breach to recover as for a total breach of the entire contract, but was only an incidental promise, and the measure of the lessee's recovery was the diminution in the earnings of the hotel caused thereby between the time of the breach and the bringing of suit.

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

Action by the Travelers' Insurance Company against the Union Pacific Railway Company. From a judgment for plaintiff, defendant brings error.

This writ of error was sued out to reverse a judgment for $40,000, which was rendered against the Union Pacific Railway Company, the plaintiff in error, for the breach of a covenant in a lease to stop its passenger trains which passed the leased premises at seasonable hours for meals a sufficient time to permit passengers to take their meals at an hotel built on the premises by the lessee. The lease was made on September 1, 1875. The first breach occurred in June, 1891. This action was commenced on July 1, 1892. In the petition damages for the loss of profits between June 1, 1891, and July 1, 1892, were demanded, but at the trial the attempt to recover these profits was abandoned, and the defendant in error claimed to recover the value of the hotel and other buildings on the leased premises as for an entire breach of the contract. The case was tried by a referee, whose findings of fact and conclusions of law were adopted by the court. The findings disclose these facts: On September 1, 1875, the Kansas Pacific Railway Company made the lease in suit to T. C. Henry. The plaintiff in error succeeded to the rights and assumed the obligations of the lessor, and the Travelers' Insurance Company, the defendant in error, succeeded to the rights and assumed the liabilities of the lessee before June 1, 1889. By the terms of the contract the railway company leased to Henry for the term of 15 years, with the perpetual right of renewal for terms of 10 years, unless the company purchased the improvements at an appraised value, a tract of land 215 feet long and 110 feet wide, situated between the railroad of the company and one of the streets of Abilene, in the state of Kansas. It covenanted to pay the expenses of putting down all platforms around a building which Henry agreed to construct on the premises for an hotel and depot, to pay for awnings over these platforms, to paint the awnings, and to keep them in good repair. It agreed to stop all passenger trains which should pass Abilene at seasonable hours for meals at the hotel on the premises a sufficient time to allow the passengers to take their meals. It covenanted that Henry should have the right to charge and receive reasonable rent from any other railroad company which should occupy the depot, and it agreed not to permit the use of any of the property then or thereafter owned

or held by it in Abilene so as to injure the hotel or its business. On the other hand, Henry agreed to erect a building 152 feet long, 42 feet wide, and 2 stories high before December 3, 1875, to be used for depot and hotel purposes, to provide therein a waiting room, ticket office, telegraph office, and baggage room suitable for railroad accommodations, to keep in this building a first-class hotel, and to sell the depot and hotel to the company at any time after five years, at an appraised value, if the company should desire to buy, and should give notice of its intention six months before the purchase. The lease provided that, if the lessee broke his covenant to keep a first-class hotel, the company might cease to comply with its covenants to stop its trains for meals, to repair the platforms and awnings, and to refuse to permit the use of its lands to the injury of the business of the hotel, might continue to use the passenger and baggage rooms and the ticket office, and might submit the rights of the parties to arbitration. The lease contained no provision relative to the effect of the breach of any other covenant which it contained. The lessee built an hotel and depot on the premises in 1875, within the time fixed in the lease. It contained twenty sleeping rooms, was adapted for general hotel purposes as well as for a railway eating house, and was within two blocks of the business center of Abilene. The railroad company occupied the passenger and baggage rooms and the ticket office, and the lessee the remainder of the building. It has ever since been, and still is, the only first-class hotel in Abilene; and it has always been, and still is, used by the lessee as such. This building cost $30,000 in 1875. Prior to April 14, 1877, the lessee added a third story to the hotel, for the purpose of providing it with additional sleeping rooms, and built a two-story brick office building upon the leased premises, fronting on a principal street. On that day a supplemental contract was made to the effect that these improvements should be treated as though they had been a part of the original building. At some time after April 4, 1887, the lessee spent $12,000 in making further improvements upon the property. None of the improvements made subsequent to the original construction were necessary for the purpose of furnishing meals to passengers. The office building has been, since a time anterior to the commencement of this action, and still is, occupied by the Kansas Farm Mortgage Company as a tenant of the lessee. The railway company leased the hotel from the insurance company for $2,000 per annum from June 1, 1889, to June 1, 1890, when it surrendered possession to the insurance company. Train No. 8 of the railway company passed the hotel at a seasonable hour for dinner during all the time here in question. Prior to March 20, 1890, it stopped there daily a sufficient time for passengers to take their meals. On March 20, 1890, the railway company for the first time put a dining car on this train, and has since operated it with the train. From that time until the railway company surrendered the hotel to the insurance company that train did not stop at Abilene for meals. Shortly before June 1, 1891, when the insurance company retook the hotel, it demanded that the train should stop for meals, and the railway company directed its trainmen to stop the train 15 minutes to allow the passengers to take their meals; but the order was not enforced, and, while the train stopped at the hotel, it usually stopped less than 10 minutes. Nevertheless passengers went into the dining room of the hotel, obtained their dinners, and paid for them, on 178 of the 395 days which intervened between May 31, 1891, and the commencement of this suit, and many other passengers from this train availed themselves of the privileges of a lunch counter which the lessee maintained. Since the commencement of the suit the insurance company has furnished dinners to passengers on this train, has continued to occupy and operate the hotel and to rent the office building, and it has always insisted upon a strict performance of the covenants made by the lessor in the lease. The plaintiff in error denied in its answer that it had broken its covenant to stop its train at Abilene a sufficient time to allow the passengers to take their meals, and introduced evidence tending to sustain its defense, but that defense failed, and the court found that there was a breach of the covenant. The operation of dining cars, and the failure to stop train No. 8 a reasonable time, depreciated the value of the buildings on the leased premises, and destroyed their rental value. If the train had stopped daily a proper length of time, and no dining car had been run upon it, the rental value of the property would

have been $2,000 per annum. Whether or not it would have had any rental value if the train had been stopped a proper length of time, and the dining car had been operated, is not found. The buildings had no market value, but the court found that it appeared from their cost and their rental value that they were worth $40,000. As conclusions of law the court found that the use of dining cars was no breach of the contract, but that the failure to stop train No. 8 a sufficient time to allow the passengers to take their dinners constituted such a breach, and that the value of the improvements on the leased premises —$40,000—was the measure of the damages caused by this breach.

N. H. Loomis (W. R. Kelly, A. L. Williams, and R. W. Blair, on the brief), for plaintiff in error.

John H. Mahan and J. E. McKeighan, for defendant in error.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

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

The proposition that the measure of damages for the continued breach for 11 months of a covenant in a lease, which had been carefully kept for 15 years, to stop trains which arrived at seasonable hours at an hotel on the leased premises for meals, is the value of the hotel, is sufficiently startling to arrest attention at least, and to excite some degree of curiosity to learn upon what theory the skill and ingenuity of counsel have thus far maintained it. Their contention is: First, that the covenants of the lessor to stop its trains at the hotel for meals, and not to permit the use of its property in Abilene to injure the business of the hotel, and the covenant of the lessee to keep a first-class hotel, with accommodations for meals for passengers and guests, were mutually dependent covenants, each of which went to the whole consideration of the contract; second, that the continuing breach of these covenants by the lessor for 11 months gave to the lessee the right to recover damages as for a total breach of the entire contract; and, third, that the lessee was entitled to recover whatever it had expended in preparing to fulfill its part of the contract, which they claim was much more than the estimated value of the hotel. Let us consider these propositions in their order.

1. The intention of the parties in this case, as in all cases of the interpretation of contracts, must determine whether the covenants of the lease were dependent or independent, and that intention must be ascertained from the contract itself by the application of common sense to its interpretation in view of the situation of the parties when it was made, and from the construction which they gave to it by their subsequent words and deeds before any controversy had arisen concerning it. The approved test for the determination of this question is found in the rule which Lord Mansfield stated in Boone v. Eyre, 1 H. Bl. 273, in these words:

"Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they only go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." Ritchie v. Atkinson, 10 East, 295; Stavers v. Curling, 3 Bing. N. C. 355; Lowber v. Bangs, 2 Wall. 728, 736; Hague v. Ahrens, 3 U. S. App. 231, 3 C. C. A. 426, and 53 Fed. 58.

The breach of a covenant of the first class—a dependent covenant, which goes to the whole consideration of the contract—gives to the injured party the right to treat the entire contract as broken, and to recover damages for a total breach. Leopold v. Salkey, 89 Ill. 412; Keck v. Bieber (Pa. Sup.) 24 Atl. 170; Parker v. Russell, 133 Mass. 74; Railroad Co. v. Van Deusen, 29 Mich. 431; Richmond v. Railroad Co., 40 Iowa, 264, 275. But a breach of a covenant of the second class—a covenant which does not go to the whole consideration of the contract, and is subordinate and incidental to its main purpose—does not constitute a breach of the entire contract, or put an end to the agreement, but the injured party is still bound to perform his part of the contract, and the only damages he can recover consist in the difference between the amount which he actually received or lost, and the amount which he would have received or lost if the broken covenant had been kept. Pordage v. Cole, 1 Saund. 320, note; Campbell v. Jones, 6 Term R. 570, 573; Surplice v. Farnsworth, 7 Man. & G. 576, 584; Obermyer v. Nichols, 6 Bin. 159, 160, 164; Burnes v. McCubbin, 3 Kan. 221, 226; Butler v. Manny, 52 Mo. 497, 506; Turner v. Mellier, 59 Mo. 527, 536; Pepper v. Haight, 20 Barb. 429, 440; Appalachian Co. v. Buchanan, 43 U. S. App. 265, 20 C. C. A. 33, and 73 Fed. 1007. Illustrations of the first class of covenants are found in contracts for personal services, such as that in Leopold v. Salkey, supra, in which one agreed to devote his entire time and skill to the business of his employer for three years, and it was held that he made a breach of his entire contract by absenting himself for two months in the busiest season. Covenants to support the grantors of land during their natural lives in consideration of the conveyances—like that in Parker v. Russell, supra, where it was held that the failure to furnish any support under such a covenant for two years constituted a total breach of the entire agreement—furnish a class of familiar illustrations of this rule many of which may be found in the reports of the New England states. Mullaly v. Austin, 97 Mass. 30; Amos v. Oakley, 131 Mass. 413; Remelee v. Hall, 31 Vt. 582; Fales v. Hemenway, 64 Me. 373; Sutherland v. Wyer, 67 Me. 64; Lamoreaux v. Rolfe, 36 N. H. 33. The promise to pay in installments for work as it progressed was held to be of this character in Railroad Co. v. Van Deusen, supra, where persistent and repeated refusals and failures to pay the installments when due according to the terms of a grading contract were declared to give the contractor the right to abandon the work, and to recover his damages for a breach of the entire agreement. In Richmond v. Railroad Co., supra, the case upon which counsel for the defendant in error seem to place their chief reliance to sustain this judgment, the supreme court of Iowa held that a covenant by a railroad company to deliver to a lessee, which had built an elevator for the purpose of handling grain, all the through grain passing over the railroad, went to the whole consideration of that lease, and that its breach authorized the lessee to recover for a total breach of the entire contract. In that case the railroad company leased a portion of its right of way on the bank of the Mississippi river at Dubuque to the assignor of Richmond & Jackson for the term of 15 years for use as the site for an elevator, and covenanted to give to the lessee the handling of all

its through grain, and to pay to it one cent a bushel and certain storage charges therefor. The lessee agreed to build and operate the elevator, and either to sell its building, or take another lease for 15 years, at the option of the railroad company, at the end of the term. The lease was made in 1860. The railroad company had no bridge across the Mississippi river at Dubuque at that time, and it was necessary to handle its through grain by means of an elevator. The elevator was erected at the terminus of the railroad on the west bank of the river and was suitably located and equipped to transfer grain to and from cars on the railroad track and boats and barges on the river. About 1867 another railroad company leased the railroad of the lessor, and assumed its obligations under the lease to the elevator company. A bridge was built across the river, and from that time forward the lessor used this bridge, and refused to pass its grain through the elevator. Richmond & Jackson, the assignees of the lessee, sued the lessor and its assignee, and recovered a judgment for $4,365.12 for failure to give them the handling of the through grain between October 1, 1867, and January 23, 1868. 26 Iowa, 191. They sued again, and recovered $73,136 for the breach of this covenant between January 23, 1868, and May 1, 1870, 33 Iowa, 422. On February 3, 1872, they brought another suit for a total breach of the entire contract, and in that action they proved and recovered the value of their elevator, which had been rendered useless by the failure of the railroad company to deliver the grain to it. This Iowa case is cited as analogous to the action under consideration, and as persuasive authority in support of the judgment in hand. But the difference between that case and the one at bar is striking and fundamental. In the Iowa case the elevator was built—the entire improvement was made—for the purpose of handling grain, which the railroad company was to furnish, and for whose handling it was to pay, and the failure to furnish the grain and pay for its handling went to the whole consideration of the contract. In the case in hand, the furnishing of dinners daily to the passengers on a single passenger train (the only passenger train that ever passed Abilene regularly at a seasonable hour for a meal) could not have been the only important purpose or the whole consideration for the erection of the three-story hotel with 55 sleeping rooms, and the two-story brick office building, whose value is charged up to the railroad company in this judgment. Indeed, the court below expressly finds that neither the addition of the third story, the construction of the office building, nor the subsequent improvements on these buildings, which cost $12,000, were necessary for the purpose of furnishing meals to passengers, and yet they constitute a large part of the value of the buildings evidenced by the judgment. If furnishing dinners to passengers upon this single train had been the whole consideration of this lease, $3,000 expended in a railroad eating house would have furnished every facility for dining them that an expenditure of 10 or 20 times that amount could provide. Moreover, it was conceded in the Iowa case that the railroad company had committed a total breach of the contract (40 Iowa, 275), while in the case at bar the railway company has constantly insisted, not only that there was not any breach of the entire contract, but that there was no breach

of the covenant to stop the trains; and, after a prolonged and expensive litigation, the only breach found by the court below is that, although the company stopped its train No. 8 for a time on each day, it did not stop it long enough daily during 11 months to properly keep its covenant in that regard. The differences between the facts in the Iowa case and those in the case at bar are so wide and marked that the decision of the one is no authority for, and very little assistance in the decision of, the other.

The cases we have been reviewing are the leading authorities cited by the counsel for the defendant in error in support of their first contention. They are cases in which the covenants upon which they were brought went to the whole consideration of the contract; cases in which the failure to perform the covenants in suit deprived the plaintiffs of the chief or the entire value of the contracts, and rendered their further existence useless to them. Thus the entire consideration for an agreement to pay for personal services is the covenant to devote the skill and ability of the employed to the service; the whole consideration for the conveyance of a farm for the support of the grantor is the covenant of the grantee to furnish that support; the entire consideration for the performance of a contract of grading, which is to be paid for in money, is the promise to pay money; and the real consideration for the erection and maintenance of the elevator at Dubuque was the covenant of the railroad company to furnish grain for it to handle, and to pay for its handling.

Perhaps we have examined this class of cases with sufficient care, and we turn to a consideration of cases involving the breach of independent covenants which do not go to the whole consideration of the contract, but are subordinate and incidental to its main purpose. The remedy for the breach of such covenants is compensatory damages for the profits lost or the injuries sustained during the continuance of the breach prior to the commencement of the action. It does not avoid or put an end to the contract, nor does it authorize the recovery of damages for its total breach. Thus, in Surplice v. Farnsworth, supra, it was held that a tenant could not quit the premises, and defend against the rent reserved in the lease, because the lessor broke his covenant to repair. In Obermyer v. Nichols, 6 Bin. 159, 160, 169, 171, Nichols had leased a mill to Obermyer for four years, and covenanted in the lease to build a house adjoining the mill, and to make certain improvements after the commencement of the term. The tenant took possession, and the lessor broke his covenants. The learned judge who delivered the opinion of the supreme court of Pennsylvania said:

"I entirely agree with the charge of the court below, that the defendant in that suit, having enjoyed the mill and premises demised, the covenants on the part of the landlord were minor and subordinate, and did not go to the essence of the contract, so as to defeat the rent in toto, in case they were not performed; but that the jury were at liberty to defalk in damages from the rent whatever they might think just and conscientious for the repairs neglected to have been made. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant."

To the same effect are McCullough v. Cox, 6 Barb. 386, 390, where the lease contained a covenant by the lessor to make improvements in a store, and to introduce water; Burnes v. McCubbin, 3 Kan. 221, 226, where the lease contained a covenant, broken by the lessee, not to assign; and the other cases cited in this class in the earlier part of this opinion. It seems unnecessary to review the cases of this class further, and it is not difficult now, in the light of the principles and authorities to which we have referred, to determine to which class of covenants the promise of the railroad company in the lease in suit to stop its trains at the hotel for meals belonged. The situation of the parties when the contract was made, and the terms of the lease itself, disclose the evident intention of the railroad company to obtain depot accommodations, and of the lessee, Henry, to obtain the site for a first-class hotel within two blocks of the center of the city of Abilene, fronting upon a principal street upon one side and upon the railroad upon the other. By the first article of the lease, Henry secured the use of this site for 15 years, and by the second article the railroad company secured in return the use of a passenger room, baggage room, telegraph office, and ticket office for the same length of time. The other provisions of the lease follow those which secure these controlling considerations, and are made by its very terms minor, subordinate, and incidental to them. The lease contains covenants that the lessor shall paint the awnings, and keep them and the platforms in repair, that it shall stop its passenger trains for meals, that the lessee may rent depot accommodations to other railroad companies, that the lessor will not permit the use of its property in Abilene to injure the business of the hotel, and that the lessee shall keep a first-class hotel, with accommodations for passengers and guests; and then it expressly provides that, if the lessee fails to keep a first-class hotel, the lessor may withdraw the advantages covenanted to him in regard to the repair of awnings and platforms, the stopping of trains for meals, and the use of the railroad property, but it leaves the possession of the hotel by the lessee and the use of the depot accommodations by the railroad company—it leaves the controlling considerations of the contract—unaffected by the cessation of the performance of all these incidental covenants. It is difficult to conceive of more conclusive evidence of the intention of these parties that these covenants should be subordinate to, and independent of, the lease of the hotel site to Henry, and the release of the depot accommodations to the railroad company, than this express provision of the lease. Moreover, the character of the structure which the lessee agreed to build is a very persuasive indication that the chief consideration for its construction was not the covenant of the company to stop its train No. 8 to enable the passengers upon it to take dinner. It was 152 feet long and 42 feet wide. It contained 20 sleeping rooms, and cost $30,000. It is too severe a strain upon credulity to believe that the entire or chief consideration for the construction of such a building was the covenant of the railway company that it would stop its train No. 8 daily at this hotel a sufficient length of time to enable passengers to take their dinner.

Nor can it be possible that the lessee was induced by that covenant to put the third story on his hotel, and to build the two-story brick office building which he constructed in subsequent years, for it is expressly found by the court below that these were entirely unnecessary to enable him to dine the passengers. The result is that the contract itself, the situation of the parties when they made it, and their acts under it, all urge with compelling force to the conclusion that the covenant to stop the trains for meals did not go to the whole, or to the chief part, of the consideration for the lease, but was a minor and incidental promise, whose violation could not constitute a total breach of the entire contract. It follows that the true measure of damages in this case was the difference between the amount which the lessee earned between June 1, 1891, and July 1, 1892, from the operation of its hotel, and the amount which it would have earned if the contract in suit had been fully performed by the plaintiff in error, and the rule applied by the court was erroneous.

The objection urged by counsel for defendant in error to this rule of damages—that it is impossible under it to prove any damages, and that the defendant in error ought not to go remediless—has not escaped attention. We are, however, of the opinion from a careful inspection of the evidence in the record, that it is neither impossible nor impracticable to produce such evidence as will sustain a finding of the amount of these damages by a jury or by the court. Moreover, if we are mistaken in this, we are unwilling to assent to the proposition that, if an injured party can prove no damages according to the true rule, he may recover $40,000 under an erroneous rule.

The conclusion which we have reached renders it unnecessary to consider the question whether or not the use of dining cars was a breach of any of the covenants of the lease, because the true measure of damages would be the same in this case whether it was or was not, and the case must be reversed in any event because of the erroneous measure which was applied.

It is likewise unnecessary to consider the second and third propositions stated in the opening of this opinion as the contentions of counsel for defendant in error. The overthrow of their first proposition is fatal to this judgment, whether the second or third could be sustained or not. It may be remarked in passing, however, that it is possible that the plaintiff in error, now that it is settled by this litigation that it must stop its passenger train No. 8 for 20 minutes daily at the Abilene Hotel to permit its passengers to take their dinner, will comply with its covenant, and that it will appear upon the subsequent trial that there was no intention on its part to persistently violate its agreement, but that the litigation resulted from an honest difference of opinion as to the time and manner of its performance. It may be well to note also that, if the rule invoked by the defendant in error that the injured party is entitled to recover whatever he has expended in preparing to fulfill his part of a contract were applicable to this case, there could be no recovery under the breach alleged for the expenditures for the third story of the hotel, and for the brick office building, or for the $12,000 subsequently

expended, nor for the entire value of the building, which includes as one of its elements the improvements made by these expenditures, because it is certain that these improvements were not necessary to enable the lessees to furnish dinners to the passengers, or to enable them to perform their part of the contract, and they were not made to prepare them to do so, because they were prepared to do so without them. The judgment below must be reversed, with costs, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.

SMILEY v. BARKER.

(Circuit Court of Appeals, Eighth Circuit. November 22, 1897.)

No. 913.

1. STATUTE OF FRAUDS—WAIVER OF WRITTEN CONTRACT.
   Strict performance of a written contract subject to the statute of frauds may be waived by oral words, and by acts inconsistent with an intention to require it, which have induced the other party to omit such performance, though such words may be inadmissible, under the statute of frauds, for the purpose of showing a new contract modifying the old one.
2. SAME—SALE—DELIVERY—RESCISSION.
   A written contract of sale providing for delivery and payment "about" a specified date gives the purchaser at least as late as midnight of that day in which to perform it; and if the seller, without notice or tender of the thing sold, or demand of payment, sells it to a stranger during that day, and thus disables himself from performing the contract, this is a repudiation of it, which gives the purchaser the option either to rescind and sue in assumpsit to recover any money he may have paid, or to sue for damages for breach of the contract. Therefore, where the purchaser sues to recover money which he has paid on the contract, there is no error in permitting him to testify that, on learning of the sale to a third party, he treated his own payment as forfeited, thus showing that he elected to rescind.
3. APPEAL AND ERROR—REVERSAL.
   A just judgment, which is warranted by the record and the facts, will not be reversed because it was based on a wrong reason.
4. SAME—WAIVER OF JURY.
   In a case tried to the court, a jury being waived, the only question relative to the findings is whether or not they are sufficient to sustain the judgment, and no question of the sufficiency of the evidence to sustain the findings can be considered.

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

This writ of error challenges a judgment for the recovery of part of the purchase price paid by Samuel M. Barker, the defendant in error, to Robert A. Smiley, the plaintiff in error, for 6,000 sheep, none of which were ever delivered. Barker alleged in his complaint that on November 21, 1892, he paid $1,000 to Smiley, and promised to pay him $28,500 on the delivery of 6,000 sheep, and that Smiley made a written contract with him to deliver the sheep to him at Medicine Bow, in the state of Wyoming, on May 1, 1893; that on May 31, 1893, he paid $5,000 on this contract, and he and Smiley made another written agreement, to the effect that the balance of the money should be paid when the sheep were delivered, about November 1, 1893, that Barker should pay $750 interest and all the expense of shearing and herding the sheep meanwhile, not exceeding

$100 per month, and that Smiley should sell the wool, and apply its proceeds in payment of the purchase price on the contract; that on October 25, 1893, Smiley agreed to ship 3,000 of the sheep to Chicago by way of Silver Creek, in the state of Nebraska, where Barker was, and where he had a suitable place to feed the sheep, to deliver these sheep to him at Silver Creek if he was then able to pay $10,000 on the contract, and to keep the remaining 3,000 sheep for him until May 1, 1894, when Barker was to pay the unpaid balance owing upon the agreement; that he raised the $10,000, and had it ready to pay about November 1, 1893, but that Smiley sold the 3,000 sheep to a stranger before that date, kept the $6,000 paid to him as part of the purchase price, and failed to deliver any of the sheep. He sued for and prayed to recover the $6,000 as money had and received by Smiley to his use. The plaintiff in error answered. In his answer he admitted the execution of the contracts of November 21, 1892, and May 31, 1893, and the payment of the $6,000, but he denied the agreement of October 25, 1893, and averred that that agreement was to the effect that the defendant in error should pay $10,000 to him at Rawlins, in the state of Wyoming, on or before October 27, 1893, and that thereupon he should deliver the 3,000 sheep to him at Medicine Bow, and should keep the remainder until the 1st of May, 1894, when they should be delivered, and the unpaid balance of the purchase price should be paid. He alleged that Barker failed to pay the $10,000 as he agreed, and thereby violated his contract, and he claimed $11,000 for his breach of it. The court tried the case, without a jury, and filed special findings of fact and conclusions of law. The material facts which it found were these: The three contracts alleged by the defendant in error in his complaint were made, but the last one was not in writing. Before this last contract was made, the plaintiff in error wrote to Barker, and proposed that he should take but 3,000 instead of 6,000 sheep about November 1, 1893. About October 22, 1893, the plaintiff in error went to Silver Creek, Neb., where he found Barker, and made the oral agreement with him to ship the 3,000 sheep about November 1, 1893, to Chicago, to feed them in transit at Silver Creek, Neb., to accept $10,000 when they arrived there, and to deliver them to Barker, and to extend the time for the delivery of and the payment for the remaining 3,000 sheep until May 1, 1894, if the $10,000 was paid. Barker agreed to secure the $10,000 if possible. He did secure it, and had it on hand, ready to pay over, on November 1, 1893, at Silver Creek, where he was awaiting the arrival and delivery of the 3,000 sheep. Before the October agreement was made, he had sent 18 cars to Medicine Bow for the purpose of transporting the sheep East. After the October contract was made, the plaintiff in error requested him, by letter, to turn these cars over to him, so that he could use them to ship the 3,000 sheep to Chicago; and Barker sent a written order for the cars, with detailed directions for shipping the sheep, which Smiley received on November 1, 1893. On that day he sold and delivered 2,750 of the sheep to a stranger, without any notice to the defendant in error, who first learned of this fact on November 4, 1893. The court found as conclusions of law that the plaintiff in error waived the defense of the statute of frauds by his pleading; that the oral agreement of October 22, 1893, was a valid and binding contract; that Smiley had failed to comply with his written contracts as modified by this oral agreement; that he was not entitled to recover upon his counterclaim; and that the defendant in error must have judgment against him for the portion of the purchase price which he had paid, and interest.

Frederick H. Bacon, for plaintiff in error.

T. F. Burke (B. F. Fowler on the brief), for defendant in error.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

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

The principal complaint concerning the trial of this case is that the court below admitted evidence of the oral agreement of October, 1893, which tended to modify the written contracts for the sale of the

sheep, held that oral agreement valid, and rendered this judgment of $6,000 and interest for its breach, over the repeated objections of the plaintiff in error that this contract was void under the statute of frauds, and without consideration. A careful examination of the record has convinced us, however, that the invalidity of this oral agreement is not necessarily fatal to the judgment, and for these reasons:

1. It is assigned as error that the testimony of Barker and another to the terms of the oral agreement was erroneously received, because that contract fell under the ban of the statute of frauds, and was without consideration. Conceding that parol agreements modifying written contracts that are within the statute of frauds are themselves within that statute, and cannot be enforced (Emerson v. Slater, 22 How. 28, 42, and cases there cited; Swain v. Seamens, 9 Wall. 254, 271), and that the plaintiff in error had not waived this defense by his answer, we are still of the opinion that the court rightfully received this evidence on another ground. On October 1, 1893, the plaintiff in error was bound, under written contracts, to deliver 6,000 sheep to the defendant in error at Medicine Bow, Wyo., and the latter was bound to pay him about $24,000 for them on delivery. Thereupon he wrote to Barker, and suggested to him that he should take only 3,000 instead of 6,000 sheep that year. He then went to Barker's ranch, at Silver Creek, Neb., and told him that he would ship the 3,000 sheep from Medicine Bow Station to Chicago, by way of Silver Creek; that he would stop and feed them there; and that, upon the receipt of the $10,000 when he arrived there, he would deliver these sheep to Barker, and would defer the delivery of the remaining 3,000 and the payment of the unpaid balance under the written contracts until May 1, 1894. Barker assented to this proposition, and proceeded to raise the $10,000. Smiley went to Medicine Bow; and, in order to enable him to ship the 3,000 sheep to Silver Creek, he wrote Barker for an order for the delivery of the 18 cars which he had sent for the transportation of the sheep before the conversation about the delivery of the 3,000 sheep at Silver Creek. Barker relied on these letters and statements of Smiley, and was thereby induced to stay away from Medicine Bow about November 1, 1893, when he would otherwise have been there to accept delivery of the sheep and pay for them, to send him the order for the cars, to raise the $10,000, and to await his arrival at Silver Creek with the sheep.

The statute of frauds may not be used to perpetrate a fraud. One cannot take advantage of his own wrong. One may not so speak and act as to knowingly induce another to change his position, and then avail himself of that change to his prejudice. The letters and statements of Smiley in October lulled Barker into security, and prevented his attendance at Medicine Bow to receive or pay for the sheep on November 1, 1893; and he cannot be permitted to take advantage of this absence, which he himself had induced, to default Barker on his contract, and charge him with damages. The letters and conversation constitute a waiver of the delivery and payment at the time

and place named in the written contracts, and, although they did not evidence an enforceable agreement, they were all admissible to establish this waiver.

Bishop, in his work on Contracts, says, at section 792:

"Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it. Thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards."

And the supreme court has expressly held that the strict performance of a contract subject to the statute of frauds may be waived by words and acts inconsistent with an intention to require it which have induced the other contracting party to omit it. Swain v. Seamens, 9 Wall. 254, 272; Dodsworth v. Iron Works, 31 U. S. App. 292, 299, 13 C. C. A. 552, 554, and 66 Fed. 483, 486; Browne, St. Frauds, §§ 424, 425; Railroad Co. v. Ristine, 40 U. S. App. 579, 582, 23 C. C. A. 13, 14, and 77 Fed. 58, 60.

2. It is assigned as error that the court below found that the oral agreement of October, 1893, was a valid contract, and was violated, and that it based its judgment upon this contract and its breach. But, if we discard this conclusion altogether, the other findings of the court are not insufficient to sustain the judgment. They disclose the facts that under the written contracts themselves, without any waiver or modification, the sheep were not to be delivered nor paid for until about November 1, 1893, and that the plaintiff in error, without notice or tender of the sheep or demand of payment, sold 2,750 of them to a stranger on that day, and thus disabled himself from fulfilling the contracts. This was a repudiation of the agreements before the defendant in error could have been placed in default under the exact terms of the written contracts. The word "about," before the date of delivery and payment in these contracts, has significance, and must have effect. "About" November 1st does not mean "on" November 1st, and this word gave to the defendant in error at least until midnight of that day in which to perform his contract. Moreover, the findings disclose the fact, as we have seen, that the plaintiff in error had waived strict performance at the time and place named in the written contracts, and the defendant in error had changed his position in reliance upon that waiver. Smiley could not then default Barker for a failure to comply with the written contracts without giving him a reasonable notice that such a compliance would be required. The result is that, if we disregard the conclusion of the court relative to the oral agreement, the other findings are sufficient to sustain the judgment either upon the face of the written agreements without considering the waiver, or upon the basis of the waiver. A just judgment, which is warranted by the record and the facts, will not be overthrown because it was based on the wrong reason (Pennsylvania Co. v. Versten [Ill. Sup.] 30 N. E. 540, 541; White v. Railroad Co. [Ind. Sup.] 23 N. E. 782, 786; Railway Co. v. Batsell [Tex. Civ. App.] 34 S. W. 1047); and this judgment cannot be reversed on account of the assignments of error which were leveled at the rulings of the court relative to the oral agreement.

It is assigned as error that the court permitted Barker to testify that he treated the purchase price he had paid as "forfeited" when Smiley had sold the sheep, and that it permitted him to recover the amount he had paid on the contract, instead of restricting him to the difference between the value of the sheep and the amount he was owing for them at the time of the repudiation of the agreement. But Mr. Justice Clifford well said, in Nash v. Towne, 5 Wall. 689, 701:

"Where the seller of goods received the purchase money at the agreed price, and subsequently refused to deliver the goods, and it appeared at the trial that he had converted the same to his own use, it was held at a very early period that an action for money had and received would lie to recover back the money; and it has never been heard in a court of justice since that decision that there was any doubt of its correctness. Anon., 1 Strange, 407."

The refusal of the vendor to deliver the goods purchased, and his conversion of them to his own use before the time of delivery had passed, are a distinct repudiation of the contract. It is a notice to the vendee that he will not abide by and will not perform it. It gives to the purchaser the option to accept the repudiation as a rescission of the contract, and to sue him on the implied assumpsit for money had and received, on the ground that the consideration for the payment he has made has failed, or to sue him for damages for the breach of the agreement. The defendant in error has chosen the former alternative, and the court below committed no error in permitting him to testify to his election, and in allowing him to recover the amount he had paid on the repudiated contracts of sale, with interest. Ankeny v. Clark, 148 U. S. 345, 353, 13 Sup. Ct. 617; Eames v. Savage, 14 Mass. 425; McCrelish v. Churchman, 4 Rawle, 26; Baston v. Clifford, 68 Ill. 67; Stahelin v. Sowle, 87 Mich. 124, 49 N. W. 529; 2 Smith, Lead. Cas. 30 (7th Am. Ed. note); Withers v. Reynolds, 2 Barn. & Adol. 882; Planche v. Colburn, 8 Bing. 14; Palmer v. Temple, 9 Adol. & E. 508; Tiffany, Sales, 235.

Finally, it is assigned as error that the court below found a certain fact not warranted by the evidence; that it failed to find another fact which was established by the testimony; and that each one of its six conclusions of law was wrong. In a case in which a jury has been waived, the only question relative to the findings of a trial court that is open for consideration in a federal appellate court is whether or not those findings are sufficient to sustain the judgment. We have already considered that question in this case, and reached the conclusion that the findings of the court below are ample. No question of the sufficiency of the evidence to sustain these or other findings can be considered by this court. Stanley v. Supervisors, 121 U. S. 535, 547, 7 Sup. Ct. 1234; Wile v. Bank, 36 U. S. App. 165, 167, 17 C. C. A. 25, 26, and 70 Fed. 138; Insurance Co. of North America v. International Trust Co., 36 U. S. App. 291, 303, 17 C. C. A. 616, 618, and 71 Fed. 88, 90; Searcy Co. v. Thompson, 27 U. S. App. 715, 13 C. C. A. 349, and 66 Fed. 92. The judgment below must be affirmed, with costs, and it is so ordered.

THAYER, Circuit Judge. I concur in the order affirming the judgment of the circuit court, but I am unwilling to concede that the de-

fendant below (who is the plaintiff in error here) was entitled to invoke the statute of frauds to prevent the admission of oral testimony relative to the terms of the agreement of October 22, 1893, which modified in some respects the existing written agreement. In view of the manner in which the pleadings in the case were framed, I am of opinion that the defendant waived the protection of the statute of frauds. The defendant below admitted in his answer that the original written agreement for the purchase and sale of the sheep had been modified by mutual consent of the parties on or about October 22, 1893, and that except in two respects the terms of said modified agreement were correctly set forth in the plaintiff's petition. He averred that, by the provisions of the modified agreement, the sum of $10,000 was payable on or before October 27, 1893, at the city of Rawlins, in the state of Wyoming, instead of being payable at Silver Creek, in the state of Nebraska, and that the 3,000 head of sheep were deliverable at Medicine Bow, in the state of Wyoming, instead of being deliverable at Silver Creek, Neb. In all other respects the plaintiff's version of the terms of the modified agreement was admitted to be correct. Moreover, the defendant filed a counterclaim, wherein he pleaded the modified agreement, according to his understanding of its terms, and claimed damages for the breach thereof in the sum of $11,000. The answer contained no suggestion that the statute of frauds would be relied upon to defeat the agreement of October 22, 1893. On the contrary, the counterclaim amounted to an explicit declaration on the part of the defendant that he would himself claim the benefit of the modified agreement, although he knew it to be oral, and that he would demand damages for its nonperformance. Under these circumstances, I think it should be held that the defendant voluntarily elected to waive the benefit of the statute of frauds, and to rest his defense upon the sole ground that the terms of the modified agreement had not been correctly stated in the plaintiff's petition. It is always competent for a litigant to waive the benefit of the statute of frauds. Public policy does not require that a litigant must always take advantage of the statute when he may do so. In the present case it would seem that there is as much reason for holding that the benefit of the statute was intentionally waived by the defendant as there is for holding that, by entering into the modified agreement, the defendant thereby waived a strict compliance with the terms of the written agreement, and may therefore be held liable in damages for a breach thereof. It may be conceded that there are some cases which hold, in effect, that the method of pleading herein referred to does not amount to a waiver of the statute (Gulley v. Macy, 84 N. C. 443; Holler v. Richards, 102 N. C. 549, 9 S. E. 460); but there are other cases which adopt a contrary view, and, upon the whole, I conclude that they announce the better rule (Crane v. Powell, 139 N. Y. 379, 386, 388, 34 N. E. 911; Battell v. Matot, 58 Vt. 271, 5 Atl. 479; Iverson v. Cirkel, 56 Minn. 299, 57 N. W. 800; Gregg v. Garrett [Mont.] 31 Pac. 721).

It is desirable, for many reasons, that the pleadings in a case should disclose in advance the precise questions of law and fact that will be raised on the trial, and all modern rules of procedure have been

framed to accomplish that object. I think, therefore, that whenever it may fairly be inferred from the method of pleading which has been adopted that a litigant does not intend to raise a given question or avail himself of a statutory defense which he is at liberty to waive, the court should regard that question or that defense as eliminated from the controversy.

STERNAMAN v. PECK, United States Marshal.

(Circuit Court of Appeals, Second Circuit. July 10, 1897.)

EXTRADITION—MURDER—VENUE.

One accused of poisoning, resulting in death in Canada, may be extradited, though it appears that the poison, if administered at all, was given in this country.

This was an application for a writ of habeas corpus to procure the release of Olive A. Sternaman, who had been committed by a commissioner for extradition to Canada on the charge of murdering her husband by administering poison. The circuit court, after a hearing, discharged the writ (77 Fed. 595), and the petitioner appealed. This court, in an opinion filed May 26, 1897, affirmed the order below. 26 C. C. A. 214, 80 Fed. 883. The petitioner has now filed an application for a rehearing.

From the facts brought forth on the hearing before the commissioner it appeared that the accused and her husband, for some time prior to the latter's death, were in Buffalo, N. Y., where he was attended by physicians, and that six days before his death the accused took him to Canada, where he died. The petition for rehearing, after setting forth the proceedings heretofore had, continued as follows:

"That on the argument before the district court, on the return of the said writs, the objection was made on the behalf of the said Olive A. Sternaman that the depositions taken in Canada were improperly certified, and were inadmissible in evidence; but the court overruled said objection, and at the close of the argument dismissed the said writ of habeas corpus. That an appeal was thereupon duly taken to this court from the order dismissing the said writ. That the said appeal was argued at the present term of this court, and on the 26th day of May, 1897, this court rendered its decision affirming said order. Your petitioner further alleges that this court, in its opinion written by Judge Wallace, decided that there was evidence before the United States commissioner tending to show that the said Olive A. Sternaman had committed the crime with which she was charged; but that the court also decided that the depositions taken in Canada were not authenticated by the certificate of the principal diplomatic or consular officer of that country, as required by section 5 of the act of congress of August 3, 1882 (22 Stat. 216); and, as your petitioner understands, this court, in reaching its conclusion, wholly disregarded, and intended to wholly disregard and lay out of view, the said depositions. For proof of this statement your petitioner begs leave to refer to the language of the aforesaid opinion of Judge Wallace. Your petitioner further alleges that among the depositions so held to have been improperly received in evidence before the commissioner was the deposition of Dr. Ellis, of Toronto, the chemist who analyzed the viscera taken from Sternaman's body, and who swore to having found arsenic therein; also that one of the two depositions of the undertaker in which he swears that he did not embalm the body of Sternaman; and also the depositions of the two physicians in Canada who attended Sternaman in his last illness. And your petitioner alleges and states as a fact that, leaving out the said depositions from the case, there was absolutely and literally

no evidence whatever before the United States commissioner showing or tending to show the commission of any crime by the said Olive A. Sternaman at any place within the dominion of Canada, but, on the contrary, the evidence shows that, if a murder was committed at all, it was committed at Buffalo, New York. Your petitioner alleges that in the presentation of the appellant's case before this court he failed adequately to call the court's attention to the situation in which the case would be left with the said depositions omitted therefrom, and he believes that, by reason of such failure upon his part, the court overlooked the fact that the crime, if any there was, was committed in the United States, and not in Canada; and that, should the order of this court stand, a grave injustice against the appellant would be committed. And your petitioner, representing the said Olive A. Sternaman as her counsel, respectfully petitions the judges of this court, or one of them, for leave to move for a rehearing of this case upon this ground. Your petitioner further certifies that this application is made in good faith, and not for delay. And your petitioner will ever pray," etc.

Frank C. Ferguson and Wallace Thayer, for appellant.

W. A. Poucher, U. S. Atty., and W. H. Mackey, Asst. U. S. Atty., for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. In deciding this case the court did not overlook the point which is now raised for the first time, and made the basis of an application for a reargument; but, as the point had not been presented, the court did not deem it necessary to discuss it. We think it is not well taken. Ex parte Rousse, Stew. R. (Lower Canada) 321; 2 Geo. II. c. 21; 14 Geo. III. c. 83; Tyler v. People, 8 Mich. 320; Com. v. Macloon, 101 Mass. 1. The application for a reargument is denied.

UNITED STATES v. LAHEY et al.

(Circuit Court of Appeals, Second Circuit. December 1, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—CHIFFON VEILING.

The thin silk fabric known as "chiffon," which is suitable for veils, and is also much used for ruching, neckwear, and dress trimmings, when imported in widths of 14 inches, with a border on each side, generally known in the trade as "chiffon veiling," was dutiable under the tariff act of 1894 as "veilings," under paragraph 301, and not as manufactures of silk, under paragraph 302.

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

This was an appeal by Isaiah A. Lahey and Colon C. Duncan, composing the firm of Lahey & Duncan, from a decision of the board of general appraisers reversing a decision of the collector of the port of New York in regard to the classification for duties of certain merchandise. The circuit court affirmed the decision of the board, and the United States appealed to this court.

Wallace Macfarlane, U. S. Atty., and Henry D. Sedgwick, Asst. U. S. Atty.

Comstock & Brown (Albert Comstock, of counsel), for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. The importations in controversy are a thin fabric of silk, of a kind known, on account of its texture, as "chiffon"; and the decision of the case involves merely the question of fact whether such importations were "veilings," according to the commercial understanding prevailing when the tariff act of August 28, 1894, was passed. In the proofs before the board of general appraisers it appeared that while chiffons of various widths were suitable for veils, and were largely used for that purpose, they were also much used for other purposes, such as ruching, neckwear, and dress trimmings; and they were to some extent, but not generally or uniformly, known and dealt in as veilings. In the proofs before the circuit court there is a decided preponderance of testimony to the effect that chiffons like the present importations,—viz. of the width of 14 inches, and having a border on each side,—being specially adapted for use as veils in 1893 and subsequently, were generally imported and sold by the trade designation of "chiffon veiling." Upon the testimony in the record, we are of the opinion that the circuit court should have decided the question of fact in favor of the government, and its adjudication is therefore reversed.

UNITED STATES v. GIESE.

(Circuit Court of Appeals, Second Circuit. December 14, 1897.)

No. 44.

CUSTOMS DUTIES—CLASSIFICATION—CARBONATE OF POTASH.

Refined carbonate of potash was entitled to free entry as "potash, * * * carbonate of," under paragraph 595 of the tariff of 1894, and was not subject to duty under paragraph 60, as within the description "all chemical compounds and salts not specially provided for in this act." 78 Fed. 805, affirmed.

This is an appeal from a decision of the circuit court, Southern district of New York, affirming a decision of the board of general appraisers, which reversed a decision of the collector of the port of New York. 78 Fed. 805. That officer classified an importation of refined carbonate of potash under paragraph 60 of the tariff act of 1894, as being within the description "all chemical compounds and salts not specially provided for in this act." The importers protested, contending that it should be assessed for duty under paragraph 595 of the same act.

Jas. T. Van Renssalaer, for the United States.

Edw. Hartley, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. The paragraph on which the importers rely reads as follows:

"595. Potash, crude, carbonate of, or black salts. Caustic potash, or hydrate of, including refined in sticks or rolls. Nitrate of potash, or saltpeter, crude. Sulphate of potash, crude or refined. Chlorate of potash. Muriate of potash."

It will be noticed that the first sentence of this paragraph employs three descriptive phrases, viz.: Potash, crude; potash, carbonate of;

black salts. The use of the word "or" might leave it uncertain whether or not they were mere alternative designations for the same article; but the board of general appraisers has found that "there are potash salts known, respectively, as black salts, crude potash, carbonate of potash, and caustic potash"; and there is abundant evidence to sustain this finding. Under these circumstances, we see no reason why the court should be astute to find some excuse for holding that congress did not intend to say what it has said in positive and unambiguous language. When an importation is within the description which congress has used in this paragraph as "carbonate of potash," it should be classified accordingly, whether it be crude or refined. There is no force in the suggestion that it is not to be assumed that congress would admit refined carbonate of potash free, in view of the fact that, in this very paragraph, refined sulphate of potash and refined caustic potash are expressly given free entry. The decision of the circuit court is affirmed.

SAWYER SPINDLE CO. et al. v. MORRISON CO. et al.

(Circuit Court of Appeals, Second Circuit. December 1, 1897.)

No. 70.

PATENTS—CONSTRUCTION OF CLAIMS—INFRINGEMENT—SPINDLES FOR SPINNING MACHINES.

The Atwood patent, No. 253,572, for an improved support for spindles for spinning machines, wherein the gist of the invention is the flexible attachment of the supporting tube, with relation to the rail, is limited by the language of the specifications and the claims to a supporting tube which is so mounted, and which contains in itself both bolster and step bearings; and the patent is not infringed by a spindle in which, though the supporting tube is flexibly mounted, with relation to the rail, the lower part of it has been cut off so that the end of the spindle is supported upon a flat step, which can move freely in the bottom of the oil cup.

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

This is an appeal from an order of the circuit court for the district of Connecticut which granted an injunction pendente lite against the infringement of claims 2 and 3 of letters patent No. 253,572, dated February 14, 1882, and issued to John E. Atwood, for an improved support for spindles for spinning machines.

Charles L. Burdett, for appellants.

Fredk. Fish and W. K. Richardson, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This patent has been three times under consideration by the circuit court for the district of Connecticut, in suits against the same infringer for three infringements; and a description of the patentable character of the improvement, of its distinctive features, and of the infringed claims, was given in the opinions of that court. Sawyer Spindle Co. v. W. G. & A. R. Morrison Co., 52 Fed. 590, 54 Fed. 693, and 57 Fed. 653. The patent has also been sustained by the circuit court and the circuit court of appeals for the

Third circuit. Sawyer Spindle Co. v. Taylor, 69 Fed. 837; Id., 22 C. C. A. 203, 75 Fed. 301. The infringing device in the first case was quite a close copy of the patented structure, and therefore the attention of the court was especially called to the patentable character of the invention, in view of the spindle support of Francis J. Rabbeth, which was patented in 1880, by letters patent No. 227,129, and upon which the Atwood support was an improvement. "The Rabbeth structure had a supporting tube rigidly connected with the rail, a bolster bearing, which was a thin tube affording a lateral bearing surface for the spindle, a yielding cushion between the bolster bearing and the supporting tube, and a step bearing within the supporting tube." This spindle is well adapted for cotton spinning, and was largely used, but was not a success in silk spinning, in which the spindles necessarily carry unequally balanced loads, must have room within which to vibrate, strength to resist strains, and must be enabled to vibrate within restrained limits. The Atwood support was a tube containing step and bolster bearings, which was flexibly mounted, with relation to the rail of the spinning machine. "The flexible attachment, with relation to the rail, of this supporting tube, is the gist of the Atwood device, and was its substantial improvement upon the rigidly held supporting tube of the Rabbeth spindle; and its cushion interposed between the supporting tube and the thin tube which constituted the bolster bearing." The Atwood spindle has had large success, and is generally adopted in silk-spinning machines. After the decision of the first suit, the infringer moved further away from the patent in the second infringement, which was known as the "Hammond Spindle," and the use of which was also enjoined, and which it is not necessary to describe. The third infringement moved still further away from the patent, and was known as the "Dady Spindle," the use of which was also sought to be enjoined in the suit which included the Hammond infringement. The specification of the Atwood patent laid stress upon the supporting tube, which contained both step and bolster bearings; and the court, in its first opinion, spoke of a tube which combined the two bearings "in one piece of metal." In the Dady spindle, the supporting tube was transversely divided into two parts. The lower part was about 13-16 of an inch in height, rested upon the bottom of the oil cup, was socketed, and received into its socket the step of the spindle, and was its step bearing. One piece of metal did not contain both bearings, but the two parts were so bound together by the spindle which revolved in the socketed step bearing that they acted as one tube, and there was no substantial independent movement of the step bearing. It was said in the third opinion that Atwood's method of construction of both bearings in one tube was vital, if it was demanded by the claims of the patent, or if the transverse severance created a substantial change in the mode of operation of the supporting tube. It became clear that the severance created no difference, and that the parts of the tube moved together laterally in all directions. The court was also satisfied that the claims did not require that the tube should be of one piece of metal, and the use of the Dady spindle was enjoined. The device which is the subject of this suit has been moved still further away from the patent. The lower

part of the supporting tube has been cut off, and the end of the spindle is supported upon a flat step, which can move freely in the bottom of the oil cup. It is urged by the complainant, and it is true, that, while the loosely moving flat step affords the only vertical bearing, a lateral bearing for the lower reduced end of the spindle exists in the single supporting tube. and that the effect or the mode of operation is not at all changed by this change in the mode of construction; but it is also true that the step bearing is that part of the structure upon which the lower end of the shaft of the spindle revolves, and that by "step bearing" the part which contains the endwise pressure is meant. The learned expert for the complainants presents his point upon this part of the case as follows:

"Of course, it is not strictly accurate, as a matter of language, to say that in defendants' spindle the supporting tube contains the step and bolster bearings for the spindle, as the step bearing, or the portion thereof that sustains the endwise pressure of the spindle, is supported in the oil cup, and not contained within, or made a part of, the supporting tube. As a mechanical matter, however, the difference is of no importance, and the mode of operation and result is precisely the same as if the end bearing of the spindle were a part of the supporting tube; that is, in defendants' structure, the same as in that of the Atwood patent, the spindle and its supporting tube may move together laterally in all directions during the self-adjustment of the spindle while carrying an equally balanced bobbin and its yarn."

The case is therefore as follows: The gist of the Atwood invention, which is the flexible attachment with relation to the rail of the supporting tube, is contained in the present Morrison spindle, in which the effect or the mode of operation of the Atwood support has not been changed. But Atwood thought that a portion of his improvement consisted in a flexibly mounted supporting tube, which contained both step and bolster bearings for the spindle. He says:

"The characteristic feature of my present invention is a supporting tube which is flexibly mounted, with relation to the spindle rail, and contains the step and bolster bearings for the spindle, so that the latter and said tube may move together laterally in all directions during the self-adjustment of the spindle, while carrying an unequally balanced bobbin and its yarn, instead of relying upon the movement of the spindle and its bearings within, and independently of, the supporting tube, as heretofore in this class of spindles."

The specification says, also:

"The supporting piece or tube, G, containing, as it does, the bolster and step bearings for the spindle, constitutes a combined bolster and step, which moves laterally with the spindle in all directions during its self-adjustment."

And furthermore, when describing the construction shown in Fig. 4:

"The supporting tube, c, c', like the one before described, contains both the upper and lower bearings for the spindle; but its lower portion is partially located within the base, H, as is clearly shown in the drawings. The upper portion, c, of said tube, contains the upper or bolster bearing; and the lower portion, c', contains the step bearing."

A part of the combination of claim 2 is "a combined bolster and step," and a part of the combination of claim 3 is "a supporting tube flexibly mounted with relation to the spindle rail, and containing step and bolster bearings." As we now understand the patent, it is difficult to examine the claims by the aid of the language of the specification, and say that the patentee did not describe, and did not intend to describe, in claims 2 and 3, as an indispensable portion of his invention,

the supporting tube, which contained in some of its parts both bolster and step bearings, and thus constituted a combined bolster and step. He seems to have tied up his patent to this method of construction, and thus to have permitted the defendants to take the vital part of his invention, without infringement of the claims of the patent. The order of injunction pendente lite is reversed, with costs.

RYNEAR CO. v. EVANS.

(Circuit Court, S. D. New York. November 12, 1897.)

1. PATENTS—INVENTION—SWAGING METAL ARTICLES.
   In view of the prior state of the art, there is no invention in applying the process of swaging or striking up metal blanks into articles of manufacture to the making of artificial tooth crowns or caps.
2. SAME.
   The Rynear patent, No. 305,238, for an artificial metal tooth-crown cap struck up from a blank by dies, is void for want of invention.

This was a suit in equity by the Rynear Company against George Evans for alleged infringement of a patent for artificial metal tooth crowns or caps. Final hearing.

James C. Chapin, for complainant.
Francis Forbes, for defendant.

COXE, District Judge. This is an equity suit for the infringement of letters patent No. 305,238, granted to Moses Rynear, September 16, 1884, for an artificial metal tooth-crown cap. The specification states that prior to the alleged invention metallic tooth crowns had been constructed by fitting a band around each root at its upper end. After being fitted to the contour of the root the band was removed and soldered, forming a ring. The top or grinding surface of the tooth was subsequently soldered to the ring. After pointing out the disadvantages of this mode of procedure the patentee states that the object he has in view is to facilitate the setting of crowns in a more expeditious and less costly way by providing dentists with "metallic caps" already formed in the shape of artificial teeth so that, having selected a cap of the proper size and shape, it can easily be fitted to the root. The alleged invention consists "in the peculiar cap as a new article of manufacture" made entirely of the same piece of metal "without seam or joint." The drawings show six figures representing the blank from which the cap is stamped, the completed cap, and the intermediate stages of stamping and drawing.

The patentee says:

"I am aware that it has been proposed to make cup-shaped sockets or hollow shells in the form of human teeth for forming artificial tooth crowns; but such crowns have been made in two pieces, as before explained, or they have been formed in one piece by cutting and bending sheet metal into shape, and completed by soldering meeting edges. Both these forms, however, possess the disadvantages already explained. I am not aware that a seamless metallic cap in the shape of a natural tooth has before been produced and used for forming an artificial tooth crown. What I claim is: As a new article of manufacture,

a seamless metallic cap for forming an artificial tooth crown, having the shape of a natural tooth upon its grinding surface, substantially as set forth."

Infringement is established. The principle defense is lack of novelty and invention. Dr. Rynear did not invent a metallic tooth crown. Crowns, nearly identical in appearance with the crown of the patent, were known and tooth caps were made by the method described in the patent; namely, stamped from metal by the use of male and female dies, long prior to 1883. The words "crown" and "cap" are used interchangeably in the record, but the word "cap" is here used as having reference to a structure more shallow than a crown and designed to be placed over the natural crown of the tooth, not as a substitute for it. At least one of the witnesses called by the defendant swears to a complete anticipation. He testified that a seamless crown was made for him by a dentist in St. Louis, was placed in his mouth in 1877 and was still there at the time of his examination. This crown was examined by Dr. Rynear. The testimony is criticised because the crown was not put in evidence, but, as was suggested at the argument, it is not unfair to assume that the witness may have interposed an objection to having his teeth marked as exhibits in this cause, preferring, rather, that they should remain in his own mouth, so long, at least, as it continued to be "a going concern." Other witnesses testify to work done by them prior to 1883, and it cannot be doubted that in several instances the cap or crown made by them, if not a complete anticipation, is dangerously near the mark. The complainant has endeavored to demonstrate that this testimony is untrustworthy, and its expert has introduced a series of experiments to show that the method described by the defendant is incapable of producing a seamless cap. That the complainant's expert should prove the defendant's method inoperative is not surprising. An experience of 14 years in patent litigation has convinced the court that when an expert undertakes to prove that his adversary's process or machine is a failure he always scores a success. It is much easier to make a machine that will not work than one that will.

Again, it is urged that the defendant's witnesses describe caps and not crowns; that they were much shallower and shorter than the crown of the patent and designed to subserve a very different purpose. In many instances this is true; the difference is sufficiently marked to remove the device from the anticipatory group. It is unnecessary to decide the question whether prior use is established beyond a reasonable doubt for the reason that the court prefers to rest the decision upon another ground, namely lack of invention, regarding which no doubt is entertained. It will be observed that the patentee claims a seamless tooth crown, and though the specification describes how it is made—stamped from a gold plate—the claim covers such a crown no matter how constructed. A crown which is molded, drilled, reamed, swaged, annealed and burnished, or made by any other method, if seamless, is as much within the claim as if made by the patented formula. In short, if the patent be valid, no one can hereafter make a seamless tooth

crown without paying tribute to the complainant. A claim so broad and sweeping should be scrutinized with unusual care. What has the patentee added to the art? Assuming, to avoid argument, that he was the first to make a seamless crown the entire value and virtue of his contribution is found in this single feature. There is nothing else and nothing else is pretended. An effort has been made to show that a seamless crown possesses extraordinary advantages over a nonseamless crown. Most of these are speculative and imaginary. Upon this record it is by no means certain, considering its defects as well as its advantages, that the seamless crown is an improvement upon the crowns of the prior art. These crowns were made in various ways. The methods most commonly employed are aptly described in the language above quoted from the specification. Crowns thus made so closely resemble the patented crown that the differences can only be detected by an expert and then, in some instances, only by the use of a blow pipe. The patentee, if he did not have the exact device, certainly had before him a soldered crown and a seamless cap struck up from metal by the use of dies. Did it require invention to make tooth crowns by a method formerly used in making tooth caps? It is thought not.

But this is not all. The court can almost take judicial knowledge of the fact that the art of striking up metals by the use of a series of male and female dies was archaic at the date of the application for the patent. It is, however, unnecessary to do this for the record teems with instances where the art was practiced, and stamping machines were not only notoriously in use, but could be purchased by any one who had need for one. Articles much longer and deeper than tooth crowns were constantly being made and had been made for decades before the patent. Thimbles, buttons, capsules, eyelets, ferrules, cartridge cases, percussion caps, and caps for lead pencils, umbrellas, canes and fishing rods, are familiar examples. Rynear simply made a well-known article by a well-known process. This process was so familiar to every metal worker that it seems almost incredible that it should have escaped the attention of the tooth-crown makers; it was the most natural and obvious way to make a crown. When they say that they used it the presumption is strongly in their favor. The failure to adopt it in some instances may, perhaps, be accounted for by the fact that the art seems to have been exclusively in the hands of dentists, and though many of them were metal workers it is fair to assume that the majority were occupied more especially with the science of their profession. This may account for the fact that they continued working on the old lines, when, had the art been in the hands of expert metal workers, the feasibility of striking up a crown from a disc of gold would have been axiomatic. After the demand for ready-made crowns had become apparent, if a dentist had taken a crown to a goldsmith and asked him to reproduce it, there can be little doubt that one of the ways, if not the only way, of doing this suggested by him would have been stamping by the use of dies. One whose principal occupation was the care of human teeth, might adopt a

different method, the goldsmith would not. A dentist is not entitled to pose as an inventor because by pain and travail he reaches a result which would have been explained to him for the asking by a metal worker's apprentice. The most skillful surgeon would undoubtedly encounter innumerable difficulties should be undertake the construction of an artificial limb, the expert chiropodist would in all probability leave the construction of the shoe for an injured foot to the cobbler. Had the art of making gold teeth been in the hands of the goldsmiths it is fair to assume that it would not have occurred to any of them that it required an exercise of the inventive faculties to strike up a crown from a gold plate. Such a crown would be affabrous undoubtedly, but it would possess no unusual or mysterious virtues.

This cause has been prepared and argued with such painstaking ability upon the part of the complainant's counsel that the record has been examined with care to discover a theory upon which the patent can be sustained without running counter the controlling weight of authority upon this subject, but without success. If the patent be held valid it is difficult to see how hereafter invention can be denied to one who produces a well-known metal article by the use of dies which had previously been made in some other way.

The law upon this question is well settled. In Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, the court say, at page 81, 158 U. S., and page 750, 15 Sup. Ct.:

"If a certain device differs from what precedes it only in superiority of finish, or in greater accuracy of detail, it is but the carrying forward of an old idea, and does not amount to invention. Thus, if it had been customary to make an article of unpolished metal, it does not involve invention to polish it. If a telescope had been made with a certain degree of power, it involves no invention to make one which differs from the other only in its having greater power. If boards had heretofore been planed by hand, a board better planed by machinery would not be patentable, although in all these cases the machinery itself may be patentable."

In Kilbourne v. W. Bingham Co., 1 C. C. A. 617, 50 Fed. 697, the claim was for "a sink, made of a single sheet of wrought steel or iron, without joint, seam, or interior angle." In holding this claim void, the court say:

"The art of swaging metals into any required form was venerable long anterior to the patent. The drop press, drop hammer, dead-stroke hammer, dishing ram, dies, die press, forcers, and stamping machines have long been familiar to metal workers as implements by which hollow ware in all its forms and varieties has been manufactured for over half a century, and are regarded in the art as simply equivalent machines or tools for swaging; that is, beating or drawing the ductile metals into desired shapes. The use of one or the other of these agencies is merely a preferential application by the workman of the power required for the work in hand. The variety of manufactures by this process has been limited, only by the art of designing, the ductility of metals, and the possibilities of machinery."

In Manufacturing Co. v. Holtzer, 15 C. C. A. 63, 67 Fed. 907, the court say:

"The only advance alleged to be covered by either claim is in the fact that the cover, cup, and lip are cast solid, instead of being made of several parts soldered together, or otherwise secured to each other. * * * The right to

improve upon prior devices by making solid casting in lieu of constructions of attached parts is so universal in the art as to have become a common one."

See, also, Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394; Strom Manuf'g Co. v. Weir Frog Co., 75 Fed. 279; Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81.

The defendant's motion to strike out testimony is denied. The bill is dismissed.

AMERICAN TOBACCO CO. v. STREAT.

(Circuit Court of Appeals, Fourth Circuit. November 3, 1897.)

No. 210.

1. PATENTS—COMBINATIONS—NOVELTY AND INVENTION.
   The fact that every element of a combination was well known at the date of a patent does not show lack of invention, if such elements were then for the first time utilized in a new combination, so as to produce new results.
2. SAME—PATENTABLE COMBINATION.
   An article manufactured in a machine in the manner and for the purposes contemplated when the machine itself was made cannot be considered a part of the machine itself, so as to constitute an element in the combination covered by a machine patent.
3. SAME—TEST OF INFRINGEMENT.
   A device cannot be held to be an infringement unless it would have been held, if used earlier than the patent, to have been an anticipation thereof.
4. SAME—CIGAR MAKERS' IMPLEMENTS.
   The Streat patent, No. 290,811, for improvements in "cigar makers' implements," and which covers a combination in which a clamp and a rolling apron are the characteristic elements, construed, and *held* valid, and not infringed by a machine from which the rolling apron is absent.

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

This was a suit in equity by Thomas Streat against the American Tobacco Company for alleged infringement of a patent for improvements in cigar makers' implements. In the circuit court a decree was entered sustaining the patent, finding infringement, and granting the usual relief. The defendant thereupon appealed to this court.

Charles S. Stringfellow, M. B. Philipp, and W. W. Fuller, for appellant.

Rutherfoord & Page, for appellee.

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

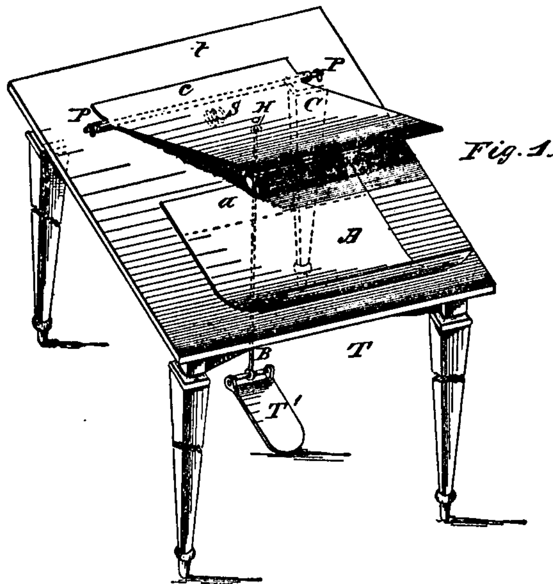
GOFF, Circuit Judge. On the 25th of December, 1883, the United States granted to Thomas Streat letters patent No. 290,811, for improvements in "cigar makers' implements." On the 13th of June, 1893, the United States granted letters patent No. 499,488, to Philip Whitlock, assignor to the American Tobacco Company, for "binder clamp for cigar bunching machines." The bill of complaint in this cause was filed by the said Thomas Streat on the 17th day of April, 1893, in

which an injunction was prayed for to restrain the American Tobacco Company from making, selling, or using a certain device and machine, which it was claimed was made in imitation of, and embodied all of the essential elements of, the machine described in the letters patent so issued to Streat. An accounting, with the relief usual under such circumstances, was prayed for. The answer of the defendant was filed on the first Monday of August, 1893, to which the complainant, on the first Monday of October following, filed his replication. The testimony was duly taken, and the case finally heard on the 17th of December, 1896, when a decree was entered by the court below adjudging that the letters patent issued to Thomas Streat were valid, and that the defendant infringed the same. The defense relied upon by the defendant below was lack of patentable novelty in the invention described in the complainant's patent, in view of the state of the art; anticipation by prior patents; and noninfringement. During the taking of the defendant's testimony it was disclosed that the machine used by it, and which it was claimed was an infringement of the complainant's patent, was covered by and described in the said letters patent No. 499,488, which were issued after the institution of this suit, to wit, June 13, 1893, although the application for said patent was filed in the patent office on the 31st of December, 1892, before the bill was filed in this cause. From the said decree of December 17, 1896, the defendant appealed.

In the specification forming part of the letters patent No. 290,811, it was set forth that the invention consisted of certain mechanism whereby means were provided for assisting in obtaining results desired in the application of the wrapper to cigarettes. The patentee stated the difficulty which his invention was intended to overcome was, in substance, as follows: In the manufacture of cigarettes having a tobacco wrapper, difficulties are experienced in obtaining a smoothly rolled cigarette, in which the wrapper is free from wrinkles, and a cigarette of sufficient density to prevent its mashing or breaking when packed. This was due to the fact that the wrapper, whether of paper or tobacco, was free to yield to any inaccuracy in the operation of rolling, or to any irregularity in the pressure applied when the cigarette is being rolled, causing that portion of the paper not held by the hands to twist, wrinkle, or pucker, which naturally detracted from the marketable value of the cigarette. He also stated in said specification that the imperfect rolling was frequently due to the unequal distribution of the filler, the quantity thereof being greater in one part of the cigarette than another, which gave rise to the unequal pressure during the operation of rolling, and caused the wrapper to wind unevenly, and thereby wrinkle. When tobacco was employed for wrapping, difficulties were greater, because it was damp and elastic, and therefore liable to stretch at the slightest inequality of pressure or strain. It was claimed that the invention would remedy such difficulties by providing a method by which one edge of the wrapper would be held tight and smooth, while the other edge was turned over the filler and rolled around it, thereby preventing such wrapper from wrinkling. To overcome these difficulties, the patentee provided in his patent for the use of a clamp

to hold one edge of the wrapper smooth while the other edge was being rolled about the tobacco, and an apron, usually made from a strip of strong paper, upon which the wrapper rested, and which was used for the purpose of applying the pressure of the fingers to the wrapper and tobacco in the rolling process, whereby the pressure was more evenly distributed over the surface of the cigarette, and the wrapper was prevented from yielding unduly because of the unequal strength. The apron so provided for was glued and rigidly held to one end of the table, and was free at the other end. The clamp consisted of a pivoted plate, spring pressed upward, which was connected by rod to a treadle, by which it could be depressed and caused to grasp one edge of the wrapper between it and the fastened end of the apron. The clamp was operated to secure the wrapper by the foot of the operator acting upon the treadle, thereby leaving both of his hands free for use in the rolling of the cigarette. These facts are fully illustrated by drawings made part of the patent and referred to by figures and letters.

The patentee, after having described his invention, set forth his claims as follows:



First. In a cigar makers' implement, a clamp, a rolling apron, a stationary support or table, upon which said clamp and apron, together with the wrapper and filler, are supported, and to which one edge of the apron is secured, the opposite edge lying free thereon; a means for depressing the clamp and holding the same in contact with the fixed edge of said apron, when said elements are combined for co-operation, as described for the purpose specified. Second. In a cigar makers' implement, a clamp, a rolling apron, A, a flat support or table for said clamp and apron, means for depressing the clamp upon one end of the apron, and holding it in contact therewith while the cigarette is being rolled in the free end of said apron, A, and means for automatically raising the clamp out of contact with the apron; said parts being combined and constructed for

co-operation, substantially as described for the purpose specified. Third. The combination of the table, T, rolling apron, A, pivoted clamp, C, and treadle, T', are constructed to operate substantially as and for the purpose shown and described. Fourth. The combination of the table, T, rolling apron, A, pivoted clamp, C, springs, S, and treadle, T', all constructed to operate substantially as shown, and for the purpose described.

We agree with the court below that the patent issued to Streat was good and valid in law. The fact that each and every element of the combination claimed by Streat was at the date of his patent old and well known was not sufficient to deprive the invention claimed by him of novelty, for most of the inventions of the present day consist of the utilization and adaptation of mechanical appliances that are themselves old and well known. The clamp and the rolling apron had both been in use before the date of the patent to Streat, and were, in fact, well known in the art, but they had not been used theretofore in the manner and for the purpose set forth in the specification of said patent; and it was in and by this new use of devices, in and of themselves not novel, that his invention consisted. Using an old process and utilizing a well-known device, by combinations which produce results not theretofore accomplished by the said process or device, is in fact invention.

Finding, as we thus do, with the court below, that the complainant's patent was valid, it now becomes necessary to consider and determine whether or not the device or machine used by the defendant below was an infringement of said patent. The defendant has not used the apparatus complained of in the manufacture of cigarettes, which seems to have been the only purpose for which the machine described in the Streat patent was intended, but has used it only in manufacturing cheroots and cigars, in the making of what is called "bunches." A short statement of the mode of manufacture shown by the evidence will enable us more clearly to understand the uses to which the machinery now in question was put. A cigar or cheroot is composed of the core, binder, and wrapper. The core consists of tobacco, sometimes called "scrap," which is divided into small pieces and formed into the shape of the cigar by the application thereto of the "binder." The binder is the leaf of tobacco upon which the filling or scrap is placed, and which, after being wound about the same, is pasted so as to cause it to retain its shape temporarily. A single leaf of tobacco is used for a binder if the same is wide enough to go around the bunch twice; but if not sufficiently wide, or if it is weak or perforated with holes, it is re-enforced by a second leaf, thus making a double instead of a single binder. The bunch thus made by the application of the binder is then transferred to a mold in which, while still moist, it is pressed and given the shape of the completed cigar. It remains in the mold until it becomes dry, when it is taken by the operator who applies the wrapper, thus making the cigar complete and ready for the market. It is well to remark in this connection, and before considering the machine used by the defendant, that we think it is clear that the function of the device patented by Streat was to aid in applying the final wrapper to the cigarette. In cases where the molds were not used, but where the article was turned out complete by hand, the

apron was used to preserve the wrapper, and to give it a perfect and finished appearance. The apron would be of no practicable utility if the bunches were to be molded into shape. We think that the patent itself, the conduct of the patentee, and the action of those who used his machines, clearly indicated that the device so patented was intended for the purposes we have pointed out.

The Streat device was first used for the making of cheroots complete, the patentee receiving a royalty of 75 cents per 1,000. These cheroots were made for the period of about five months, when, as they were not acceptable to the market, their manufacture was discontinued. The apron specified in the Streat patent was used in making the cheroots so found to be unsaleable. After the making of the complete cheroot on the Streat device was discontinued, his machine, the apron being left off, was used for making "bunches" for cheroots, both by Mr. Streat and Mr. Whitlock, who then owned the factory now operated by the defendant. During the six years previous to the institution of this suit, many of such machines without the apron were so used. It is the combination of the clamp with the apron, and the manner of using the former and attaching the latter, that constituted the novelty of Streat's invention, and justified the patent office in issuing the letters patent to him. That the apron is a vital element in the claim for the patent was shown by the record made in the patent office during its prosecution, when it was stated that it (the apron) "is the only feature of novelty in the device, and, were it omitted, a mere paper clip or clamp would be left."

The contention of counsel for the complainant below that the apron is only essential to the first claim set forth in the patent, and not required in the second, third, and fourth, is, in our judgment, without force, as the apron is the main feature in the device, and the controlling element in the combination that was patented. The apron referred to in the second, third, and fourth claims is the rolling apron, A, indicated by the letter "A" in the drawings accompanying the patent, and is an essential part of each claim, as well as the vital part of the patent itself. Parry Manuf'g Co. v. Hitchcock Manuf'g Co., 58 Fed. 402; Weir v. Morden, 125 U. S. 98, 8 Sup. Ct. 869; Hendy v. Iron Works, 127 U. S. 370, 375, 8 Sup. Ct. 1275; Knapp v. Morss, 150 U. S. 221, 228, 14 Sup. Ct. 81.

It follows, therefore, that, unless the machine used by the defendant employed a rolling apron or its mechanical equivalent in the manufacture of cigars or cheroots, there has been no infringement of the patent granted the complainant below. The evidence plainly shows that the defendant did not use an apron on any of the machines employed by it in its factory; that the machines used by it are without aprons, and are not used for making completed cheroots or cigars, but solely for the purpose of making "bunches." This is, in fact, admitted by the appellee; but it is claimed for him that the second wrapper used by the appellant is the mechanical equivalent of the apron described in the Streat patent, or, in fact, is the apron itself. In our opinion, the leaf of tobacco called the "second binder" is not the mechanical equivalent of the rolling apron described in the Streat patent,

which was evidently intended by the patentee to be a strip of strong paper—shown by the evidence to be, in practice, a strip of enameled cloth of sufficient strength to stand the strain of constant use—permanently fastened to the table, intended for continuous use, of greater strength than the tobacco leaf, the inherent weakness of which it was designed to obviate. But the second binder cannot be considered an element of the machine itself, as it is a part of the material used on the machine in the manufacture of the product offered for sale. We do not think that an article manufactured in a machine in the manner and for the purposes contemplated when the machine itself was made can be held to be a part of the machine which so produces it.

The supreme court of the United States, in the case of Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 Sup. Ct. 627, indicates quite clearly the solution of the question now under consideration. On this point we quote from the opinion in that case as follows:

"The first defense raises the question whether, when a machine is designed to manufacture, distribute, or deliver out to users a certain article, the article so dealt with can be said to be a part of the combination of which the machine is another part. If this be so, then it would seem to follow that the log which is sawn in the mill, the wheat which is ground by the rollers, the pin which is produced by the patented machine, the paper which is folded and delivered by the printing press, may be claimed as an element of a combination of which the mechanism doing the work is another element. The motion of the hand necessary to turn the roll and withdraw the paper is analogous to the motive power which operates the machinery in the other instances."

The machines used by the appellant are quite similar to the device covered by the patent issued to Philip Whitlock, though they differ from it in several particulars; but, as we are not now required to determine the validity of that patent, it will not be necessary to further consider the same. It is sufficient at this time to ascertain if the use of said machines constitutes an infringement of the Streat patent, and we hold that it does not. While it is true that the machine used by the appellant brings together several of the old devices which form part of the Streat combination, still it is also true that it omits other important parts thereof, and consequently there is no infringement. Schumacher v. Cornell, 96 U. S. 549; Palmer v. Village of Corning, 156 U. S. 45, 15 Sup. Ct. 381. The machine used by the appellee during the six years prior to the institution of his suit, without the rolling apron, A, attached thereto, was simply a clamp, and the combination thereof was without novelty, and not patentable; and an inspection of the model and drawings of the machines used by the appellant, claimed in the bill to be an infringement of the Streat patent, together with a study of the testimony taken concerning the same, shows that it also is simply and essentially a similar clamp, the object of which is to hold the edges of the "binder" in place while the filler is distributed on it, and the two rolled into a bunch. Neither one of the devices need an apron when used for the purpose of making bunches, and, as that of the appellant was made for and has been used for that purpose, no apron has been employed in connection with it. The apron of the Streat patent evidently was not intended for use in connection with

the making of bunches, but clearly its object was to enable the rolling of the cigarette to be performed without breaking, tearing, or wrinkling the binder.

The device used by the appellant cannot be held to be an infringement of the appellee's patent unless it would have been held—if used earlier than the patent—to have been an anticipation of the same; and certainly it is clear, if it had been set up as in prior use against the Streat patent, as it did not contain an apron used in the manner set forth in said patent, that it would not have been decreed to have been anticipation. Peters v. Manufacturing Co., 129 U. S. 530, 9 Sup. Ct. 389; Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81. The rule is now well established that "that which infringes if later would anticipate if earlier." Heating Co. v. Burtis, 121 U. S. 286, 295, 7 Sup. Ct. 1034; Grant v. Walter, 148 U. S. 547, 554, 13 Sup. Ct. 699; Gordon v. Warder, 150 U. S. 47, 14 Sup. Ct. 32.

It will be unnecessary for us to consider other assignments of error set forth by the appellant, as we find that the device used by the American Tobacco Company cannot be held to be an infringement of the Streat patent. It follows that there was error in that part of the decree of the court below finding infringement, and directing an accounting. Said decree is hereby reversed, and this cause is remanded to the court from whence it came, with instructions to dismiss the complainant's bill.

EVANS et al. v. SUESS ORNAMENTAL GLASS CO. et al.

(Circuit Court of Appeals, Seventh Circuit. November 8, 1897.)

No. 397.

1. PATENTS—NOVELTY AND INVENTION—GLASS CHIPPING.
   The Evans patent, No. 494,999, for alleged improvements in processes of chipping glass, consisting in covering the surface of the glass with a film of soap or other coating, and applying thereto a pattern of flexible material, then submitting the glass and pattern successively to the sand blast and the hot chipping compound, and finally removing the pattern and hot chipping compound while the compound is in a liquid condition, is void for want of novelty and invention in view of the prior state of the art. 81 Fed. 198, affirmed.

2. APPEAL—ASSIGNMENTS OF ERROR—OPINION OF COURT.
   Assignments of error which are predicated upon the opinion of the court, or on reasons given by the court for its ruling or decree, are not available.

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

This was a suit in equity by Samuel Evans and Charles L. Rawson against the Suess Ornamental Glass Company, John B. Suess, Max Suess, and Emily Suess for alleged infringement of a patent for improvement in processes of chipping glass. The circuit court dismissed the bill, holding that the patent was void for want of novelty in view of the prior state of the art. 81 Fed. 198. From this decree complainants have appealed.

The appeal in this case, brought to obtain an injunction and other relief on account of alleged infringement of letters patent of the United States, No. 494,999, granted April 4, 1893, to Samuel Evans, for improvements in processes of chipping glass, was dismissed for want of equity. Infringement is charged of the first and second claims of the patent, which read as follows: "(1) The process of chipping glass, which consists in covering the surface of the glass with a thin film of soap, in applying a pattern thereover adapted to resist the action of a sand-blast process, of removing the film of soap exposed in the openings of the pattern, in subjecting the glass with the pattern thereon to the sand-blast process, in applying a glass-chipping compound in a liquid condition to the surface of the glass and the pattern thereon, in lifting the pattern off the glass together with the chipping compound thereover while such chipping compound is in a liquid condition, and in allowing the chipping compound to dry in the ordinary way; substantially as described. (2) The process of chipping glass, which consists in covering the surface of the glass with a coating adhering to the glass sufficiently well to form a means of attaching a flexible pattern thereover, and adapted to form a coating protecting the glass from the action of a glass-chipping compound when interposed between the glass and such glass-chipping compound, in applying a flexible pattern thereover adapted to resist the action of the sand-blast process, in subjecting the glass with the pattern thereon to the action of the sand-blast process, in coating the entire surface of the glass with a glass-chipping compound in a liquid condition, in removing the flexible pattern from the glass together with the glass-chipping compound thereover while the glass-chipping compound is in a liquid condition, and in allowing the glass-chipping compound to dry in the ordinary way; substantially as described." The opinion of the court below, reported in 81 Fed. 198, after reviewing briefly the state of the prior art, and quoting the claims in question, concludes as follows: "It is difficult to understand in just what respect the novelty of the process is claimed to reside. The general art is old. The use of soap or other coating suited to holding the pattern to the glass is not a patentable element; its office here is the same as its office in many other arts. The mere application of a pattern, independently of its material, is derived from the previous art of ornamenting glass in process of sand-blasting. The removing of the film of soap or other material is certainly not new. The application of the chipping compound was in the previous art, and its application in a liquid condition seems necessarily in such art. The lifting of the pattern off the glass, together with the chipping compound thereover, was also done in the previous sand-blasting ornamentation. I can only see two possible features of novelty in this process: the material of the pattern, and the condition of the chipping compound when the pattern is lifted up. It is not seriously contended that the application of oiled paper to this process was a departure involving inventiveness. Many other materials will answer the same purpose as oiled paper; and, what is more, the claim is not resting upon oiled paper, but upon any material suited to resist the action of the sand-blast process. This is too broad to cover any particular material, and is so broad that it covers material formerly used in patterns applied to glass undergoing the sand-blast process. Much stress at the argument was laid upon the contention that the chipping compound or glue was in just such condition of self-cohesion that when the pattern was lifted up, cutting through the glue substance, the glue would neither be so liquid as to run over the adjoining space, nor so solid as to break along irregular lines. This is, at most, the discovery of a suitable condition for the lifting of a pattern, and is not the description of any new material, or new method of making such material. Neither do I think that it evinces invention. The pattern being on the glass underneath the warm glue, and the want being seen, namely, a clear cut edge, almost any mechanic would conclude that a condition of either too much fluidity or too much solidity would impair the result. I refrain from holding whether, if all the claims of the complainant were assumed, a process could be sustained under the Risdon Iron & Locomotive Works Case, 158 U. S. 68, 15 Sup. Ct. 745, for the reason that, in accordance with the foregoing conclusion, such opinion is immaterial." The assignment of errors contains numerous specifications, each of which relates to a quoted part of the court's opinion, but that the court erred in dismissing the bill is not alleged. There has been no appearance here for the appellee.

Charles Turner Brown, for appellants.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

We are not able to perceive that the conclusion of the circuit court was erroneous. The chief feature of novelty, as asserted in the briefs for appellants, and especially at the oral argument, was, in the language of the second claim, "in removing the flexible pattern from the glass, together with the glass-chipping compound thereover, while the glass-chipping compound is in a liquid condition." That step in the process is fairly anticipated in the prior art. In the Shaw patent, No. 15,532, which was for a method of lettering and ornamenting glass, patterns, preferably of tin-foil or lead-foil, were placed upon the back surfaces of plates of glass coated with the white of eggs, by which the patterns were held, while over the whole surface of the patterns and glass was brushed the color desired for the background, after the drying of which the patterns were removed, "so as to leave the designs with clean surfaces and smooth and sharply defined outlines." And so in patent No. 154,032, granted to Carl Frederici, in the year 1873, for improvement in processes of preparing glass for etching, a pattern upon a pane of glass to which a thin layer or film of beeswax, or equivalent material, has been applied, is stripped off, after the film is set, in such a manner that the parts from which the pattern has been removed may be exposed to the sand-blast or etching liquid, while the remainder of the surface will be protected by the wax or other material, by which means, according to the specification, it is practicable to produce designs with sharp and clearly defined contours. The asserted distinction that in the processes described in those patents the paint is said to be dry, and the film or wax to be set, before the patterns are to be lifted, while in the process of the Evans patent the glue or chipping compound is to be in a liquid state when the pattern is removed, is not important, or, to say the least, not controlling, upon the question of invention. "Dry," "set," and "liquid," as used. are relative terms, and signify no more than sufficiently dry, sufficiently set, or sufficiently liquid, as determined by practice and experiment, to contribute most effectively to the desired result. When asked, in reference to the patent in suit, how rapidly does the glue set, an expert witness for the appellants answered that that could not be stated accurately, since the time varies greatly, depending upon the temperature, and upon the amount of moisture in the atmosphere; that the extreme ranges of time, he thought from observation, were from 5 minutes to 25 minutes. Infringement of the earlier processes certainly could not have been evaded simply by removing the patterns before the paint was dry, or the wax set; nor of the patent in suit by postponing the removal until the chipping compound had ceased to be, in a strict sense, liquid. See, also, letters patent No. 63,328, granted on March 26, 1867, to C. C. Strumme, and No. 405,283, granted on June 18, 1889, to Thomas J. Thompson.

We are constrained to repeat and emphasize the observation that an assignment of error which is predicated upon the opinion of the court, or upon a reason given by the court for its ruling or decree, is not available. Caverly's Adm'r v. Deere & Co., 24 U. S. App. 617, 13 C. C. A. 452, and 66 Fed. 305; Russell v. Kern, 34 U. S. App. 90, 16 C. C. A. 154, and 69 Fed. 94; Clark v. Deere & Mansur Co., 25 C. C. A. 619, 80 Fed. 534. It is something done by the court,—a ruling, judgment, order, or decree,—and not a reason therefor, which may be assigned as error. A sufficient assignment in this case would have been simply that the court erred in dismissing the bill. Though not required to do so, we have given the same attention to the merits of the case as if that had been the specification of error. To do this has involved more than the usual labor, especially in the study of the expert testimony adduced on either side. Our conclusion is that the judgment below should be affirmed.

REEDY v. WESTERN ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1897.)

No. 478.

1. PATENTS—INFRINGEMENT SUITS—EQUITY JURISDICTION.
   In a suit in equity for alleged infringement, a defense that the alleged infringing machines were in fact made, not under the patent sued on, but under an earlier patent, also owned by complainants, and that the latter patent had expired before the filing of the bill, is not a matter going to the jurisdiction of the court, but a defense on the merits. 66 Fed. 163, affirmed.
2. SAME—DECREE PRO CONFESSO.
   In an infringement suit, where an order and decree pro confesso is entered for want of an answer, and the cause is referred to a master for an accounting, the only question open before the master is the amount of damages and profits.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was a suit in equity by the Western Electric Company against Henry J. Reedy for alleged infringement of a patent for improvements in electrical annunciators for elevators. In the circuit court an order, followed by a decree, of pro confesso, was entered against the defendant for failure to answer. A motion to set aside the default and dismiss the cause for want of jurisdiction was overruled (66 Fed. 163), an accounting was taken before the master, and a decree was entered for complainant. The defendant has appealed.

L. M. Hosea, for appellant.

George P. Barton, Charles A. Brown, and R. de V. Carroll, for appellee.

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

CLARK, District Judge. This suit is based upon patent No. 172,993 to Elisha Gray, dated February 1, 1876. This patent expired

February 1, 1893. The bill was filed May 31, 1892, nearly a year before the expiration of the patent. The bill alleged infringement of the patent by the appellant, Reedy. Injunction, with an account of profits and damages, was prayed for in the bill. The alleged infringement consisted in putting annunciators, the device covered by the patent, in hydraulic and steam elevators. A demurrer was sustained to the original bill, which was thereupon so amended as to remove the grounds of objection taken by the demurrer. The defendant failing to answer the amended bill within the proper time, a regular pro confesso order was entered, followed by a decree in favor of the plaintiff based upon that order, expressly adjudging that the plaintiff's patent was a good and valid one, that Gray was the original and first inventor of the improvement described in the patent, and that the annunciator which the defendant had used, and was still using, in elevators was an infringement of the patent. It was further adjudged that the plaintiff recover of the defendant the profits made or received by the defendant, and, in addition thereto, such damages as the plaintiff may have sustained by reason of the infringement. Motion was subsequently made by defendant below to set aside the pro confesso order and decree thereon, but this motion was overruled by the court. The case was referred to a special master for proof and account of profits and damages between July 1, 1882, and February 1, 1893, the date on which the patent expired. The report of the special master was filed the 25th of January, 1896, in which the master found that the defendant, between the 1st day of July, 1882, and the 1st day of February, 1893, sold and attached to elevators 47 of the infringing devices named in the decree of the court. The master further found that there was an established license fee of $25 for each of such patented devices, and determined that this was a proper measure of damages for the number of devices actually used by the defendant, and on this as a basis fixed the damages at $1,175. Notwithstanding the pro confesso order, the appellant appeared by counsel before the master at the introduction of the proof, and filed exceptions to the report, which were overruled, the report confirmed, and from the final decree the case is brought to this court.

The main contention now made in this court for reversal of the decree below is that it appeared in the proof before the master that the annunciators used by the appellant, Reedy, were actually made under and in accordance with what is called the "Hahl patent," No. 148,447, of March 10, 1875, which had expired before this bill was filed.[1] Upon the facts which it is insisted were thus disclosed before the master, the appellant, the defendant in the court below, moved the court to dismiss the suit, upon the ground that the facts brought out before the master showed that the court had no jurisdiction; it appearing, as is insisted, that the devices were made under the Hahl patent, which had expired before the suit was brought. It is said that on these facts the remedy is at law, and not in equity. It is

[1] The Hahl patent was also owned by the complainant.

difficult to understand exactly the theory on which this motion proceeded. The bill fully alleged ownership of the patent, and that it was valid, and further alleged distinctly infringement by the defendant, and injunction, with an account of profits and damages, was sought. The case made by the bill was clearly one properly within the jurisdiction of the court, and the court certainly had full jurisdiction to determine whether the facts thus alleged were true or not; in other words, to hear the case on its merits. It is well settled that the expiration of a patent pending a suit for infringement does not defeat the jurisdiction of a court of equity, although it is a reason for denying an injunction which was the basis of equity jurisdiction. Beedle v. Bennett, 122 U. S. 71, 7 Sup. Ct. 1090; Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217. If the defendant had regularly filed answer and made an issue on the facts stated in the bill, and had on hearing disproved the allegations of the bill, it would certainly not be insisted that this defeated the jurisdiction of the court. If so, exactly such a contention could be made in every case where the plaintiff fails on the merits, and, in such case, instead of adjudicating the merits and dismissing the bill, the result would be that the suit would be dismissed as without the jurisdiction of the court, and the question left open for a new lawsuit. We think the argument for appellant overlooks the distinction between the facts which show that the merits of the case are against the plaintiff, and facts which establish that the court is without jurisdiction to determine the merits of the case. It is also very clear that the facts which the appellant's counsel says show that the plaintiff's remedy is at law really in their effect establish that the plaintiff is without any right to recover either at law or in equity, for, if the device were made under the Hahl patent, it is clear that the plaintiff could not recover in an action at law any more than by suit in equity, the suit being upon the Gray patent only.

As we have seen, the decree based on the pro confesso order adjudged the plaintiff's right to recover, and that it was entitled to an account of profits and damages for all the devices covered by the Gray patent, and used by the defendant between July 1, 1882, and February 1, 1893, and this decree, remaining undisturbed and in full force, is conclusive on this court, and the only question left open on the reference before the master was the amount of damages and profits. It is further insisted, as we understand the argument, that the report of the master is erroneous because it includes damages for devices made under the Hahl patent, as well as those made under the Gray patent; or, stated in another form, it fails to distinguish between devices made under the two patents. We do not think that the proof sustains this contention. It is further said that the license fee of $25 included a charge for the attachments covered by the Hahl patent, as well as the improvement in the Gray patent. We are satisfied, from an examination, that this view is not sustained by the proof. The proof shows that this charge of $25 was made after the expiration of the Hahl patent, as well as before, and the finding of the master is correct.

Some other criticisms of the report of the master are made in the exceptions and argument, but we do not think these are valid. It is not insisted that there was any abuse of discretion by the court below in refusing to set aside the pro confesso order and the decree thereon, and the action of the court in that regard, being a matter of discretion, is not subject to review in this court.

We have examined the cases cited by appellant's counsel, and do not think they are applicable. The only question of jurisdiction which would arise in a case of this character would be that of equitable jurisdiction, as distinguished from jurisdiction at law, and cases relating to federal, as distinguished from state, jurisdiction are inapplicable. Upon the whole case, we are satisfied that there was no error in the proceedings and decree below, which is accordingly affirmed, with costs.

TOEPFER et al. v. GALLAND-HENNING PNEUMATIC MALTING DRUM MANUF'G CO. et al.

(Circuit Court of Appeals, Seventh Circuit. November 23, 1897.)

No. 258.

PATENTS—INFRINGEMENT—MALT KILNS.

The Toepfer patent, No. 226,890, for improvements in malt kilns, construed, and *held* not infringed as to the first claim, which relates to certain devices for suspending and dumping the drying trays. 67 Fed. 134, affirmed.

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

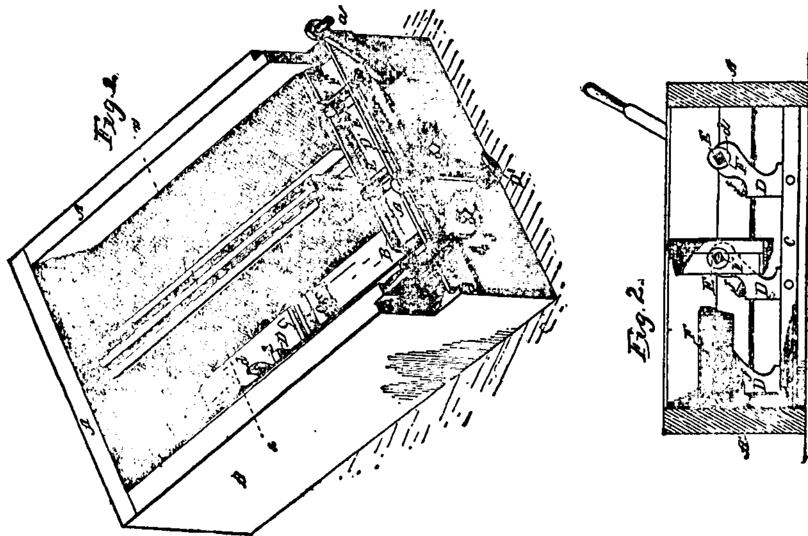
This was a suit in equity by Frank Toepfer and Peter G. Toepfer against the Galland-Henning Pneumatic Malting Drum Manufacturing Company and others for alleged infringement of a patent for improvements in malt kilns. The circuit court dismissed the bill, on the ground that the defendants' device did not infringe the claim in controversy. 67 Fed. 134. From this decree the complainants appealed.

Henry S. Towle and Stanley S. Stout, for appellants.

H. G. Underwood, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge. The cause of action here is an alleged infringement of the first claim of letters patent No. 226,890. The bill was dismissed in the circuit court on the holding there of non-infringement. The patent was for "certain new and useful improvements in malt kilns." The claim in question concerns more particularly "certain devices for suspending and dumping the drying trays." Fig. 1 of the drawings, being "a perspective view of one floor of a malt kiln," and Fig. 2, being "a section of the same on the line x, x, Fig. 1," are shown on the following page.



The patentee says in his specification:

"A, A, A′, A′, represent the walls of the kiln. In the walls A, A, I leave openings, in which I affix bearing plates, B, B′, and across from the walls A′, A′, I suspend girders, C, to which I attach bearing brackets, D, D. These brackets project upward for about half their length at right angles to the girders, and are then deflected at an angle of about forty-five degrees, terminating in bearings, d. The trays are constructed as follows: I make them about twelve inches wide, and of any length up to fifty feet, with metallic frames, over which coarse wire gauze is stretched, and fastened by side pieces riveted on the outside. They are also provided with journals, E, at their ends, and as many more along their length as may be necessary to afford a proper support; and these journals I make hollow, with square bearings, for the operating rods, F, which are also square. Now, the rear journals of the trays having been thrust into the bearings, B′, in the rear wall, the other journals will naturally drop into their respective bearings, after which the front bearings may be covered by a face plate, which I make easily removable, and the joint protected by face plates, a, cut out at a′, to correspond with the bearings B. The trays will now be free to make a quarter of a revolution in one direction, studs, f, f, preventing their revolution in the other direction, and, together with the shanks of the standards, D, stopping them on the quarter or after they have passed slightly beyond it, the jar caused by the violent contact entirely ridding the trays of the malt. To bring about this dumping, I provide square rods, F, with crank arms, J, and pass the rods, F, through the journals, E, connecting the crank arms by a bar, D′, using one of the arms as a handle by which to dump all of the trays in a series at once."

The specification contains, also, as bearing on the claim in question, the following:

"Heretofore it has been impossible to use very long iron trays, and to operate them from the outside, as it was difficult to control them, owing to their liability to spring and twist. Long wooden trays are open to the same objection, and have had to be dumped separately by an operative, who entered the kiln; but by means of my square rod, F, I can apply the dumping force equally along the entire length of the trays; and, as there is no keying to be done,

there will never be any danger of the parts becoming loose or getting out of order; and, besides, each tray may be easily removed by itself without displacing any of the others."

The original first and second claims were as follows:

"(1) In a malt dryer, the trays, having end and intermediate bearings in combination with square operating rods, passing through corresponding apertures in said bearings, as set forth."

"(2) In a malt dryer, brackets, D, constructed as described, in combination with end stops, f, f, for supporting, and for limiting the motion of, the trays as set forth."

These claims were rejected in the patent office on reference to a patent (No. 73,503) issued to one Whitney; and the following, which is the claim here in controversy, was inserted:

"In a malt dryer, a removable tilting tray, provided with journals having bearing in the end walls of the kiln and on an intermediate bracket or brackets, the journals of the trays having polygonal openings for the reception of a polygonal tilting shaft, in combination with a corresponding tilting shaft, substantially as and for the purpose specified."

A tilting tray with intermediate journals in supporting bearings, and with journals at either end in bearings which are integral with and form part of the walls of the building or kiln, and with a polygonal tilting shaft extending through polygonal openings in the journals, is readily conceivable. The tilting shaft in such a structure might be withdrawn, but the tray would still remain in position. It could not be removed as an entirety without tearing down a portion of one wall or the other. Whether such a structure or combination would be patentable is not a question here. The subject-matter of the claim here in controversy is a removable tray. The patentee says:

"Now, the rear journals of the trays having been thrust into the bearings, B′, in the rear wall, the other journals will naturally drop into their respective bearings, after which the front bearings may be covered by a face plate, which I make easily removable."

If this face plate be removed, the tray will then be retained in position only by the tilting shaft, F. If that shaft, which is not keyed, be now withdrawn, the tray may be lifted bodily from its position in the kiln. It is plainly the showing of the specification and drawings that the bearings, B and B′, are each divided horizontally, so that the upper section or half of either or both may be removed. The structure of the shaft, F, whereby it may be withdrawn from the journals, is functional, therefore, with respect to the removability of the tray. If this shaft could not be withdrawn, the tray could not be removed. The shaft, F, of the claim, is one which is thus separable, or capable of being withdrawn longitudinally, from the journals, as the means whereby the tray is removable. It is in this aspect that the shaft, F, enters into relation with a removable tray.

In the structure of appellees, the tray, if not made in sections, would not be removable at all, since the bearings for the end journals are integral with the walls of the kiln or building. But the practice of the appellees is to make the tray in sections placed in line, and secured by bolts through adjacent end crosspieces. The tilting shaft is also made in sections, but one section of shaft may extend through two sections of tray. A tray of this kind is not removable as an en-

tirety, or as a tray. The bolts which hold the sections together are withdrawn, and then the sections, each containing a portion of the shaft inseparable from it except by breakage, are removed one by one; or two sections of the tray, held together by one section of the shaft, are unbolted and removed in a single piece. There is in appellees' structure no shaft, F, by the longitudinal withdrawal of which the tray is released, so that it may be lifted bodily out of its journal bearings,—no shaft, F, in other words, which by its structure is functional as contributing towards the removability of the tray as an entirety, or as a tray. Or, on the view taken by the learned judge who heard the case in the circuit court, there is in appellees' structure no removable tray, in the sense which the word "removable," as used in the claim, must apparently have. The abandonment of claims 1 and 2, as shown by the file wrapper and contents, makes it unnecessary for this court to comment on the prior art as affecting the matter of novelty in the combination of the claim in controversy. The decree is affirmed.

THE HAXBY.

THE HAXBY v. MERRITT'S WRECKING ORGANIZATION.

(Circuit Court of Appeals, Fourth Circuit. November 3, 1897.)

No. 223.

1. SALVAGE—COMPENSATION—INCOMPLETE SUCCESS.
   The fact that a vessel which has gone ashore receives injuries in the course of the salvage operations, while it does not deprive the salvors of their claim both to compensation and bounty, is one proper to be considered in determining the amount of the award.

2. SAME—DANGER TO LIFE.
   In determining the effect on the amount of salvage of risk incurred in going through the breakers, the fact that a life-saving crew was in close proximity, and ready to effect a rescue in case of accident, is to be taken into consideration as affecting the degree of merit in facing the danger.

3. SAME—SALVING STRANDED STEAMER.
   Where a steamer stranded on the eastern shore of Virginia was rescued with comparatively little danger in about 3½ days, by the use of tugs and other appliances belonging to a wrecking company, and worth about $117,000, operated by a crew of 24 men, *held*, that an award by the district court of $27,500 on a salved value of $100,000 was excessive, and should be reduced to $16,666.66⅔, or one-sixth of the salved value.

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

This was a libel in admiralty by Merritt's Wrecking Organization against the British steamship Haxby to recover compensation for salvage services. The district court awarded to the salvors the sum of $27,500, and the claimants have appealed.

George Whitelock, for appellants.

Robert M. Hughes, for appellees.

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

GOFF, Circuit Judge. The libel in this case was filed February 11, 1897, by Merritt's Wrecking Organization, a partnership in the wrecking business, duly supplied with the equipments of the character required in such business, against the British steamship Haxby, in a cause of salvage. The Haxby is a modern English steamer, with triple expansion engines, gross tonnage 3,445, net tonnage 2,252, built of steel, 330 feet long, 43 feet beam, 21 feet depth of hold, and is equipped with all modern improvements. During the night of January 15, 1897, said steamer went ashore abreast of Dam Neck Life-Saving Station, on the eastern shore of Virginia. There was no harbor in the immediate vicinity. In going ashore, she had crossed the shoal, where there was less than 6 feet of water at low tide, although she was drawing from 12 to 15 feet. At a distance of about 30 feet from the beach at low tide, she swung broadside to it, where she lay helpless, exposed to the action of wind and wave. The next morning the libelants, having received information of the disaster, sent their steamer Coley to the assistance of the Haxby. She arrived at the point where the distressed vessel was about half past 7 in the morning, and found the Haxby broadside on the beach, heading to the northward. The Haxby was in a dangerous position, and, in order to save her, those in charge of the salvage operations took immediate steps to lay cables and anchors, which they succeeded in doing about 3 p. m. of that day, when the operation of hauling the ship was commenced. During the day there was a heavy sea, and a moderate northerly breeze. The work continued throughout the night of the 16th and the following day, the ship swinging to and fro, and surging heavily, on account of which the salvors found it necessary to lash the cables to the ship's bits to prevent her from going ashore, in case the tackle was carried away. The steamer was now helpless, having broken her stern post and bent her rudder stock. On the morning of the 17th, the salvors, finding other equipments necessary, sent the Coley to their station at Norfolk to procure the same,—including additional cables and anchors,—which were duly received, and the work continued during that day. The Haxby's rudder in the meantime had been lost. The salvors utilized the engines and winches of the Haxby in hauling on the cables. Near noon on the 18th the large wrecking steamer J. D. Jones, belonging to the salvors, arrived at the wreck for the purpose of assisting in the operation of rescue, but she was unable, on account of the storm and the current, to render much assistance until about 3 p. m., when, by the use of a surf boat, another anchor and cable was laid, and the work of hauling on both cables then continued until about 8 p. m., when, because of the falling tide, it ceased until the next morning. During the night the ballast tanks were pumped out, in order to lighten the steamer. Early in the morning of the 19th, the steamer was floated, and taken in tow by the J. D. Jones, the Coley being fastened to her stern, as her rudder was gone and her propeller disabled. At about 3 p. m. of that day the Haxby was delivered at the dry dock at Newport News, and the vessels of the salvors reached their station at Norfolk about 5 o'clock.

The answer of the master of the Haxby was filed on the 18th of February, 1897, in which it was admitted that the salvors' services were rendered substantially as set forth in the libel, but it alleged that there was at no time while the Haxby was ashore any peril whatever to any of her crew, as they were near to the beach, and in constant communication with the men of the United States life-saving station, which was in the immediate vicinity, who would, in case of danger, have taken them ashore. The answer claims that all the injuries received by the Haxby occurred subsequent to the arrival of the salvors, and during the time they were endeavoring to float her, and that, therefore, the salvors' operations were not attended with complete success. The cost of the repairs to the Haxby on account of the injuries so received is stated as between $25,000 and $30,000. It is also set forth in the answer that the service which had been rendered by the salvors was in no sense unusually hazardous or dangerous, but that it and the risk encountered were simply those that all men engaged in the avocation of wreckers are constantly liable to. The libel alleged the value of the Haxby to be $150,000, while the answer states that the true value of said steamship in her damaged condition did not exceed from $80,000 to $90,000. The libelants claimed $40,000 for the services rendered by them in floating the Haxby, and towing her to Newport News; and her master, deeming said claim excessive, declined to pay the same, and consequently the libel was filed. The case came on to be regularly heard, the witnesses were examined in open court, and on the 17th of March, 1897, the court entered a decree finding the libelants' claim for salvage to be meritorious, and allowing for the same the sum of $27,500, with interest from January 19, 1897, and costs. From this decree the present appeal was sued out.

The appellants insist that the award made by the district court is excessive, and that it cannot be justified by the rules of law applicable to cases of this class. The meritorious character of the services rendered by the salvors is apparent; in fact, is not denied by the owner and master of the Haxby, who claim that they have always been ready and willing to pay a reasonable compensation for the same, but they insist that the allowance of $27,500 is shown by the testimony to be largely in excess of the sum that should be allowed. The services by the salvors commenced on the morning of the 16th of January, 1897, and terminated during the afternoon of the 19th of that month, thus consuming less than four days' time. The value of the property used by the salvors, and exposed to danger during the work, was about $117,000, and the crew employed numbered 24 men. Considerable skill was undoubtedly displayed by the salvors, but we do not find that the risk to life or property was either great or constant,—not other than that necessarily connected with work of that character. The services extended through parts of four days, but what may be called the really dangerous work was done during the two hours from 2 to 4 o'clock of the afternoon of the 16th. The rest of the services, while commendable in character, and performed with skill and energy, taking into consideration the equipment in use, was not of the character that brought with it imminent

risk to either life or property. While it is true that the salvors floated the stranded ship, and delivered it at the dry dock, still we do not find that their services were entirely successful, for the reason that the vessel was badly damaged when delivered, and it is clear from the evidence that such injuries were received after the salvors commenced their work of rescue,—a matter which, while it does not deprive them of the right to claim both compensation and bounty, is eminently proper to be considered in determining the amount of salvage they are entitled to. The value of the Haxby, as she was when delivered at Newport News, is of material importance in determining the allowance that should be made to the salvors. Four witnesses were examined as experts on this question,—two on each side. They differ materially as to the value of the ship; those offered by the libelants placing the same, one at $123,600, and the other at $119,334; and those offered by the respondent estimating the value, one at $85,000, and the other at $82,000. A close study of the testimony, and of the facts and circumstances on which the opinions of the experts are based, leads us to the conclusion that a fair and impartial valuation of the Haxby at the time she reached the dry dock at Newport News did not, at least, exceed $100,000, and therefore, in determining the question of salvage, we will regard that as her true value in her saved condition.

The law relating to the question of salvage, as well as the rule by which the same is to be applied to the facts of any given case, has been repeatedly announced and illustrated in decisions of the supreme court of the United States; and neither the discussion of the same nor the citation of authorities relating thereto is deemed necessary in disposing of this case. The cases cited and relied upon by the appellee, especially The Sandringham, 10 Fed. 556, and The Egypt, 17 Fed. 370, differ materially, so far as the facts are concerned, from the case we now have under consideration. It is hardly safe to make comparison of cases of this character, unless at the same time careful attention is given, and proper discrimination made, as to the facts and the special circumstances existing in each case. The dissimilar facts are generally so marked, especially those relating to value, time, risk, and skill, as to render the decision in one case an unsafe guide in another. In the case of The Sandringham the salvage service continued for a week, and the ship was in unusual peril, having been virtually abandoned by the master and crew, and left in charge of the wreckers. The wrecking company in that case employed a large number of men in the salvage operations, and, in addition thereto, a number of steamers, tugs, wrecking schooners, surfboats, and lighters were continuously used in the work. In addition, there was imminent and continuous danger to the lives of those so employed, as well as to the valuable cargo of the vessel. In that case the court allowed the salvors a sum equal to one-fourth of the value of the property saved. In the case of The Egypt, the ship went ashore in a snow storm; the weather was bad, and the sea rough, and the force of salvors, which was large, was employed for eight days. The circumstances, in some particulars, were like those of The Sandringham, and yet the court allowed a lower proportionate

award as salvage, granting on that account one-fifth of the value of the property saved. The case of The Kimberley, 40 Fed. 289, has also been called to the attention of the court, but it is easily distinguished from the case at bar. That ship was one of very great size. She was stranded 3,000 feet from deep water. Her engines were practically useless, and most of her crew had abandoned her. The salvors, using nine vessels, and a large force of men, were employed from December 1st to January 26th, during extremely severe weather, and with continuous risk to vessels and men. Her valuable cargo was moved in surf boats, and the effort to save it, as well as the ship, was attended with perfect success. The salvors in that case were allowed one-fifth of the saved value of the property, together with a quantum meruit allowance for money expended for chartered vessels, and as compensation to the salvors for their own property. An appeal was taken because of the amount of the salvage award, but, the matter being subsequently compromised, the case was not decided by the appellate court.

There is some conflict in the testimony as to the condition of the sea, and the character of the storm, but it is quite evident that there was no such extraordinary peril existing at the time the work was going on as endangered the lives of either the crew of the Haxby or of any of the salvors, if the precaution usually practiced on such occasions was observed. It seems that the crew regarded themselves as perfectly safe, and the master testified that they could have gone ashore by means of a ladder. There was at one time considerable danger to those of the salvors who went through the breakers to the shore, when the operations looking to the rescue of the Haxby were commenced. But it should be borne in mind, as Capt. Nelson, who had charge of the surf boat at that time, states in his testimony, that the risk was taken because of their close proximity to the life-saving station, the crew of which, then on duty, had full view of what was transpiring, and would have gone to the assistance of the wreckers if their services had been needed. The act of the salvors in that particular, and, indeed, throughout the work attending the rescue of the Haxby, was courageous and commendable, and will not be overlooked by the court in connection with the award for salvage. Considering the degree of danger to life and property, to which we have already alluded, and the value of the property saved, which we have found to be $100,000; keeping in view the value of the property used by the salvors, the risk to it, the number of men employed by them, the time of their employment, and the skill shown by them,—we are of opinion that an allowance of one-sixth of the value of the property saved will be, under the circumstances of this case, fair to the salvors and just to the owners of the ship, and therefore we find the sum due Merritt's Wrecking Organization, the libelants, on account of salvage from the steamship Haxby, to be $16,666.66 ²/₃, instead of the sum of $27,500, allowed in the decree of the court below. The decree appealed from is modified as indicated, and this case is remanded to the district court of the United States for the Eastern district of Virginia, with instructions to proceed in accordance with this opinion.

THE HAXBY.

BROWN v. MERRITT WRECKING ORGANIZATION.

(Circuit Court of Appeals, Fourth Circuit. November 24, 1897.)

No. 251.

ADMIRALTY APPEALS—REDUCTION OF SALVAGE AWARD—MANDATE—ALLOWANCE OF INTEREST.

The district court in a salvage case awarded a specified sum to libelants, with interest from the date of completion of the salvage services. On appeal, the award was reduced, and the decree and mandate of the appellate court directed the entry of a decree for a specified sum, without any mention of interest. *Held*, that the district court had no authority to give interest on this sum from the date of completion of the salvage services, and that interest should only run from the date of a decree of the appellate court.

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

This was a libel in admiralty by the Merritt Wrecking Organization against the British steamship Haxby to recover compensation for salvage services. The district court awarded to the salvors the sum of $27,500. Upon a prior appeal to this court this award was held to be excessive, and was reduced to $16,666.66⅔. See 83 Fed. 715. On the receipt of the mandate from this court the district court entered a decree for libelants in the sum specified, with interest from January 19, 1897, the date of the completion of the salvage services. The complainant thereupon took this second appeal, assigning error in respect to the court's action in allowing interest.

Schmucker & Whitlock, for appellants, contended that as the decree of this court, and the mandate in pursuance thereof, were silent on the subject of interest, the district court was without authority to provide for interest in its decree.

The court, without filing any written opinion, thereupon reversed the decree below, and remanded the cause, "with instructions to enter a decree in favor of the Merritt Wrecking Organization for the sum of $16,666.66⅔, with interest thereon from the 3d day of November, 1897"; this being the date of the decision on the prior appeal.

RAYMOND v. RAYMOND.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1897.)

No. 889.

FEDERAL COURTS — JURISDICTION OF SUITS BETWEEN MEMBERS OF CHEROKEE NATION—CITIZENSHIP.

A white person, a citizen of the United States, who, by intermarriage with an Indian, becomes by adoption a member of the Cherokee Nation, does not thereby cease to be a citizen of the United States, but such adoption ousts the jurisdiction of the federal court over suits between the adopted member and other members of his tribe, and confers exclusive jurisdiction thereof on the tribal courts; and a subsequent unauthorized naturalization of such person does not affect his legal status.

Appeal from the United States Court of Appeals in the Indian Territory.

Suit for divorce by Eliza E. Raymond against Jesse B. Raymond.

William T. Hutchings, for appellant.

Thomas Marcum and S. S. Fears, for appellee.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree of the United States court of appeals in the Indian Territory (37 S. W. 202), which affirmed a decree of divorce rendered by the United States court in the Indian Territory for the Northern district thereof at its December term, 1895. At the threshold of the investigation, the appellant challenges the jurisdiction of the trial court upon the ground that both of the parties to the suit were members of the Cherokee Tribe of Indians, and that the courts of that tribe had exclusive jurisdiction over all suits and controversies between them. The appellee meets this challenge with the assertion that on October 2, 1894, she was naturalized by the United States court in the Indian Territory, pursuant to the provisions of section 43 of "An act to provide a temporary government for the territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," approved May 2, 1890 (26 Stat. c. 182, pp. 81, 99). These are the facts disclosed in the record which present the question of jurisdiction: The appellee, Eliza E. Raymond, was a white woman, and a citizen of the United States, and Jesse B. Raymond was an Indian by blood, and a member of the Cherokee Nation. On June 5, 1893, they intermarried, and lived together in the Cherokee Nation as man and wife. On August 28, 1893, a decree of divorce was rendered in a suit between them in the circuit court of the Canadian district, which was one of the established courts of the Cherokee Nation. On October 2, 1894, the appellee, Eliza E. Raymond, procured a certificate of naturalization from the United States court in the Indian Territory, under the provisions of section 43 of the act of May 2, 1890. On October 4, 1894, she brought a suit in equity against the appellant for a divorce and for alimony. The appellant answered, in effect, that the United States

court had no jurisdiction of the parties or the suit, because the parties to it were both members of the Cherokee Nation, and that the decree of the Cherokee court was conclusive, and rendered the questions presented in the federal court res adjudicata. The trial court overruled these defenses, and entered a decree of divorce, and granted an allowance of alimony.

The Cherokee Nation exists within the territorial limits of the United States, is subject to their sovereignty, and is entitled to their protection against foreign states and powers. It is a distinct political society, capable of managing its own affairs and governing itself. It may enact its own laws, though they may not be in conflict with the constitution of the United States. It may maintain its own judicial tribunals, and their judgments and decrees upon the rights of the persons and property of members of the Cherokee Nation as against each other are entitled to all the faith and credit accorded to the judgments and decrees of territorial courts. It is a domestic, dependent nation. Cherokee Nation v. State of Georgia, 5 Pet. 1, 20; Crabtree v. Madden, 12 U. S. App. 159, 164, 4 C. C. A. 408, 410, and 54 Fed. 426, 428; Mehlin v. Ice, 12 U. S. App. 305, 5 C. C. A. 403, and 56 Fed. 12. The United States has maintained treaty relations with this tribe of Indians as such a nation for more than a century. Article 8 of the treaty of July 2, 1791 (7 Stat. 39, 40), provided:

"If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States and the Cherokees may punish him or not, as they please."

It is not material to the present issue that this provision has been subsequently modified. It shows, as do subsequent treaties, that for more than a century this tribe of Indians has claimed and exercised, and the United States have guarantied and secured to it, the exclusive right to regulate its local affairs, to govern and protect the persons and property of its own people, and of those who join them, and to adjudicate and determine their reciprocal rights and duties. The preamble of the treaty of 1835 (7 Stat. 478) shows that one of the principal objects of the Cherokees in selling their lands east of the Mississippi was to secure for themselves a permanent home, "where they can establish and enjoy a government of their choice, and perpetuate such a state of society as may be most consonant with their views, habits, and condition." The fifth article of that treaty provides:

"The United States hereby covenant and agree that the land ceded to the Cherokee Nation in the foregoing article shall, in no future time, without their consent, be included within the territorial limits or jurisdiction of any state or territory. But they shall secure to the Cherokee Nation the right, by their national councils, to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided, always, that they shall not be inconsistent with the constitution of the United States and such acts of congress as have been or may be passed regulating trade and intercourse with the Indians."

Article 13 of the treaty now in force, the treaty of July 19, 1866 (14 Stat. 799, 803), expressly stipulates:

"That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty."

The act of congress of May 2, 1890, which extends and determines the jurisdiction of the United States court in the Indian Territory, recognizes the rights secured by this treaty, and declares "that the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or adoption shall be the only parties" (26 Stat. c. 182, p. 94, § 30); that "nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood, or adoption, are the sole parties" (26 Stat. c. 182, p. 96, § 31); and "that any member of any Indian tribe or nation residing in the Indian Territory may apply to the United States court therein to become a citizen of the United States, and such court shall have jurisdiction thereof and shall hear and determine such application as provided in the statutes of the United States," but "that the Indians who become citizens of the United States under the provisions of this act do not forfeit or lose any rights or privileges they enjoy or are entitled to as members of the tribe or nation to which they belong" (26 Stat. c. 182, pp. 99, 100, § 43). This relation of the United States to these Indian tribes thus uniformly maintained by the treaties between them and the United States, and by the express enactment of this act of congress, leave no doubt that the United States court in the Indian Territory is expressly excluded from the right to hear and determine civil suits to which members of the Cherokee Nation are the sole parties. It is conceded that under the laws of that nation the appellee became a member of that tribe, by adoption, through her intermarriage with the appellant. It is settled by the decisions of the supreme court that her adoption into that nation ousted the federal court of jurisdiction over any suit between her and any member of that tribe, and vested the tribal courts with exclusive jurisdiction over every such action. Alberty v. U. S., 162 U. S. 499, 16 Sup. Ct. 864; Nofire v. U. S., 164 U. S. 657, 658, 17 Sup. Ct. 212. The counsel for the appellee seek to escape from this conclusion on the ground that the certificate of naturalization which she obtained from the United States court under section 43 of the act of May 2, 1890, deprived her of membership in the Cherokee Nation, and extended the jurisdiction of the federal court over any controversy she might have with any member of that tribe. But a citizen of the United States who becomes a member of one of the civilized Indian tribes by adoption does not thereby denationalize himself, and does not become an Indian. He remains a citizen of the United States. He still owes support and allegiance to the land of his birth, and is still entitled to her protection against the assaults of every foreign prince,

potentate, or power. U. S. v. Rogers, 4 How. 567, 572; City of Minneapolis v. Reum, 12 U. S. App. 446, 6 C. C. A. 31, and 56 Fed. 576. His adoption into one of these tribes has the effect to bestow on him the privileges and immunities of its members, and subjects him to the laws and usages of the tribe, but it has no greater effect. It deprives him of the right to appeal to the federal court for redress for civil injuries he sustains from members of the tribe of his adoption, but it confers upon him the right to have these wrongs redressed in the courts of his adopted tribe. His adoption into an Indian tribe has an effect upon his right to sue in the federal court analogous to that of a change of citizenship from one state to another. A native-born citizen of the state of Missouri has the right to the determination in a federal court of every controversy involving the requisite amount which he may have with a citizen of the state of Illinois. If, however, he becomes a citizen of the state of Illinois, he thereby surrenders that right, and is compelled to submit his controversies with the citizens of that state to its own judicial tribunals. Nor does he cease to be a citizen of the United States because he changes his residence from Missouri to Illinois. Nor would any certificate of naturalization from a federal court remove his disability to sue the citizens of his adopted state in the federal tribunals. Adoption into an Indian tribe has a like effect. It leaves the citizenship in the United States unaffected, but it ousts the jurisdiction of the federal court over controversies between the adopted member and the other members of his tribe, and confers exclusive jurisdiction thereof upon the tribal courts. Section 43 of the act of May 2, 1890, was never intended to empower the federal court in the Indian Territory to naturalize those who were already citizens. Its only purpose and sole effect was to empower that court to naturalize Indians; to naturalize those who were not, and never had been, citizens of the United States. The result is that the federal court in the Indian Territory is without power to naturalize a citizen of the United States who has been adopted as a member of one of the civilized Indian nations, and its certificate of such naturalization does not restore the ousted jurisdiction of the federal court over controversies between such a citizen and the members of a tribe which adopts him. The decree of the United States court of appeals in the Indian Territory and of the United States court in the Indian Territory must be reversed, with costs, and the case must be remanded, with directions to the trial court to dismiss it for want of jurisdiction; and it is so ordered.

FIRST NAT. BANK OF MANISTEE, MICH., et al. v. MARSHALL & ILSLEY, BANK OF MILWAUKEE, WIS.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1897.)

No. 474.

1. BANKS—REPRESENTATION BY CASHIER—ESTOPPEL.
The cashier of a bank does not act as its agent or representative in answering an inquiry addressed to him by another bank as to the business standing of a third person; and the bank is not bound or estopped by statements so made by him, his act being one not relating to the business of his bank, but simply one of customary courtesy, rendered without consideration.

2. SAME—ESTOPPEL BY ACTS OF OFFICERS—PRIORITIES OF LIENS.
The failure of the officers of a bank, in answering a general inquiry from another bank as to the character and standing of a customer, to disclose the fact that the customer was indebted to their bank, and that it held liens on certain of his property, will not estop it to assert such liens as against a mortgage subsequently taken by the inquiring bank, in the absence of any fraudulent intent.

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

Bill for foreclosure by the Marshall & Ilsley Bank of Milwaukee, Wis., against the Watervale Manufacturing Company, the First National Bank of Manistee, Mich., and others. From a decree postponing a lien held by the latter bank to complainant's mortgage, it appeals.

The original bill in this cause was filed to foreclose a mortgage executed in favor of appellee by the Watervale Manufacturing Company, conveying, besides other property, certain lots and a strip or parcel of land situated at Watervale, Mich., on which there is a sawmill and lumber plant, with pier and other improvements. The bill alleges that, at or soon after the date of execution of the mortgage in favor of appellee, it was discovered that the appellant claimed a lien on the same lots and parcel of real estate prior in time to the lien of appellee's mortgage. Appellant was made a defendant to the original bill, for the purpose of having appellant's lien postponed to the lien of appellee's mortgage, and this was the relief sought against appellant. After answer to the original bill, appellant filed a cross bill to foreclose the lien in its own favor, which was answered, and the question presented under both the original and cross bills is one of priority of lien on the same real estate. In the relief sought against appellant, the original bill proceeded upon the ground that appellant was precluded by estoppel from asserting priority for its lien as against appellee, the main facts being set out in the bill. Appellant is a banking association, organized under the acts of congress, and appellee is a state bank, formed under the laws of the state of Wisconsin. For convenience, appellant may be called the "Manistee Bank," and appellee the "Milwaukee Bank." On the hearing, the conclusion was reached by the circuit court that the lien of the Manistee Bank, though prior in date, ought to be postponed to the lien of the Milwaukee Bank; and it was decreed accordingly, and the case is brought here by appeal for review.

Hanchett & Hanchett, for appellant.

Dovel & Smith and Frank M. Hoyt, for appellee.

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

CLARK, District Judge, after making the foregoing statement, delivered the opinion of the court.

The estoppel urged against the Manistee Bank, and on account of which its lien was postponed, is predicated mainly on a letter written by Dunham, cashier of that bank, to Ilsley, vice president of the Milwaukee Bank, which is as follows:

"Manistee, Mich., Jan. 2, 1894.

"Marshall & Ilsley Bank, Milwaukee, Wis.—Gentlemen: In reply to yours of the 29th ult., would say Mr. Hale has a fine reputation as a competent, careful, and industrious business man. He has no bad nor expensive habits, but always gives his business the closest attention, and is very careful in his expenses. As near as I can judge, he has invested in his business about $40,000 above his indebtedness. Had lumber held up as well as it opened in the spring, I understand he would have cleared up nearly all of his indebtedness.

"Yours, truly, Geo. A. Dunham, Cashier."

The letter to which this was an answer was as follows:

"Milwaukee, Wis., Dec. 29, 1893.

"Geo. A. Dunham, Esq., Cashier, Manistee, Michigan—Dear Sir: Will you be kind enough to give us what information you can in regard to the character and financial standing of Leo F. Hale, of Watervale, which will be regarded as entirely confidential. Thanking you in advance, we remain,

"Yours, very truly, C. F. Ilsley, Vice Pres."

The inquiry was the result of an application for a loan made by the Watervale Manufacturing Company through Ellis, who presented a statement of the property and assets of that corporation prepared by Leo F. Hale, treasurer and general manager of the company. In this statement the real estate in question was included. In considering this letter and its effect, it becomes necessary to first determine whether it is to be treated as the letter of the bank, and affecting it as such, as seems to have been the view of the circuit court, and certainly the view presented by counsel for the Milwaukee Bank in argument at the bar. We are clearly of the opinion that Dunham cannot be regarded as acting for or as the agent of the bank in writing this letter. The acts and declarations of a cashier of a bank are binding on the bank, and affect it only when the cashier is in the discharge of his duty as such cashier, acting either in the general line of duty, or in regard to some business transaction with the bank pending at the time, and coming within his duty and authority. It is not insisted that there was any express authority conferred upon Dunham, cashier, to make voluntary answers of this kind to other banks, or the customers of other banks, although the practice of doing so is very common in the nature of the case. It is well understood to be a mere favor or courtesy, such as one banking institution extends to another. It was no part of the duty of Dunham, as cashier, to furnish such an answer as he did; and, not being a duty belonging to his position, there was no implied authority from the bank to do so. To require that the bank shall make good statements of this kind would be to impose on banks extraordinary liability for the acts of their agents, such as belongs to the relation of principal and agent in regard to no other line of business. To hold the bank liable for a mere voluntary statement made by its cashier, without

consideration, and having no relation to any business transaction with the bank, would be to subject the property of the bank to such risk as would tend to prevent the investment of capital in such an institution. We regard this question as now well settled by the adjudged cases. Horrigan v. Bank, 9 Baxt. 137; U. S. v. City Bank of Columbus, 21 How. 356-365; Mapes v. Bank, 80 Pa. St. 163-165; Bank v. Dunn, 6 Pet. 51, 59, 60; Bank v. Jones, 8 Pet. 12-16; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 291, 296. The same principle has been announced in many other cases, but we refer to only some of these, as follows: Gray v. Bank, 81 Md. 631, 32 Atl. 518; Bank v. Foote, 12 Utah, 157, 42 Pac. 205; Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co., 43 U. S. App. 550, 22 C. C. A. 378, and 75 Fed. 433; Surety Co. v. Pauly, 38 U. S. App. 254, 18 C. C. A. 644, and 72 Fed. 470.

It remains to inquire whether this letter, taken in connection with the whole of the evidence in the case, establishes that the officers of the Manistee Bank, acting in the interest of the bank, have, by fraudulent misrepresentation or concealment, or both, misled the Milwaukee Bank into making a loan which it would not otherwise have made, in consequence of which it has or will sustain a loss. Such misrepresentation and concealment are the grounds alleged for the contention that appellant has, by equitable estoppel, lost priority for its lien of older date. This renders it necessary to go into the material facts at length. Stated in the order of time, these facts are as follows:

On the 16th day of December, 1892, Leo F. Hale was indebted to the Manistee Bank in a sum which may be stated as $18,000, the exact amount not being important. He had for several years been a customer of that bank, and transacting business with it. At that date, the president of the bank insisting that the debt should be in some way secured, Hale assigned to George A. Dunham, cashier of the Manistee Bank, two unrecorded land contracts made by William Vincent, in favor of said Hale, on which there was a balance of purchase money due of $2,500. These land contracts were assigned to Dunham, as security for the debt of Hale to the bank. On the 2d day of September, 1893, Hale made a bill of sale for the purpose of securing the same debt, in favor of the bank, of certain timber called "cedar stock," in boom, in and around Lake Herring. This bill of sale was made in favor of the bank at the request of Hale, in order to release certain stock in the South Arms Lumber Company, then held as security for the same debt. This bill of sale was not filed for record in the office of the clerk of the proper township, as required by the law of Michigan, until June 7, 1894. On the 21st of December, 1893, pursuant to an understanding with Hale, the Manistee Bank paid to Vincent the balance due on the land contracts; and Vincent made deeds for the land to Dunham, cashier of the bank, absolute in form, but in trust as security for the debt before mentioned, and the further amount thus paid to Vincent. These deeds were not recorded as required by the law of Michigan until June 23, 1894; so that, from the time the contract of sale was made between Vincent and Hale, the record title remained in Vincent until the deeds from Vincent to Dunham were put on record, June 23, 1894, as before stated. In explanation of the

delay in filing the bill of sale for the cedar stock in the proper office, Dunham, cashier of the bank, states that the bill of sale was filed away at a proper place in the bank office, and overlooked until about the date when it was filed in the office, viz. June 7, 1894. In explanation of the delay to have the deeds from Vincent to Dunham recorded, the president of the bank says that taxes were due from Hale on the land, which Hale promised to pay, and, when paid, to give notice, so that these deeds might be recorded; it being required under the law of Michigan that all taxes should be paid on land before a deed therefor could go on record. The president of the bank states that the deeds were recorded as soon as notice was given by Hale that the taxes had been paid, and says, further, that the deeds were withheld from registration for no other reason, and with no other purpose or motive. Hale was a lumber merchant and manufacturer, and seems to have transacted a large business, borrowing considerable sums of money from time to time, and during the year 1893 was considerably pressed for money with which to carry on his business and meet his debts as they matured. He was at various times during that year indebted considerably to persons and companies other than the Manistee Bank, and these general facts were no doubt well understood, at least in a general way, by the officers of the Manistee Bank. Charles H. Ellis, a lumber commission merchant, of Milwaukee, Wis., had handled much, if not all, of the product of Hale's plant at Watervale. He had been doing business with Hale for several years, and was well acquainted with him.

In November, 1893, negotiations were set on foot between Hale, William M. Williams, and Fred E. Mansfield, of Milwaukee, through the aid of Ellis, for the purchase by Williams and Mansfield of a half interest in the sawmill plant at Watervale. During the time over which these negotiations extended, and early in December, 1893, Hale, Williams, Mansfield, and Ellis met T. J. Ramsdell, president of the Manistee Bank, at the Buckner House, in Manistee, where the general subject of the negotiations was mentioned. Among other things, it was stated to Ramsdell that Williams and Mansfield were about to purchase an interest in the Hale sawmill plant, and could or would do so, provided the Manistee Bank would take a mortgage for $24,000 on property at Milwaukee, which mortgage Williams, or Williams and Mansfield, proposed to transfer to the Manistee Bank in payment of Hale's indebtedness to that bank. It was arranged that Ramsdell should go to Milwaukee, make an examination, and determine whether the Manistee Bank would take the mortgage. While Ramsdell was at Milwaukee, an interview occurred between him and Ellis at the Plankinton House, in which Ellis states that he made specific inquiry of Ramsdell about Hale's property, and whether the bank had any lien or claim on the real estate, and that Ramsdell stated that the bank had no lien on the property. This statement is directly and positively denied by Ramsdell, who says no such statement was ever made, nor anything in substance or effect like such statement. After his return to Manistee, Ramsdell, president of the Manistee Bank, reported that the Milwaukee mortgage was not satisfactory, and would not be accepted by the bank. Hale, Williams, and Mansfield went to Manistee,

and had a second interview with Ramsdell at his office, on the 27th of December, 1893. The subject of Hale's indebtedness to the bank was then discussed, but there is a conflict in the testimony as to what was said and what occurred on that occasion. It is, however, not disputed, that the effort on the part of Hale, Williams, and Mansfield was to arrange with the Manistee Bank either to pay Hale's debt to the bank, or to so secure the debt that the bank would not press its collection. Ramsdell states that he said to Williams that the bank had just paid $2,500 to Vincent to obtain title to the property on the contract from Vincent to Hale, which had been assigned to the bank, and that the bank ought to have that amount paid at once, which Williams said could be paid by January 15, 1894. Ramsdell says that he then prepared and handed to Williams a memorandum showing the amount and date of payments which would be satisfactory to the bank, a copy of which is as follows: "$2,500, due February 1, 1894; $6,500, due June 1, 1894; $6,500, due January 1, 1895. Stock of cedar to be held by us until January payment of 1895 to be met." "And I signed my name to it,—T. J. Ramsdell. I made a memorandum on the same pad." Mansfield, Williams, and Hale then returned to Watervale, and on the 28th of December, 1893, Williams and Mansfield purchased a half interest in Hale's plant, and formed the corporation known as the "Watervale Manufacturing Company"; and on the same day Hale conveyed to that corporation practically all of his Watervale property, real and personal, including the real estate now in controversy, but conveying this real estate by quitclaim deed only. Mansfield and Williams agreed to pay Hale, for a half interest in the property, the sum of $30,000. The capital stock of the Watervale Manufacturing Company was fixed at $75,000, and $60,000 of the stock was treated as paid up by the property conveyed by Hale to the manufacturing company. Accordingly, $30,000 of paid-up stock was issued to Mansfield and Williams, and a like amount to Hale, and the corporation was duly organized by the election of Williams, Hale, and Mansfield as officers. Williams and Mansfield executed to Hale their notes, which amounted in the aggregate to $30,000; and $22,000 of these notes were transferred by Hale to the Manistee Bank, as further security for its debt against Hale, with the agreement that any sums paid on such notes should be credited on the bank's debt against Hale, and also on Williams' and Mansfield's notes. On the same day that the corporation was organized, viz. December 28, 1893, and on which Hale conveyed his property to that corporation, a contract was executed between Hale and Williams and Mansfield, a copy of which is in evidence, and is as follows:

"We, Williams and Mansfield, do hereby agree to and with Leo F. Hale to pay to the First National Bank of Manistee, Mich., the following amounts, as hereinafter stated, viz.: On or before February 1, 1893, $2,500; on or before June 1, 1894, $6,500; on or before January 1, 1895, $6.500; on or before January 1, 1896, $6,500,—and, upon the payments of the said sums as stated, the said sums are to be indorsed upon our notes for like amounts, bearing date of this agreement, and due as before mentioned at said bank, but drawing interest at the rate of six per cent. per annum. Leo F. Hale agrees that upon the payment of the said amounts to said bank, as stated, to make indorsements as stated upon the said notes, and when the entire sum of twenty-two thousand dollars ($22,000) is fully paid, to deed by warranty deed the property now

held by First National Bank of Manistee, Manistee, Mich. (as security for his obligation to them), to the Watervale Manufacturing Company, this day organized.
"Williams & Mansfield.
"Leo F. Hale."

In this connection it should be stated that the first, second, and third of the notes executed by Williams and Mansfield to Hale, and transferred by Hale to the bank, correspond exactly in date of payment and amount with the first, second, and third payments mentioned in this contract, and in like manner correspond with the first, second, and third payments in the memorandum which Ramsdell says he furnished Williams at the interview in Manistee, on December 27, 1893. The bearing of this agreement as to dates and amounts will be noticed further on. On the next day after the formation of the corporation, to wit, December 29, 1893, Ellis made application to the Milwaukee Bank for a loan in favor of the Watervale Manufacturing Company, explaining to the vice president, with whom the loan was negotiated, that he desired it in order that the manufacturing company might purchase timber, and work it up during the winter for the market in the spring and summer following, and stating, further, that he was handling the product of the manufacturing company, and expected to repay the loan out of the proceeds of sales of the product to be made by him. Hale had prepared a statement of the assets of the manufacturing company, which included the real estate covered by the deeds from Vincent to Dunham, and by quitclaim deed from Hale to the manufacturing company, and this was presented by Ellis to Ilsley in the negotiations for loan. Ellis explained to the vice president of the bank, Charles F. Ilsley, that he had known Hale for some years, and that he regarded him as an honorable, responsible, and excellent business man. Ilsley says, after putting various questions to Ellis in regard to the property of the Manufacturing Company, that he told Ellis he would write to the Manistee Bank, and that, if what Ellis said was in a measure corroborated by that bank, he thought the loan would be made. On the 29th of December, 1893, Hale was notified by telegram from Williams that a letter had been written to the Manistee Bank, the telegram indicating that the Milwaukee Bank had written to Ramsdell. A letter is put in evidence as written by Hale to Williams on the 29th day of December, 1893, in which Hale, after acknowledging that the telegram had been received, says:

"On receipt of same, this a. m., I wrote Mr. Ramsdell, fully stating what we had done to organize the company, etc., and went over everything, and asked him to put no cold water on the matter, and I take that letter to Frankfort with me this a. m. I will mail it the same time I do this, so it goes out this afternoon. I wrote you this morning, mailing papers you left, etc. Now, I hope money matters will be all right, and that I shall know soon, as you know my position, I think, fully, and do not wish to get embarrassed on the start. I gave Ramsdell the same statement I gave you in details, etc.; so that he would act understandingly. Now, should you send telegram in the morning before 10 o'clock, send it to Pierport, Mich.; if after that time, send to Frankfort, Mich.
"Yours, very truly, Leo F. Hale."

It is also disclosed by the record that on the same day Hale wrote Ellis, stating, in substance, the same thing as was stated in the above letter to Williams. Ramsdell denies that he ever received

any such letter from Hale as indicated in the foregoing letter to Williams, and Hale, on being pressed on cross-examination, declined to say whether he in fact wrote such letter to Ramsdell, and says, in substance, that he might have done so, or that he might have changed his mind, and concluded not to do so. It is further brought out in testimony that Hale had a letterpress copy book in which at that date he was in the habit of copying such personal letters as it was thought important to preserve. This book is not produced in evidence, although called for on cross-examination, and although five or six other books which had been previously used were produced. Mr. Hale says this particular book was kept with the other books, and that he is unable to find it after making search for it. It is not quite clear whether the cedar stock covered by the bill of sale to the Manistee Bank on September 2, 1893, was excepted from the conveyance from Hale to the manufacturing company. It is not important now to consider how this was. On the 29th of December, 1893, Mr. Ilsley, vice president of the Milwaukee Bank, made inquiry in regard to Hale, by letter addressed to the cashier of the Manistee Bank. This letter, with Dunham's answer, has already been set out. Ilsley testifies that, on receipt of this letter from Dunham, he agreed with Ellis to loan the Watervale Manufacturing Company a sum not exceeding $15,000. He states very distinctly that in making the loan he relied upon the statement of the property of the Watervale Manufacturing Company, as prepared by Hale, and furnished through Ellis, together with what Ellis said as to the reputation and financial standing of Hale, as well as what was said in this letter from Dunham on the same subject. He says that the letter of Dunham was the final statement on which he decided to make the loan. Between the 8th of January, 1894, and the 7th of May, following, the bank had loaned to the Watervale Manufacturing Company the sum of $25,000. Notes were taken, signed by the Watervale Manufacturing Company, with a written guaranty of payment of each note, signed individually by Hale, Williams, Mansfield, and Ellis. Ilsley states that, when application was made for a loan above $15,000, he called attention to the fact that the loan was, according to the agreement, not to exceed $15,000, but says that, after full consideration of the matter, he thought the best method to secure the payment of what was already loaned was to make a further loan of money. Payments have been made on this indebtedness until now there remains a balance of $17,000 of principal. On the 9th of July, 1894, it became evident that the business of the Watervale Manufacturing Company was in very unsatisfactory shape, and not being successfully prosecuted; and thereupon, after proper steps taken, two mortgages were executed in favor of the Milwaukee Bank,—one covering the real estate, and the other the personal property, of the Watervale Manufacturing Company. A demand note was then executed for $23,000, the balance then due to the Milwaukee Bank. Demand was made, and on the 4th of August, 1894, the original bill was filed by the Milwaukee Bank in the court below, to foreclose these mortgages, and for the appointment of a receiver. It was alleged that the Milwaukee Bank had just recently discovered the fact

of the existence of the deeds to Dunham, as well as the bill of sale of the cedar stock to the Manistee Bank, that stock having been included in the chattel mortgage executed by the Watervale Manufacturing Company to the Milwaukee Bank. The bill, as we have seen, sought to have the lien of the mortgage of July 9, 1894, declared prior to the lien held by the Manistee Bank, upon the ground that the officers of the Manistee Bank had fraudulently combined with Hale to aid him to obtain a loan in order that he might thereby be enabled to pay his indebtedness to the Manistee Bank, and that it was in aid of this purpose that the deeds were withheld from registration, and the bill of sale not filed as required by law. The pleadings are sufficient to admit of the further contention now made in argument that, if the proof does not sustain the charge of a fraudulent combination, nevertheless the officers of the Manistee Bank were aware of the loan which the Milwaukee Bank was about to make to the Watervale Manufacturing Company, and had knowledge that Hale had included the real estate covered by the Vincent deeds, as well as the cedar stock in the statement prepared of the assets on which the loan was obtained, and that, under such circumstances, it was the duty of the bank to make known the fact of its lien, and, having failed to do so, it is precluded by estoppel from now claiming priority for its lien. The bill was answered by the Manistee Bank as well as the Watervale Manufacturing Company, the Manistee Bank denying all charges of fraud and collusion, and distinctly denying all knowledge of the proposed loan from the Milwaukee Bank, and also denying all knowledge of the fact that Hale had included the real estate in any statement of assets of that company.

It should be stated that there is here no longer any question for determination in regard to the bill of sale. After the Milwaukee Bank had taken possession of the property covered by the bill of sale, an action of replevin was instituted in the state court for possession of that property, which resulted in a judgment in favor of the Manistee Bank, and the judgment was on writ of error affirmed by the supreme court of Michigan. The contention in that case was that the Manistee Bank, not having filed its bill of sale in the proper office, so as to give public notice, was under duty on the facts to make known the fact of its lien, and that, not having done so, it had waived its right to claim the lien as against the Milwaukee Bank. An attempt was made to show that the Manistee Bank had knowledge of all of the facts by reason of the letter of inquiry to Dunham, as well as the letter which Mr. Hale said in the communication to Williams had been written to Ramsdell, president of the bank. In regard to this contention, the supreme court of Michigan said:

"It is insisted that it was the duty of the plaintiff, in reply to the letter to the defendant inquiring as to the character and financial standing of Mr. Hale, to state the indebtedness of Mr. Hale to it. There might be circumstances where this would be required. This letter, however, contained no intimation that the defendant bank was intending a loan to Mr. Hale. In fact, it contemplated a loan to the corporation, and made the loan to it, but no intimation of this purpose is found in the letter. In order to create an estoppel in pais, it must appear that the party making the representations

knew or was informed that the party to whom they were made intended to rely upon them. The rule applicable to this case cannot be better stated than it was by Lord Campbell, in Howard v. Hudson, 2 El. & Bl. 10: 'If a party willfully makes a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an "estoppel." It is not quite properly so called, but it operates as a bar to receiving evidence contrary to that representation, as between those parties. Like the ancient estoppel, this conclusion shuts out the truth, and is odious, and must be strictly made out. The party setting up such a bar to the reception of the truth must show that there was a willful intent to make him act on the faith of the representation, and that he did so act.' Boyd v. Stone, 11 Mass. 349. See, also, Hyde v. Powell, 47 Mich. 156, 10 N. W. 181; Heyn v. O'Hagen, 60 Mich. 150, 26 N. W. 861; Pearson v. Hardin, 95 Mich. 369, 54 N. W. 904; Pierce v. Andrews, 6 Cush. 4; Freeny v. Hall (Ga.) 21 S. E. 163; Meisel v. Welles (decided at the present term) 65 N. W. 289, where the meaning of the term 'willful' is discussed. No statement of liabilities was called for, but only his character and financial standing as a business man. Banks, as well as individuals, frequently write for information of this character. Business men of the highest standing and credit often obtain loans at banks for carrying on their business. When an inquiry comes to such bank asking simply for the character and financial standing of the merchant, the bank is not bound at its peril to report any loans which such merchant may have at its bank. Banks, too, often make such inquiries, not for themselves, but for their local customers. The plaintiff was not therefore, as a matter of law, estopped by his letter in this case. The entire question was submitted to the jury, under instructions very favorable to the defendant. Error is assigned upon that portion of the instructions above stated in regard to the statements found in the letter of Mr. Hale of December 30, 1893, to Mr. Williams, and to the letter of Mr. Dunham, the cashier, to Mr. Ilsley. The proof was not conclusive that Mr. Hale wrote the letter to Mr. Ramsdell. He is not positive that he wrote it, and he stated that he found no copy of such letter in his letter book, in which it was his custom to keep copies of his letters. Mr. Ramsdell was a witness, and was not asked by either party in regard to this letter. Under the evidence, the question was one of fact for the determination of the jury. It is claimed that the bill of sale upon its face is too indefinite and uncertain to have effect as security. This might become important if Hale had conveyed the title to his company, and if it were conclusively established that the defendant bank had obtained a valid lien upon the property as that of the Watervale Company. As between the vendor and the vendee, or the mortgagor and the mortgagee, the bill of sale could not be held indefinite and uncertain for failure to state the amount secured thereby. Under the instructions, the jury must have found that the title was not conveyed by Hale to the company. Therefore, the defendant is not in position to raise this question. Complaint is made of the rejection of certain testimony offered in regard to statements claimed to have been made by Mr. Hale after the defendant had obtained its mortgage. There was no offer to connect the plaintiff with these statements, and therefore they could not be binding upon it. The testimony was properly rejected. We find no error upon the record, and the judgment is affirmed." First Nat. Bank of Manistee v. Marshall & Ilsley Bank of Milwaukee, 65 N. W. 604.

As before stated, the letter from the Milwaukee Bank to Dunham, cashier of the Manistee Bank, was apparently treated as a letter to the bank itself, and the answer by Dunham as the answer of the bank. Both Dunham and Ramsdell very distinctly state that neither Ramsdell nor any director or other officer of the bank was aware of the letter to Dunham, and that Dunham never mentioned the fact of having received or answered any such letter, and that this fact was only known to Ramsdell a considerable time afterwards. It will be observed by reference to the letter that it makes no inquiry whatever in regard to the Watervale Manufacturing Company or its

property or assets. The inquiry is of the most general character, and limited to the character and financial standing of Mr. Hale individually. Ramsdell and Dunham both testify that at the time tney were not aware of the fact that the Watervale Manufacturing Company had been formed as a corporation; that they had no knowledge of any proposed loan from the Milwaukee Bank to that company, and no knowledge whatever of any statement made or list of assets prepared and furnished for the purpose of obtaining such loan. Their denial in these respects is very positive. We think that, to establish conditions necessary to give rise to an equitable estoppel, it would be necessary to show, not merely that the officers of the Manistee Bank had such general knowledge as the letter from Ilsley to Dunham would imply, but that they had specific knowledge that a loan was being negotiated, and that the real estate on which it held a lien was included in the schedule of property which was being made the basis of the loan, and, further, that the bank officers were aware of the fact that Hale was claiming an unincumbered title to this real estate, as there would exist no reason why Hale might not include the property in the schedule for the purpose of using his equity of redemption therein as a basis of credit, provided the Milwaukee Bank was not misled upon that point. It certainly could not be maintained that the letter to Dunham, without more, conveyed, by implication, knowledge of any of these specific facts; nor could it be claimed that, in the answer to so general an inquiry, there would be any gross negligence in not disclosing the existence of the Manistee Bank's lien; and the proof in this record fails to establish, in our opinion, any fraudulent intention in making such an answer as was made. It is quite evident that the supreme court of Michigan, in the case referred to, entertained the opinion that there was nothing in this letter and answer sufficiently specific, as to facts, to give rise to an estoppel, and the view expressed by that court is in harmony with other well-considered cases.

In Brant v. Iron Co., 93 U. S. 326, the elements necessary to constitute an estoppel of the kind now relied on were much considered. Mr. Justice Field, speaking for the court, said:

"It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud, or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only; that there must be positive fraud or concealment or negligence so gross as to amount to constructive fraud.' 1 Story, Eq. Jur. 391. To the same purport is the language of the adjudged cases. Thus, it is said by the supreme court of Pennsylvania that 'the primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of the denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up.' Hill v. Epley, 31 Pa. St. 334; Henshaw v. Bissell, 18 Wall. 271; Boggs v. Mining Co., 14 Cal. 368; Davis

v. Davis, 26 Cal. 23; Com. v. Moltz, 10 Pa. St. 531; Copeland v. Copeland, 28 Me. 539; Delaplaine v. Hitchcock, 6 Hill, 14; Hawes v. Marchant, 1 Curt. 136, Fed. Cas. No. 6,240; Zuchtmann v. Roberts, 109 Mass. 53. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established. 'It is also essential,' continued the court, 'for its application with respect to the title of real estate, that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. Crest v. Jack, 3 Watts, 240; Knouff v. Thompson, 16 Pa. St. 361.' "

The cases of Henshaw v. Bissell, 18 Wall. 255, and Marshall v. Hubbard, 117 U. S. 415, 6 Sup. Ct. 806, are to the same effect.

We have referred to the elements necessary to give rise to estoppel in respect to a right or lien such as that now in question. It has been seen that the facts must be clearly established. We now refer only briefly to such other points in the evidence as have been treated as material, besides the letters just mentioned. Ellis testifies, as before stated, that, in the interview at the Plankinton House, Ramsdell told him that the bank had no lien or incumbrance on the property of Hale, and that he communicated to the vice president of the Milwaukee Bank the conversation thus had with Ramsdell. Ramsdell denies this, as we have seen, and the vice president of the Milwaukee bank, in his testimony, does not sustain Ellis in this respect. It is altogether improbable that Ilsley would have forgotten so important a fact as this, and his failure to sustain Ellis in this respect is very significant. Ellis is the only solvent party on the notes to the Milwaukee Bank, and the payment of the balance due on that debt, or any large part thereof, would render him insolvent. He is therefore testifying under the influence of the strongest possible pecuniary motive. For Ramsdell to have made such a statement at that time was not only to have stated a falsehood directly to the prejudice of his bank, but to have done so under circumstances which did not call for such a statement, and without any adequate motive for doing so. Under these circumstances, we are unable to accept the statement of Ellis as sufficient to overcome the positive denial of Ramsdell. Again, Williams says that he believes Ramsdell saw, in the interview at the Buckner House, the statement of assets, prepared by Hale for the negotiations between him, Mansfield, and Hale, and Ellis says he thinks Ramsdell "gazed over it." It is not suggested, however, that anything was said or intimated to the effect that Hale was claiming to Williams and Mansfield that he had anything more than an equity of redemption in the real estate which it is said was included in that statement; and it is clearly established that both Ramsdell and Hale acted fairly with Williams and Mansfield in disclosing the truth about this property and the existence of the bank's lien thereon. This is clearly shown by the fact that the bank's debt was further secured in the deal which followed, and the further fact that the title is expressly referred to and provided for in the

contract between Hale and Williams and Mansfield, wherein it is stipulated that, when the bank's debt is paid, a warranty deed is to be made for this property to the Watervale Manufacturing Company. So these statements by Ellis and Williams, not very important in themselves, are not sustained by any testimony in the record, and cannot be credited. Williams undertakes to state positively that Hale was to make a warranty deed in the first instance to the Watervale Manufacturing Company, and that he thought this had been done, and was so informed by subsequent letter from Hale. This statement is in direct conflict with the stipulations of the contract signed by Williams and Mansfield, before referred to, and is in conflict with the clearly established fact that Williams and Mansfield fully understood that the bank held title to this real estate to secure this debt. So, Williams states that Ramsdell gave no such memorandum of the date and amounts of payments which might be made on the bank's debt, as Ramsdell says was done, while the exact agreement of this memorandum in respect to the first, second, and third payments, with the corresponding payments provided for in the contract between Hale and Williams and Mansfield, and with the first, second, and third notes executed by Williams and Mansfield to the bank, is obviously important, and, with the other proof, leaves no doubt whatever that Ramsdell is correct and Williams mistaken about the execution and delivery of this memorandum. Without further reference to details, it is sufficient to say that both Ellis and Williams were mistaken about some of the most material facts in the case; so much so that we cannot accept their mere impression or belief in regard to facts of secondary importance, such as this statement last referred to.

The only other material point in the evidence is the statement by Hale, in his letters to Williams and Ellis, that he had written Ramsdell on the 29th of December, 1893, giving him the facts in regard to the negotiations for a loan from the Milwaukee Bank. As we have seen, Ramsdell denies receiving this letter. If such letter had been written, it would not warrant the inference that Hale explained to Ramsdell that he was representing or causing Ellis to represent to the bank that the title to the real estate covered by the Vincent deed was unincumbered and clear. If Hale was practicing a fraud of this kind upon the bank, it is not in accordance with experience that he would inform Ramsdell of such a fact, unless the evidence justified the conclusion that there was a deliberate fraudulent collusion for this purpose previously entered into; and in that case no letter would be necessary, as Ramsdell would understand the scheme without explanation. The learned circuit judge leaves the question whether such letter was in fact written or received undecided; and we need only say that this fact is not made out over the positive testimony of Ramsdell that no such letter was received.

This disposes of all the points in the evidence regarded as material in support of the claim of the Milwaukee Bank; and, having concluded that such evidence is not sufficient to uphold the decree of the court below, it is hardly necessary that we should refer to those phases of the evidence which support the denial of the Milwaukee

Bank and its officers. We may say, however, by way of general observation on the case, that the Milwaukee Bank did not cause such inquiry to be made as reasonable business prudence would have suggested. No examination was made of the records in the proper office for registration of conveyances affecting lands, and where notice could have been obtained in the mode provided by the registration policy of the Michigan law. Had such examination been made, it would have disclosed that the record title to this property was in Vincent, and this would have led to such inquiry as would readily have disclosed all the facts. This is the position of the Milwaukee Bank. There is no evidence to show that the officers of the Manistee Bank were under any great apprehension as to the loss of the bank's debt finally. On the contrary, it must be regarded that the security which they held was reasonably sufficient. In addition, it was clearly understood from the beginning of the negotiations between Hale and Williams and Mansfield, for the sale of a half interest in Hale's property, that the bank was to be paid or further secured by the purchase price coming from Williams and Mansfield, as was subsequently done. So at the time of the negotiations for a loan from the Milwaukee Bank, the Manistee Bank's debt must have been regarded as reasonably safe; and there could exist no strong motive on the part of the officers of the Manistee Bank to enter into a fraudulent collusion, tacit or express, with Hale, to aid the latter in perpetrating a fraud on the Milwaukee Bank; and as Hale and Mansfield resided at Milwaukee, and were fully aware of the true state of the title, a collusive scheme of the kind insisted on could hardly have been looked upon as practicable unless Williams and Mansfield were also made parties to the scheme. It has not been suggested that it was understood on the part of any one that the Manistee Bank was to receive directly any part of the loan from the Milwaukee Bank, while it was to be directly benfited by and to receive the purchase price, or a part of it, in the sale to Williams and Mansfield; and, nevertheless, as we have seen, the true condition of the property was fully made known to Williams and Mansfield. In addition to this, Hale supports Ramsdell and Dunham in the main facts in their testimony. It is true, as was observed by the learned judge, that Hale appears to be making common cause with the Manistee Bank. It is equally true, we think, that Williams, Mansfield, and Ellis are in sympathy with the Milwaukee Bank, and Ellis is liable for the debt of that bank only, while the other three are equally liable to both banks. Ilsley undoubtedly understood that Hale was indebted. Dunham's letter clearly implies this. If details as to the amount of Hale's indebtedness individually, and how secured, if at all, were regarded as material in deciding upon a loan to the corporation, further inquiry was called for. If Dunham had been acting for the bank in answering the letter, he could not reasonably have been expected in replying to so general an inquiry to voluntarily disclose the state of the account with the bank's customer. A bank whose officers would do so as a practice would doubtless soon find itself without customers.

The letter to Dunham conveyed no information or suggestion as to the details of the reason for the inquiry.

Whatever the letter may have implied to any one was general, and not specific. We need not, however, pursue this line of discussion. The decree proceeds upon grounds which discredit the positive testimony of Ramsdell and Dunham. Admitting the suspicious circumstances, such as withholding the deeds and bills of sale from record, and the absence of the letter copy book, we are not satisfied (the burden of proof resting on appellee) that the result below is sustained by that measure of proof required by law in cases such as this. We conclude, therefore, that there was error in the decree postponing the lien of appellant to that of appellee. Reversed and remanded for further proceedings not inconsistent with this opinion.

STEARNS v. LAWRENCE.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1897.)

No. 523.

1. RES JUDICATA—FINDING OF FACT—CONCLUSIVENESS BETWEEN CO-DEFENDANTS.
   A finding made in an action against a bank and its president that the president purchased certain notes for the bank with knowledge of a condition on which they were given is conclusive of such fact in a suit brought by a receiver subsequently appointed for the bank to charge the president with losses resulting from his negligent management.
2. SAME—EVIDENCE AS TO QUESTIONS ADJUDICATED—OPINION OF COURT.
   Under the provision of the constitution of Michigan (article 6, § 10) requiring the decisions of the supreme court to be in writing, signed by the judges, and filed in the clerk's office, the opinion of that court, so filed in a case, is competent evidence of the questions adjudicated therein, in a subsequent action wherein the decision is sought to be used as an estoppel.
3. BANKS—LIABILITY OF OFFICER FOR MISMANAGEMENT—NEGLIGENCE.
   The purchase of a note by the president and managing officer of a bank, for which he paid from its funds over $20,000, with knowledge that it was burdened with a guaranty made by the payee, which might defeat its collection, is such negligence as renders him liable to account to the bank or its creditors for any loss which resulted.
4. SAME—MEASURE OF RECOVERY.
   Where the president of a bank negligently purchased a note, subject to a condition which defeated its collection, the bank is entitled to recover from him, as a part of the loss resulting, the expense of an unsuccessful defense made by him for the bank to an action brought by the maker of the note to enforce the condition.

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

Bill by John S. Lawrence, receiver of the Northern National Bank of Big Rapids, against George F. Stearns. From a decree for complainant, defendant appeals.

The defendant in error, as receiver of the Northern National Bank, of Big Rapids, Mich., brought this suit by bill in the court below to recover from the appellant damages for alleged breach of trust and negligence on his part while the active managing officer and president of that bank. The original capital stock of the bank was fixed at the sum of $150,000, but was subsequently reduced, under the direction of the comptroller, to $100,000. The bank having failed and closed its doors to business, the appellee was, on the 5th of August,

1893, appointed receiver of the bank by the comptroller of the currency, and entered upon the discharge of his duties as such receiver. The case as stated in the bill is as follows:

The appellant was president of the bank from its organization to about the 3d of August, 1891, and La Fora S. Baker, his nephew, was cashier from the organization of the bank to January, 1887. After Baker ceased to be cashier, the entire control and management of the bank was in the hands of the president, exercising thereafter practically the powers previously exercised by both officers. On the 22d of January, 1888, the bank held paper made by Baker, and indorsed by the Baker Lumber Company, to the amount of $15,000, and paper to the same amount made by the Baker Lumber Company, and indorsed by Baker. It was charged that the Baker Lumber Company was organized for the purpose of carrying on Baker's business, and to be used merely as a cover under which to obtain loans from the bank in excess of the amount permitted by law. Baker owned all the stock in the Baker Lumber Company, except a nominal amount, say one or two shares. It is charged that Stearns knew all of these facts, and that the corporation had been organized merely for the purpose of obtaining a loan in excess of the amount allowed by law, and that, with knowledge of such facts, he made the loan above stated, making in the aggregate $30,000. On the 22d of March, 1886, Baker sold to Anderson and Griffin certain pine lands for the sum of $50,000,—$5,000 in cash paid down, and the note of Anderson & Griffin taken for the remainder, $45,000, payable at two years, with interest at 7 per cent. This note was secured by a mortgage upon the property sold, and Baker at the same time gave to Anderson & Griffin a written guaranty that the lands, together with some other logs mentioned, would produce 13,000,000 feet of pine lumber, and agreeing to refund, at the rate of $3.50 per M., for any number of feet short of that amount. The bill further charged that the defendant, Stearns, had full knowledge of all of the particulars of this entire transaction, including the guaranty against shortage or deficiency. On the 9th of February, 1887, Baker transferred the note and mortgage to Palmer & Brown, as security for a loan of $20,000, which they had made to him, upon his note indorsed by Stearns. Anderson & Griffin made payments upon the note and mortgage to Palmer & Brown, so that January 22, 1888, there remained a balance due to Palmer & Brown of $4,508.56, leaving still due at that time, on the Anderson & Griffin note, a balance of $23,089.12. On the 3d of August, 1887, Stearns, acting for the bank, pursuant to an understanding with Baker, bought the Anderson & Griffin note and mortgage from Palmer & Brown, the transaction being closed the 22d of January, 1888, on which date Stearns, acting for the bank, paid the balance due Palmer & Brown of $4,508.56, this being the balance on the note of Baker, indorsed by Stearns. Stearns took the assignment of the note and mortgage to himself, and at once transferred the same to the bank in payment of the note of the Baker Lumber Company, indorsed by Baker, of $7,500, and two notes of $5,000 each, made by Baker, indorsed by the Baker Lumber Company, these being parts of the indebtedness of the lumber company and Baker to the bank, previously referred to. The notes were canceled and delivered up, and the Baker Lumber Company given credit upon the books of the bank for the sum of $1,080.56, this being the balance of the whole sum due upon the Anderson & Griffin note. The $1,080.56 thus placed to the credit of the Baker Lumber Company was afterwards checked out. It was further charged that this purchase for the bank of the Anderson & Griffin note and mortgage was without the knowledge of the directors or other officers of the bank, and that Stearns conducted the same personally, with full knowledge of the guaranty made by Baker against any shortage in the pine lumber. The quantity of pine on the lands turned out to be below the number of feet guarantied by Baker, and bill was subsequently filed in the state court by Anderson & Griffin against the bank, Stearns, and Baker, for the purpose of obtaining an abatement or credit for the deficiency on their note then held by the bank, and charging knowledge on the part of the bank of the rights of Anderson & Griffin under the contract. Baker made no defense, but Stearns, who was charged with having full knowledge of the guaranty when he purchased the note and mortgage for the bank, conducted the defense for the bank, and also answered for himself. In both answers it was denied that Stearns or the bank had knowledge of the Baker guaranty at the time Stearns purchased the note and mortgage and paid Pal-

mer & Brown. On final hearing, the court found that the bank and Stearns did in fact have knowledge of the guaranty, and decree went in favor of the complainant. The bank and Stearns both appealed to the supreme court, and the decree below, with a modification not affecting the present discussion, was affirmed. 57 N. W. 808.

It was decreed that, upon the payment by Anderson & Griffin to the bank of the amount paid by it to Palmer & Brown, Anderson & Griffin were entitled to have the note canceled and the mortgage discharged, it being found that there was a deficiency under the Baker guaranty which entitled Anderson & Griffin to a credit of $19,250,—a sum larger than the amount sufficient to discharge the balance due on the note at the time of its purchase by Stearns for the bank, after deducting the sum paid to Palmer & Brown, as to which sum it was held that the bank was an innocent holder. In this way the entire sum of the balance on the Anderson & Griffin note was discharged, and this sum, together with the credit checked out as before stated, was lost to the bank.

In his answer in this case, Stearns practically admits all the allegations of the bill except the charge that at the time he took the Anderson & Griffin note, and surrendered the paper of Baker and the Baker Lumber Company, he had any knowledge of Baker's guaranty. This is the only material thing denied in the answer, Stearns further setting up the statute of limitations in bar of the suit. The case is thus stated with reference to the substance and effect of the evidence, and such conclusions on the facts as the evidence taken as a whole fully warrants. It is not regarded as necessary or serviceable to refer to the proof in detail. The case was disposed of by the circuit court in a written opinion, with a full discussion of the facts and citation of authorities. The opinion is now published in Lawrence v. Stearns, 79 Fed. 878. Decree was rendered against appellant for $28,958.36, the damages sustained by the bank in consequence of the purchase of the Anderson & Griffin note, from which decree Stearns appealed, and has assigned error.

Albert Crane, Mark Norris, and Frederick W. Stevens, for appellant.

Niram A. Fletcher and George P. Wanty, for appellee.

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

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

The discussion of the case at bar in this court has not taken so wide a range as it apparently did in the court below. In the brief and argument in this court, counsel for appellant have urged two principal objections as grounds for reversal: (1) It is insisted that the proof does not sustain the charge that appellant, Stearns, at the time the Anderson & Griffin note was taken, and other paper of the bank surrendered, had knowledge of the existence of the Baker guaranty, on account of which the balance of this note was subsequently lost to the bank; and (2) the statute of limitation is relied on. This second defense was briefly disposed of by the court below by stating that all knowledge of the real facts of this transaction was concealed by Stearns from the bank until a time clearly short of the time prescribed by the statute of limitation, which has been suggested as applicable to the case.

The precise language in which the appellant undertakes to avail himself of the statute of limitation, as stated in the answer, is this:

"And this defendant avers that if said transaction was a violation of sections 5137 and 5200 of the Revised Statutes of the United States, which this defendant does not admit, but expressly denies, then that all right of action for such violation, if any exists, has been and is barred by the statute of limitations."

In regard to this point, counsel in the brief say:

"This suit is for the statutory penalty, and therefore is barred by the United States statute of limitations. Rev. St. § 1047. No suit * * * for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."

It is obvious without further statement that the supposed application of the statute of limitation to this case grows out of a total misconception of the character of the suit and the ground on which it proceeds. This suit is in no sense a suit for a penalty or forfeiture for the violation of any of the acts of congress in relation to banking associations, but is a suit to recover damages for the injury to the bank and its creditors from the negligence and bad faith of its managing officer, occupying a trust relation to the stockholders and to the assets in his hands for management belonging to the bank. We dismiss this point, therefore, with the simple announcement that the statute of limitation relied on has no place whatever in, or application to, the facts of this case. It is true that in the bill there is an allegation that the Baker Lumber Company was formed fraudulently for the purpose of enabling Baker to obtain a loan at the bank in excess of the limit prescribed by statute, but the suit was not predicated on this fact, and such fact was alleged merely as a circumstance throwing light on the transaction actually involved. As was properly observed by the court below: "This is not the gravamen of the charge, but it casts some light upon his subsequent proceedings."

In regard to the other defense, it will more narrowly draw the exact limits of the question to state that the bill alleges that the transaction resulting in the purchase of the Anderson & Griffin note was conducted by Stearns personally without the knowledge of any other director or officer of the bank. The testimony clearly shows this is so, and Stearns admits that he conducted the transaction throughout. There is not a suggestion in the pleadings or proof that any other officer of the bank had anything whatever to do with it or any notice or knowledge of it.

A part of the evidence on which the case was heard in the court below consisted of portions of the printed record in the case of Anderson & Griffin against the Northern National Bank, of Big Rapids, Mich., and Stearns, in the state court, which resulted in a decree canceling the Anderson & Griffin note, including the bill and answer of the bank and Stearns, the decree of the state circuit court, and the decree of the state supreme court, affirming the decree of the circuit court. Both of these decrees were prepared, and stated the result in general terms, without distinctly showing the specific facts found by the courts, and on which the judgments rested. The decree of the state circuit court adjudged that the bank and Stearns both had full and complete notice and knowledge of the written agreement and guaranty of Baker, and the right of the complainants to a rebate from the principal sum named in the note and mortgage on account of the shortage in the pine lumber, and that, having such knowledge, they were not holders in good faith. In the decree of the supreme court the same facts were found, with the further find-

ing that the defendants below, the bank and Stearns, had notice of the fact that the deficiency existed at the time the bank acquired the note and mortgage. The complainant introduced no parol testimony to show the precise facts found, and on which the judgments of those courts were actually pronounced; and the argument now is that the complainant has failed to make out a case, because it is consistent with these decrees to say that the bank obtained knowledge otherwise than through Stearns and through Stearns only. In other words, the decrees do not distinctly show that they were based on the finding that the bank was affected with knowledge, and its right defeated through Stearns and his knowledge only. In support of this position, the insistence is that this court is limited to the pleadings and the final decrees pronounced, which constitute part of the record, and that the court may not look to the opinion of the supreme court of Michigan for the purpose of determining the facts passed upon in the case. It is conceded, or at least not controverted, that, if the court may look to the opinion of the supreme court of Michigan, it discloses distinctly that the decree of that court was based upon the proposition that the bank had knowledge of the Baker guaranty by reason of the knowledge of its president and managing officer, Stearns, and Stearns only. The opinion clearly shows that this fact was distinctly passed upon, and if this question of fact was considered and settled in that case, the decree is, as to such fact, conclusive, although Stearns and the bank were both defendants. Wilson's Ex'r v. Deen, 121 U. S. 525, 7 Sup. Ct. 1004; Louis v. Brown Tp., 109 U. S. 163, 3 Sup. Ct. 92; Corcoran v. Canal Co., 94 U. S. 741; Southern Pac. R. Co. v. U. S., 168 U. S. 18, 18 Sup. Ct. 18. Stearns having been notified by service of process, and being directly interested in the subject-matter of that litigation, and having actually controlled the proceedings for the defense, the case falls within the doctrine of Robbins v. Chicago City, 4 Wall. 657; Chicago City v. Robbins, 2 Black, 418; Railway Co. v. Twiss, 35 Neb. 271, 272, 53 N. W. 76; Parr v. State, 71 Md. 236, 17 Atl. 1020; Drennan v. Bunn, 124 Ill. 176, 16 N. E. 100; Western & A. R. R. v. City of Atlanta, 74 Ga. 777; Davis v. Smith, 79 Me. 357, 10 Atl. 55, and cases cited. We are not to be understood as extending the rule beyond the principle of the Robbins Case. From a comparison of the Robbins Case and its facts with Minnesota Co. v. Chamberlain, 3 Wall. 704, relied on by appellant, it will clearly appear that the former case controls the one at bar, and that the latter case and others cited are not applicable.

It is not necessary or practically useful here to consider the distinction between a former adjudication of the same fact when specially pleaded as an estoppel and when admitted in evidence, the conclusive effect being the same. The question is, then, presented whether the written opinion of that court filed in the case constitutes a part of the record, or whether, regardless of the question whether it is technically a part of the record, the opinion may be examined for the purpose of determining the points adjudged, in order to give effect to the judgment of the court as an estoppel on the parties, so far as the same issue now involved was passed upon

in that case. In regard to this question, we do not think there is any very serious difficulty. The constitution of the state of Michigan (section 10, art. 6) declares that "the decisions of the supreme court shall be in writing, signed by the judges concurring therein. Any judge dissenting therefrom shall give the reasons of such dissent in writing, under his signature. All such opinions shall be filed in the office of the clerk of the supreme court." We remark that if the opinion thus filed, as required by the constitution of the state, may not be examined for the purpose of determining the real points passed upon in the case, so as to give full effect to the judgment as res adjudicata, it is difficult to understand the full purpose or motive in making the constitutional requirement that the opinion shall be filed in the cause, and preserved. The circuit court concluded that there could be no higher or better evidence of what was decided than the written opinion itself, upon which the formal decree was based, and in this view we concur.

In support of the right and duty of the court to examine that opinion for the purpose of ascertaining the point actually decided, cases will be found referred to by the circuit judge. In the examination of this question, the distinction between the different cases must always be closely observed, growing out of the purpose for which it was sought to treat the opinion as part of the record, and depending, further, upon whether the opinion offered is one of a court of last resort, filed as required by law. For illustration, the question may arise as to what constitutes a part of the record on writ of error to a judgment at law or on appeal from a decree in chancery. The question may again be presented in a case where the judgment is relied on as an estoppel, as in the case at bar, or on writ of error from the supreme court of the United States to the court of highest authority in a state, in which that court must examine the record for the purpose of determining whether or not such question was presented and decided as authorizes that court to review the judgment of the court of highest authority in the state. Whether or not attention to these different phases of the question would make it possible to reconcile the cases, and explain the apparent conflict of opinion upon the admissibility of the written opinion of a court as evidence to identify the question decided, we will not now stop to inquire.

In Corcoran v. Canal Co., 94 U. S. 741, the opinion of the court of appeals of Maryland was made an exhibit for the purpose of identifying the point decided in a former suit, and to give effect to the judgment in that suit as an estoppel. It was held that the parties were bound by the decree in that case, and the opinion of the court of appeals of Maryland was examined for the purpose of determining the issue passed upon. The court, having referred to the opinion, said:

"The opinion of the court of appeals of Maryland, found in the record as an exhibit, and reported in 32 Md. 501, while conceding the general rule that where the annual or semiannual interest on a bond is represented by a distinct coupon, capable of separation and removal from the main instrument, it bears interest from its maturity, if unpaid, holds that, under the special statute of Maryland authorizing the pledge by the canal company of its revenues for the

payment of these preferred bonds and interest, and waiving her own existing priority of claim on these revenues, simple interest only was meant, and that, as to the lien on those revenues and tolls, the interest on the coupons was not included in the lien. The opinion, undoubtedly, decided the very point in controversy here. It is said, however, that this is only an opinion, and that, unless a judgment or decree is produced, there can be no estoppel, and the principle asserted is undoubtedly correct. But, in a stipulation signed by the parties to the present suit, it is agreed 'that a decree has been passed by the circuit court of Baltimore city making distribution of the net revenues of said canal company, and ordering their payments from time to time as the same accrue, in conformity with the said opinion.' The opinion of the court, then, by virtue of that decree, has become, by the well-settled principles of jurisprudence, the law of the case as to the parties who are bound by that decree."

So, too, in Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 690, 15 Sup. Ct. 736, the question was presented how far the court might look to the written opinion to explain what was in issue, and what was determined by the judgment or decree relied on as a bar or estoppel. Mr. Justice Brewer, speaking for the court, said:

"It is said that the statutes of Idaho do not provide for findings of fact in a case like this, and that, therefore, the recitals in such findings must be ignored. If it be true that the statutes of Idaho do not authorize findings of fact, it is none the less true that such findings are a declaration by the court of the matter it determines. Even if not conclusive as against all testimony, they are certainly very persuasive evidence of what the court did in fact decide. In Lumber Co. v. Buchtel, 101 U. S. 638, the judgment relied upon as an estoppel was based upon the finding of a referee, and it was said: 'This finding, having gone into the judgment, is conclusive as to the fact found in all subsequent controversies between the parties on the contract. Every defense requiring the negation of this fact is met and overthrown by that adjudication.' In Legrand v. Rixey's Adm'r, 83 Va. 862, 877, 3 S. E. 864, it appeared that the pleadings and judgment left a doubt as to the precise matter decided. Reference to an opinion of the trial court, for the purpose of making certain that which otherwise was uncertain was approved. We quote from the supreme court of appeals: 'In the case at bar, the trial judge filed with the papers in the cause his reasons for his decision, which the decree itself shows was done for the express purpose of explaining his decision. This being the case, the opinion of the trial judge thus referred to in the decree becomes a part of the record, and may be looked to, and is even more reliable to explain in doubtful cases what was in issue and what was determined than mere extrinsic evidence to the same end. We do not mean that the mere opinion of the trial judge, which may happen to be in writing, and copied into the record, constitutes a part thereof; but we do say that where the decree (as in this case) refers to the opinion of the trial judge in terms that make it clear that the object was to refer to it to explain what was determined, and the reasons therefor, then such opinion becomes legitimately a part of the record, and must be looked to, to explain what was in issue, and what was determined by the judgment or decree in question. See Burton v. Mill, 78 Va. 468, at page 470.'"

For the same purpose, the opinions of the courts of highest authority have been examined in many other cases, as the decisions of that court show, but without any question being expressly made on the right or duty of the court to do so. It must certainly be regarded as an established practice in that court to refer to such opinions as evidence of the issue, and the points determined, in the case of a judgment or decree stating the result of the litigation in general terms only.

In Miles v. Strong, 68 Conn. 273, 36 Atl. 55, the supreme court of Connecticut, in disposing of the same question, said:

"The court permitted the plaintiffs, against the objection of the defendants, to read to it from the opinion of this court, referred to in the finding 'as bear-

ing upon the issues in the case.' One of the issues was whether the judgment in that case was a bar to this suit, and that depended on the further fact whether the judgment in question had settled the matters in litigation in the present suit; and, to ascertain this, the court below clearly might have read the opinion for itself, and it was no error to permit the plaintiffs to read it in the manner and for the purpose stated."

In Strong v. Grant, 2 Mackey, 218, this precise question was presented to the supreme court of Maryland for decision, the decree in a former suit being relied on as res judicata. Mr. Justice Hackner, speaking for the court, said:

"It is necessary, before proceeding to apply the tests laid down by this rule to the matter before us, to consider a preliminary objection insisted on by the appellant, that we are confined to the written record in the proceeding pleaded in bar, and have no power to examine the opinion of the supreme court, or resort to any other means of ascertaining what was the matter really in controversy in the equity suit, and actually settled by the decree relied on. In examining this question in the case of Cromwell v. County of Sac, 94 U. S. 353, the supreme court says: 'But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.' On page 354, the judge, speaking of the decision in Miles v. Caldwell, 2 Wall. 35, says: 'The court held, after full consideration, where the form of the issue was so vague as not to show the questions of fact submitted to the jury, it was competent to prove by parol testimony what question or questions of fact were thus submitted and necessarily passed upon by them,' etc. In the case before it, the court was considering the effect and scope of its previous decisions in a case which was relied upon as res judicata in the cause thus pending, and in this connection it says, on page 359: 'Reading the record of the lower court [in the first case] by the opinion and judgment of this court, it must be considered that the matters adjudged in that case were these,' etc. So, in Steam-Packet Co. v. Sickles, 24 How. 344, the court declared that 'extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury.' See, also, Campbell v. Rankin, 99 U. S. 263; 1 Greenl. Ev. § 532. In the light of these authorities, we are authorized and required to examine the opinion of the supreme court reported in the case of Grant v. Strong, 18 Wall. 624, with a view of ascertaining what that court really intended to settle by its decision reversing the decree below. And from that examination it appears to be too plain for controversy that the only question designed to be passed upon in that judgment was whether Strong was entitled to a mechanic's lien upon Grant's real estate described in the notice filed in the clerk's office."

As the court points out further on in the same opinion, the supreme court of the United States, in Phelps v. Harris, 101 U. S. 370, followed out its usual practice in examining and citing the opinion of the supreme court of Mississippi for the purpose of showing the scope and extent of the decree in that case, and the point really intended to be settled by that decision. See, also, New Orleans, M. & C. R. Co. v. City of New Orleans, 14 Fed. 373; 1 Freem. Judgm. § 273; 2 Black, Judgm. § 630; Satterlee v. Matthewson, 2 Pet. 410.

We hold, therefore, that it was competent for the court to examine, and its duty to examine, the opinion of the supreme court of Michigan for the purpose of determining the question of fact really settled and

intended to be settled by the decision of that court. It is needless to state, what clearly appears from what has been said, that we are dealing with the case where a former decree is relied on as res judicata, accompanied with the opinion filed pursuant to the requirements of law disclosing the issue settled by the decree. It may be remarked, further, that the opinion can be examined for the purpose only of construing a general decree and giving it just scope and effect, and not for the purpose of changing or modifying the decree.

The fact, then, being established that the appellant, Stearns, took the transfer of the Anderson & Griffin paper with full knowledge of the Baker guaranty, appellant's counsel further insist that this does not establish such negligence as renders the appellant liable for the loss which resulted to the bank. The contention is that it would be necessary to further show that, at the time the paper was transferred to the bank, the appellant knew there was a shortage which would defeat the collection of the debt in whole or in part under the Baker guaranty. The decree of the supreme court of Michigan expressly finds that a deficiency existed at the time that the bank and Stearns acquired the note and mortgage, and that they had notice of the same, and, as that court further settled the proposition that knowledge on the part of the bank was acquired through Stearns, it is difficult to see on what ground this part of the argument can be rested. The fact of knowledge of the deficiency was not only decided, but this, in our opinion, is not necessary to sustain the decree of the circuit court; for when the appellant, as the managing officer of the bank, took the Anderson & Griffin note with knowledge that it was burdened with the guaranty which might destroy its value and cause loss to the bank, it was such negligence as clearly rendered him liable to account for any loss which resulted. In his position of managing officer, he was required, in relation to the stockholders as well as the creditors of the corporation, to exercise good faith and reasonable care and judgment. We are at a loss to see on what reasonable ground it could be maintained that there was either good faith or good judgment in purchasing with the assets of the bank paper representing so large a sum, affected with an infirmity liable, if not certain, to destroy its value. As trustee, Stearns was under a duty of fidelity and prudence such as a careful man would exercise in his own affairs of like magnitude and importance. He is presumed to contemplate and to intend the natural consequences of his acts. Certainly, in the exercise of reasonable caution and prudence, it must have been foreseen that a loss on the Anderson & Griffin note was not only liable, but likely, to result.

In Agnew v. U. S., 165 U. S. 53, 17 Sup. Ct. 235, the court below had given an instruction in the following language:

"The law presumes that every man intends the legitimate consequence of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action. If, therefore, the funds, moneys, or credits of the First National Bank of Ocala are shown to have been either embezzled or

willfully misapplied by the accused, and converted to his own use, whereby, as a necessary, natural, or legitimate consequence, the association's capital was reduced or placed beyond the control of the directors, or its ability to meet its engagements or obligations or to continue its business was lessened or destroyed, the intent to injure or defraud the bank may be presumed."

This instruction was declared by the supreme court to be "unexceptionable as matter of law."

See, also, Trustees v. Bosseiux, 3 Fed. 817.

In the amount of the recovery against Stearns was included the expense incurred by the bank, in the defense of the suit brought by Anderson & Griffin against the bank to enforce the Baker guaranty; and it is said there is error in this respect, because no demand was made on appellant to defend that suit. Any formal demand would have been an idle ceremony, as process in the case was evidently served on Stearns; and it appears that he actively conducted the defense for the bank, as well as himself. It is certain that a recovery, which did not include this item of expense, would come short of doing full justice to the bank, its shareholders and creditors. The expense incurred in the defense of that suit was a natural, legitimate consequence of the wrongful act of Stearns, knowingly and deliberately committed in violation of his trust, and was a result which no prudent man could fail to foresee and contemplate as natural and probable. We think the sum thus expended constitutes properly an item in the amount of damage, for which decree was rendered against the appellant.

Some other minor points are suggested rather than argued in the brief, although counsel for appellant took occasion to say expressly that no objection was waived. These suggested points are chiefly in aid of the principal defense relied on, rather than as constituting sufficient separate defenses. We have examined these in relation to the facts, and do not think they are sufficiently serious to require separate discussion. We are fully satisfied with the result of this case, and the decree of the circuit court is accordingly affirmed.

NOTE. Since this case was decided, the opinion of the supreme court of the United States in Thompson v. Railway Co., 18 Sup. Ct. 121, has been announced, which seems to sustain the holding in this case that the court is authorized to examine the opinion of the supreme court of Michigan for the purpose of ascertaining the grounds of the judgment.

HENRY v. LILLIWAUP FALLS LAND CO. et al.

(Circuit Court, D. Washington, W. D. November 4, 1897.)

1. PUBLIC LANDS—OREGON DONATION ACT—IMPROVEMENTS AND CULTIVATION
   Proof that one, through whom land is claimed under the Oregon donation act, built a log cabin on the land, occupied it as a dwelling, and cultivated a garden spot, not exceeding 10 feet square, does not show sufficient cultivation or improvements to prove good faith in claiming the land for his home.

2. SAME—NOTICE OF CLAIM.
   The filing of the notice of claim under the Oregon donation act in the office of the surveyor general of Washington territory, after the date of the law creating a district land office in the territory, with a register and receiver, was without effect, as the change in the law made the district land office the place in which the notice should have been filed.

3. SAME—SURVEYS.

Failure of a claimant under the Oregon donation act to request a survey of his claim, or provide for the expense thereof, so that no survey was ever made until the governmental survey of the township after the claimant's death, was insufficient to perfect the claim. No title could pass under the donation law except to a specific tract, after a survey and marking of the lines and corners in accordance with law.

4. SAME—PROOF OF RESIDENCE AND CULTIVATION.

Mere affidavits taken before a notary public, instead of before the register or receiver, and filed in the surveyor general's office instead of in the district land office, were not a compliance with the requirements of section 7 of the donation act; and this omission, together with the fact that no certificate was ever issued as provided by such section, was sufficient to defeat the claim of an heir of the settler.

This was a bill in equity by Mary A. Henry against the Lilliwaup Falls Land Company and Ida M. French to assert an alleged equitable title to land to which defendants had obtained the legal title.

Johnson Nickeus, for complainant.

C. W. Corliss, for defendants.

HANFORD, District Judge. The complainant, Mary A. Henry, claiming to be the daughter and sole surviving heir of Hiram H. McNear, deceased, avers that the defendants have obtained legal title by patents from the United States, and mesne conveyances from the patentees, to a tract of land situated in Mason county, in this state, which tract of land was settled upon and claimed by her father under the act of congress commonly known as the "Oregon Donation Law." The complainant avers that her father, being an American citizen, and fully qualified to become a settler, and to acquire title to land in Oregon territory, under the provision of said act of congress, emigrated to Oregon in the year 1852, and commenced his settlement, upon the land referred to, on the 3d day of August, 1853, and thereafter continued to reside upon said land, and to cultivate the same as a farm, and claimed the same as his home, until the year 1860; that on the 3d day of April, 1855, a notice, accompanied by affidavits of two competent witnesses, describing the particular tract of land which he claimed, was made, and the same was filed in the office of the surveyor general of the territory of Washington, on the 17th day of April, 1855; "that on the 30th day of March, 1860, the said Hiram H. McNear duly and in legal form made proof, by the affidavits of himself and two competent witnesses, that he had resided upon and cultivated said land from the 3d day of August, 1853, to the 30th day of March, 1858, and that all of said proofs and affidavits were duly filed in the office of the surveyor general, and were made in the form required by the said surveyor general and the rules of the United States for the disposal of public lands under said land laws;" that at all of the times mentioned the said lands were unsurveyed lands of the United States, and the same were not surveyed by the government until May 1, 1874, at which time the official plat of the township was approved, and that Hiram H. McNear died intestate before the survey of said land, to wit, in the year 1870; that, after the survey of said lands, persons named in the bill entered upon different portions of said tract, claiming the same under

the general land laws of the United States, and obtained patents for the same, and that their titles so acquired have been conveyed to the defendants. The prayer of the bill is that the complainant be decreed to be the owner of said land, and that the defendants be decreed to hold the legal title in trust for her use, and that they be required to convey the same to her. The theory by which the complainant endeavors to establish a right to this land, superior to the legal title vested in the defendants, is that her father, by being duly qualified, and by settlement upon the land and residence and cultivation thereof, and by satisfying all the conditions of the donation law, including the giving of notice within the time prescribed, and making final proof, took the land as a grantee from the United States, the donation law being of itself a grant, and that the title became completely vested in him, so that the officers of the land department were not authorized to convey the land to others. The answer puts in issue the averments of the bill as to the settlement and residence upon and cultivation of the land by McNear, and the performance on his part of the conditions precedent to the vesting of the title, prescribed by the donation law. I find the showing made by the complainant in her pleadings, and the evidence introduced in her behalf, to be insufficient to establish her claim. Therefore I will not pass upon the merits of the several special pleas and defenses set forth in the answers.

In order to show that McNear failed to comply with the requirements of the donation law, essential to perfect his right to the land under said law, the following provisions must be considered:

"Sec. 5. And be it further enacted, that to all white male citizens of the United States, or persons who shall have made a declaration of intention to become such, above the age of twenty-one years, emigrating to and settling in said territory between the first day of December, eighteen hundred and fifty, and the first day of December, eighteen hundred and fifty-three, * * * who shall in other respects comply with the foregoing section and the provisions of this law, there shall be and hereby is granted the quantity of one quarter section, or one hundred and sixty acres of land, if a single man. * * *"

"Sec. 7. And be it further enacted, that within twelve months after the surveys have been made, or, where the survey has been made before the settlement, then within twelve months from the time the settlement was commenced, each person claiming a donation right under this act shall prove to the satisfaction of the surveyor general, or of such other officer as may be appointed by law for that purpose, that the settlement and cultivation required by this act had been commenced, specifying the time of commencement; and at any time after the expiration of four years from the date of such settlement, whether made under the laws of the late provisional government, or not, shall prove in like manner, by two disinterested witnesses, the fact of continued residence and cultivation required by the fourth section of this act; and upon such proof being made, the surveyor general, or other officer appointed by law for that purpose, shall issue certificates under such rules and regulations as may be prescribed by the commissioner of the general land office, setting forth the facts in the case and specifying the land to which the parties are entitled. And the said surveyor general shall return the proof so taken, to the office of the commissioner of the general land office, and if the said commissioner shall find no valid objection thereto, patents shall issue for the land according to the certificates aforesaid upon the surrender thereof. * * *" 9 Stat. 496; Abb. Real Prop. St. Wash. T. pp. 1100, 1101.

"Sec. 6. And be it further enacted, that every person entitled to the benefit of the fourth section of the act of which this is amendatory, who was resident in said territory on or prior to the first day of December, eighteen hundred and fifty, shall be and hereby is required to file with the surveyor general of said territory, in advance of the time when the public surveys shall be extended over the particular land claimed by him, where those surveys shall not have been made previous to the date of this act, a notice in writing, setting forth his claim to the benefits of said section and citing all required particulars in reference to such settlement claim; and all persons failing to give such notice on or prior to the first day of December, eighteen hundred and fifty-three, shall be thereafter debarred from ever receiving any benefit under said fourth section. And all persons who, on the first day of December, eighteen hundred and fifty-three, shall have settled on surveyed land in said territory, in virtue of the provisions of the fifth section of the act of which this is amendatory, who shall fail to give notice in writing of such settlement, specifying the particulars thereof to the surveyor general of said territory, on or prior to the first day of April, eighteen hundred and fifty-five, shall be thereafter debarred from ever receiving the benefits of said fifth section." 10 Stat. 158; Abb. Real Prop. St. Wash. T. p. 1103.

"Sec. 6. And be it further enacted, that all the provisions of this act, and the acts of which it is amendatory, shall be extended to all the lands in Oregon and Washington territories; and for the purpose of carrying said acts into effect in said territories, the president shall be and he is hereby authorized to appoint a register and receiver for each of said territories, whose powers, duties, obligations and responsibilities shall be the same as are now prescribed by law for other land officers and for the surveyor general of Oregon, so far as they apply to such officers. * * *" 10 Stat. 305; Abb. Real Prop. St. Wash. T. p. 1106.

"Be it enacted," etc., "that in all cases under the act of congress, approved September twenty-seventh, eighteen hundred and fifty, entitled, 'An act to create the office of surveyor general of the public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands,' and the several acts amendatory and supplemental thereto, in which the actual settlement may be shown to be bona fide, and the claim in all respects to be fully within the requirements of existing laws, except as to the failure of the party to file notice within the time fixed by statute, such failure shall not work forfeiture when no adverse rights intervene before the filing of the required notification by the claimant." 13 Stat. 184; Abb. Real Prop. St. Wash. T. p. 1108.

The sixth section of the original act also makes particular provision for surveys, and requires that the surveyor general shall survey all donation claims which are not taken, according to legal subdivisions, at the expense of donation settlers, and enter a description of such claims in a claims book, which the law requires him to keep.

The supreme court of the United States in the case of Hall v. Russell, 101 U. S. 503–514, has given an authoritative construction to the granting clause of the donation law, as follows:

"The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee, he took the grant, and his right to a transfer of the legal title from the United States became vested. But, until he was qualified to take, there was no actual grant of the soil. The act of congress made the transfer only when the settler brought himself within the description of those designated as grantees. A present right to occupy and maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the territory having the other requisite qualifications, but, beyond this, nothing passed until all was done that was necessary to entitle the occupant to a grant of the land."

And in the case of Vance v. Burbank, 101 U. S. 514–521, the court ruled substantially that a wife or heir of a settler claiming land under the donation law acquires no title or interest in the land until the final proof required by the seventh section of the act shall have been made by the husband or some one in his behalf.

Considering the provisions of the law above quoted and referred to, together with the decisions of the supreme court above cited, and the pleadings in this case, I hold that, in order to establish the claim of the plaintiff to ownership by inheritance from a grantee of the United States, she must show affirmatively that she is the lawful heir of Hiram H. McNear; that her father was a citizen of the United States, and qualified to acquire land under the donation law; that he emigrated to Oregon territory, and became an actual settler upon the land prior to the 1st day of December, 1853; that he thereafter continued to reside upon the land, and cultivated and improved the same, for a period of four years; that he gave notice of his claim to the surveyor general, or the register and receiver of the district land office, prior to the inception of any adverse rights; that upon his request, and at his expense, the particular tract of land which he claimed was surveyed by the surveyor general, and its description noted in the book of claims which that officer was required to keep; and that after completion of the four-years residence and cultivation, and after the land had been surveyed, he made proof, to the satisfaction of the register and receiver of the land office, of full compliance with the requirements of the law.

In this the complainant has failed in several important particulars. Assuming the evidence in her favor to be sufficient in other respects, she has failed to prove that McNear cultivated the land, or made sufficient improvements thereon, to show his good faith in claiming the land for his home. The most that I can find from the evidence on this point is that he built a log cabin, which he occupied as a dwelling, and cultivated a garden spot not exceeding in area 10 feet square. The notice of his claim, and the amended notice, were filed in the office of the surveyor general of Washington territory after the date of the law providing for a district land office in Washington territory, with a register and receiver, to whom were given the powers and duties prescribed by law for other land officers and for the surveyor general of Oregon. This change in the law made the district land office the place in which the notice should have been filed, and it is my opinion that, according to the showing made, McNear failed to comply with the law requiring notice and preliminary proof of his claim.

By the bill of complaint and the evidence it affirmatively appears that McNear failed to request a survey of his claim, or to provide for the expense of a survey. There was no survey until the governmental survey of the township was made, several years after McNear's death, and at that time the corners and lines of McNear's donation claim could not be found. The most that appears to have been done was the setting of a stake for an initial point, which was done by McNear himself, without authority from the surveyor general, and said stake has never been recognized by the surveyor

general for any purpose. It is my opinion that title could not pass under the donation law except to a specific tract within established boundaries, and after a survey and marking of the lines and setting of the corners, in accordance with law.

Finally, the proof of residence and cultivation required by the seventh section was never made by McNear or any person for him. On this point counsel for the complainant has argued that the amended or supplemental notice, with the affidavits of two witnesses, filed in 1860, was a compliance on the part of McNear with the provisions of the law as to final proof. But the evidence shows that these papers were not understood by the witnesses to have been intended to serve as final proof. The affidavits were not made in the district land office, before the register or receiver, but were taken by a notary public at Port Townsend, and were never filed in the district land office, and there is no evidence whatever that the certificate provided for by the seventh section was ever issued. Mere affidavits taken before a notary public, and filed with the surveyor general, are not the proof which is necessary to fulfill the requirments of the law, and failure in this essential is of itself sufficient to defeat the claim asserted by the complainant to the land as an heir of the settler. Vance v. Burbank, supra. A decree will be entered that the complainant is not the owner of the land described in her bill of complaint, and that this suit be dismissed, with costs.

ALLISON v. CORSON et al.

(Circuit Court, D. South Dakota, W. D. December 1, 1897.)

No. 176.

1. MORTGAGES—PURCHASE OF TAX CERTIFICATE BY JUNIOR MORTGAGEE—INJUNCTION.
   If a junior mortgagee of real property, which is not worth the amount due on the prior mortgage, pays delinquent taxes thereon, the senior mortgagee cannot secure a decree in equity restraining him from obtaining a tax deed, without reimbursing him for such payment.

2. SAME.
   This rule applies although, before bringing suit, the senior mortgagee has bought the property in under proceedings, instituted after the taxes were paid, to foreclose his own mortgage.

3. SAME.
   It also applies although the junior mortgagee was a party to the foreclosure action, in which he sought unsuccessfully to have his mortgage declared to be a first mortgage, and did not there set up his interest arising out of the tax payment.

Edwin Van Cise and Chase & Dickson, for complainant.
C. S. Palmer, for defendants.

CARLAND, District Judge. The complainant, a citizen of the state of Iowa, brings this action, as receiver of the Western Home Insurance Company, against the defendants, for the purpose of enjoining the defendant John L. Burke, as county treasurer of Fall River county, S. D., from issuing, and the defendants Henry T. Corson and

J. W. Russell from applying for and receiving, a tax deed from said Burke, as county treasurer, for lots 1, 2, 3, and 4, block No. 23, of the Second Minnekahta addition to the town of Hot Springs, S. D., which is alleged to be of the value of more than $2,000. All the defendants are citizens of South Dakota, except Russell, who is a citizen of Vermont. On the filing of the bill, an order to show cause was granted why a temporary injunction should not issue as prayed for in said bill. A restraining clause was inserted in the order. At the hearing on the order to show cause, the following facts appeared: On June 19, 1896, the complainant, as receiver of the Western Home Insurance Company, commenced an action in the circuit court for Fall River county, S. D., for the purpose of foreclosing a mortgage on the real estate hereinbefore described, which mortgage was given to secure the sum of $10,000, by Fred D. and Ella S. Gillespie, on June 17, 1890. The defendant J. W. Russell, as trustee for certain bondholders, was the holder of another mortgage on the same property for $15,000, given by the same mortgagors. Russell was made a party defendant in the said foreclosure action, and therein set up the claim that the $15,000 mortgage was a superior lien to the mortgage which was then being foreclosed in said action. The foreclosure action went to trial, and the circuit court of the county of Fall River, state of South Dakota, on the 12th day of July, 1897, adjudged and decreed that the mortgage owned by the Western Home Insurance Company was superior to the mortgage held by the defendant Russell. It further appears that on the 31st day of January, 1896, the defendant Russell, finding that the land in question had been sold for delinquent taxes, and had been bid in by the county of Fall River, purchased from the treasurer of Fall River county the tax-sale certificates for the years 1892 and 1893, and paid, for the assignment of said certificates, $1,164.35; that this purchase was made while the defendant Russell was the holder as trustee of a junior mortgage on the land in question; that on the 1st day of May, 1897, defendant Russell, in order to secure funds to carry on litigation in connection with his trusteeship, for value received, sold and assigned said tax-sale certificates to the defendant Corson; that the defendant Corson, at the time of the commencement of this action, was taking the necessary steps to obtain a tax deed of the land hereinbefore described; that said land is not worth more than one-fourth of the amount due on the mortgage owned by the Western Home Insurance Company, which amount, as adjudicated by the circuit court for Fall River county, is $16,618.26; that said land has been sold under said decree of foreclosure, and bid in by the complainant herein, as receiver of the Western Home Insurance Company. The bill also alleges certain irregularities in and about the assessment of the taxes for which the land was sold, and certain irregularities in regard to the manner in which the land was sold; but none of these defects, if they exist, go to the justness or groundwork of the taxes, and in view of the affidavits submitted by the defendant Burke, and of chapter 3, Laws S. D. 1895, this feature of the case made by the bill will be dismissed as without merit.

The two grounds urged why an injunction should issue restraining the defendants Corson or Russell from receiving, and the defendant

Burke from issuing, a tax deed on the certificates purchased by Russell, are: First, Russell, as holder of the junior mortgage, could not acquire a tax title to the land in question while he so held it, as against the owner of the senior mortgage; second, if he could acquire such a tax title, and he held that interest at the time he was made a party to the foreclosure action in the circuit court for the county of Fall River, then it was his duty to set up his claim in that action, or be forever barred. Corson, in taking an assignment of the tax certificates, does not stand in any better position than Russell, but he stands in just as good a position, and is entitled to be subrogated, so to speak, to the rights of Russell, whatever they may be. It will be necessary, then, to determine the relative rights and duties of the owner of the property and the senior and junior mortgagees towards each other, as to the payment of the taxes for which the land was sold; and their relative duties and obligations cannot be better stated than in the language of Judge Cooley, in Insurance Co. v. Bulte, 45 Mich. 121, 7 N. W. 710:

"It certainly cannot be said that the second mortgagee owes any duty to the first mortgagee to protect his lien as against tax sales. Neither, on the other hand, does the first mortgagee owe any such duty to the second mortgagee, or to the owner. To the state each one of the three may be said to owe the duty to pay the taxes; and the state will sell the interest of all if none of the three shall pay. As between themselves, the primary duty is upon the mortgagor; but, if he makes default, either of the mortgagees may pay, and one of the two must do so, or the land will be sold, and his lien extinguished. But in such cases, where each has the same right, payment by one is allowed to increase the amount of his incumbrance; for in no other way could he have security for its repayment by the mortgagor, who ought to protect the security he has given. When, therefore, each mortgagee has the same interest in making payment of the tax, and the same right to do so, and the same means of compelling repayment, it may well be held that a purchase by one shall not be suffered to cut off the right of the other, because it is based as much upon his own default as upon that of a party whose lien he seeks to extinguish. It is as just and as politic here as it is in the case of tenants in common to hold that the purchase is only a payment of a tax. But in equity this can only be so when the party paying is in position to add the amount of the payment to the amount of his lien. It has never been held that any other person can have the benefit of the mortgagee's payment or purchase without being under any obligation to repay him the cost."

In this connection it is well to bear in mind that, on the conceded facts in this case, the holders of the junior mortgage have no way of collecting the principal mortgage debt, saying nothing about the taxes that they have paid. By applying the following language to the complainant in this action, it becomes pertinent:

"No doubt, the first mortgagee had a right to insist that the purchase was in part for his protection, and to treat it as a payment merely; but this was at his option, and it stood as a good purchase as to all the world, except as to those who might have equities in respect to it, and who should see fit, in proper mode, and by the observance of suitable conditions, to assert their equities. And one fundamental condition in every such case must be that the party claiming the benefit of the purchase shall do what is equitable in respect to it." Insurance Co. v. Bulte, 45 Mich. 123, 7 N. W. 710.

Complainant comes into this court under these circumstances, and appeals to the conscience of the court to prevent the issuance of this tax deed, and in no wise has tendered or offered to pay the taxes

which were paid to protect the property of which he now claims to be the owner. This court knows no such principle of equity and fair dealing. So much from the standpoint of the relation of the parties to this action; but, on general principles of equity and good conscience, the complainant does not stand in a position to enjoin the issuance of this tax deed without payment of the tax, so long as there is no just complaint against the groundwork or justness of the tax.

As was said in Hart v. Smith, 44 Wis. 218:

> "Nor do we understand that the rule long established in courts of equity, that he who seeks equity must do equity, is qualified or abrogated in favor of a party who seeks to remove a cloud upon his title to real estate by reason of illegal proceedings, taken to enforce a valid tax assessed thereon; and that such party may demand, as a right, from a court of equity, that such cloud shall be removed without his doing what justice and equity demand,—that is, pay the tax. None of the cases in this court recognize any such right on the part of the plaintiff, and we think no such right exists. It would be a gross impeachment of the power of a court of equity to deny it the right to demand of its suitors good faith and common honesty, before it shall be compelled to grant them any relief."

So, conceding that the purchase by Russell simply amounted to the payment of a tax, the complainant is not entitled to any relief until he shall pay the taxes paid for his benefit. It is suggested by counsel for defendant that Russell purchased the tax certificates individually, and not as trustee. It is sufficient to say that he could not do this, as it would be a violation of his trust. In the foreclosure proceeding, had in Fall River county, the defendant Russell was seeking to have his mortgage declared to be a first mortgage, and, if he had succeeded, he would have added the taxes paid to the amount of his debt; and merely because he failed in his efforts is no reason why he should be barred from asking the complainant to do equity. The order of the court will be that the restraining order heretofore issued in this action be, and the same is hereby, continued for the period of 30 days; and it is further ordered that unless the complainant shall pay the taxes represented by the certificates of sale. upon which defendant Corson is applying for a tax deed within said 30 days, said restraining order be set aside, and held to be of no force.

QUEEN CITY BARREL-HEADER CO. et al. v. STANDARD OIL CO. et al.

(Circuit Court, N. D. New York. November 13, 1897.)

PATENTS—CONSTRUCTION OF CLAIM—BARREL-HEADING MACHINES.

The Mulvaney patent, No. 437,785, for improvements in barrel-heading machines, is not entitled, in view of the prior state of the art, to a broad construction of the first and fifth claims, the novel feature of which consists in placing a counterbalanced ring on the outside of pivoted arms, so as to bring the bearing-pieces mounted thereon rigidly against the staves of the barrel, thereby forming a compressor; and these claims are not infringed by a device in which the old truss hoop is pulled down upon the barrel by the use of the well-known machine called "the Yankee cooper," or by a device in which the truss hoop is counterbalanced and pivoted to a rod moving vertically in a rigid standard, which is permanently fastened to the bedplate of the machine.

This was a suit in equity by the Queen City Barrel-Header Company and others against the Standard Oil Company and others for alleged infringement of a patent for improvements in barrel-heading machines.

John W. Strehli and E. H. Wells, for complainants.

M. B. Philipp, M. H. Phelps, and C. A. Talcott, for defendants.

COXE, District Judge (orally). This is an equity suit for the infringement of letters patent, No. 437,785, granted October 7, 1890, to J. J. Mulvaney, Jr., for improvements in barrel-heading machines. The claims alleged to be infringed are the first and fifth. They are as follows:

"(1) In a barrel-heading machine, a series of bearing-pieces mounted upon pivoted arms and constituting a compressor, means for bringing the bearing-pieces inward to encircle and bear against all the staves of the barrel at its periphery, and devices for holding said bearing-pieces rigidly in position against the staves while moving downward, in combination with mechanism for moving the compressor downward, substantially as described."

"(5) In a barrel-heading machine, a series of bearing-pieces mounted on arms, as B, in combination with a counterbalance, and a ring, as F, hinged to one of said arms, substantially as set forth."

The defenses are lack of novelty and invention and noninfringement. The latter defense is the only one which will be considered.

In view of the state of the art it is manifest that neither of the claims involved is capable of a broad construction. It is thought that the best reference of the defendants is the St. Louis prior use. It is established beyond doubt that long prior to the date claimed by the inventor for his invention a truss hoop was pulled down upon the barrel for the purpose of compressing the staves by a machine well known in the barrel-making art as "the Yankee cooper." If to the arms of the St. Louis device were added a series of broader bearing-pieces the operation would be identical with the operation now practiced in the defendants' factory. The proof is undisputed that for several years the defendants' method has consisted in pulling down upon the barrel the old truss hoop by the use of "the Yankee cooper," to the arms of which are attached broad bearing-surfaces. It is impossible to hold that a construction can be placed upon the claims broad enough to include this operation.

It appears also that before the method just referred to was used the truss hoop was counterbalanced and pivoted to a rod moving vertically in a rigid standard, the latter being permanently fastened to the bedplate of the machine. It is argued by the complainants that this latter construction is an infringement. This contention cannot be maintained. It would seem to be within the province of the ordinary workman, in view of the device shown in the English patent to Clapperston and Lyle, No. 1,764, July 4, 1865, in which a pivoted counterbalanced ring is shown, to provide such a device for holding and manipulating the hoop used in the St. Louis factory. But even if this were otherwise the hoop of the defendants can in no event be regarded as the equivalent of the ring of the patent. In neither of the methods used by the defendants do the bearing-pieces

of the pivoted arms constitute a compressor; in neither are the bearing-pieces brought inwardly to encircle and bear against the staves of the barrel; in neither is there a device for holding the bearing-pieces rigidly in position against the staves. The novel feature of the claims consists in placing the counterbalanced ring upon the outside of the arms so as to bring the bearing-pieces rigidly against the staves of the barrel. The defendants do not use this construction. The hoop of the defendants as first used was, as before stated, pivoted to a separate and independent standard and not to one of the moving arms, as described in the specification and fifth claim. The bill is dismissed.

PHŒNIX IRON-WORKS CO. v. NEW YORK SECURITY & TRUST CO. et al.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1897.)

No. 529.

MORTGAGES—AFTER-ACQUIRED PROPERTY—CONDITIONAL SALES.

Machinery constituting the complete steam plant and motive power of a street railroad, when placed in its power house, becomes an integral part of the property, as a railroad system, and passes under a mortgage, previously executed and recorded, covering the entire road and plant, constructed and to be constructed, though such machinery was placed in the building under a contract by which the seller reserved title until full payment was received therefor, which payment has never been made.

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

Bill was filed in the court below September 16, 1895, for foreclosure of mortgage executed by the Capital Railway Company, a corporation organized under the laws of Kentucky, with its principal office and business in the city of Frankfort, in that state, in favor of the New York Security & Trust Company, the original plaintiff in the court below; the same being a trust mortgage. The complainant is a corporation organized under the laws of the state of New York. The Capital Railway Company, the defendant, under authority conferred by its articles of incorporation, executed a mortgage on its franchise property and railway plant, of date September 26, 1893, to secure 70 bonds, in the sum of $1,000 each, bearing date November 1, 1893, and payable November 1, 1913, with interest until paid at the rate of 6 per cent., payable semiannually. This mortgage was acknowledged and recorded in the proper office, as required by law, October 16, 1893. The description of the property included in the mortgage is as follows: "All and singular, the aforesaid railroad of the said party of the first part, constructed and to be constructed, and situate, lying, and being in the city of Frankfort and in the county of Franklin and state of Kentucky, together with all the real and personal property and income of the said party, its lands, tenements, hereditaments, rights of way, fixtures, buildings, structures, road, switches, turnouts, ties, motors, cars, carriages, rolling stock, equipments, machinery, tools, implements, materials, chattels, privileges, franchises, rights, interests, appendages, appurtenances, incomes, rents, resources, benefits, investments, assets, and estates, legal and equitable, which are now owned, and shall hereafter be owned or acquired, by the said first party, or in any way belonging to or appertaining to its said railroad." The appellant, the Phœnix Iron-Works Company, intervened by petition in the case, and asserted a lien, prior to that of the mortgage, on certain machinery placed in the power house of the railway company, consisting of engine, stack, boiler, pump, etc., constituting the steam plant, and furnishing the motive power for the railroad. The Capital Railway Company had a contract with Frank Whitley to construct its lines and erect its power house, and furnish and set up its

steam plant; and the machinery in question was furnished by the intervening petitioner, under contract with Whitley, with the approval of the railway company. It is not claimed that the trustee in the mortgage was a party to the contract, or bound by it. The lien claimed is for $2,136.66, the balance due on the contract price from Whitley to the Phœnix Iron-Works Company; and priority for this debt over the lien of the mortgage is claimed under the contract made at the time between Whitley and the intervening petitioner. The contract, so far as its stipulations affect the matter now to be decided, is as follows: "It is further agreed that the title to said machinery shall remain in, and does not pass from, the Phœnix Iron-Works Company, until full payment is made in cash. Promissory notes or bills of exchange shall be deemed payment only when paid at maturity; and, in default of payment as herein agreed, the Phœnix Iron-Works Company, or their agent or attorney, may take possession of and remove said machinery without legal process, which taking shall not constitute a waiver of its damage for such default in payment. The said chattels shall not become or be deemed part of any real estate." The contract was made subject to the approval of the railway company, and was subsequently modified by agreement between Whitley, the railway company, and the Phœnix Iron-Works Company, with the express stipulation that the modification was not to affect the general provisions of the original contract. The machinery was furnished between November 15, 1893, and December 9, 1893, although it was not completed by final test until the early part of 1894. The machinery furnished by the Phœnix Iron-Works Company, and put in place for the railway company, constituted a complete steam plant. The machinery, as stated, was erected in the power station house of the defendant railway company. As will be observed from the dates, this machinery was furnished and set up in the power house subsequently to the execution and registration of the mortgage; and the intervener was, of course, affected with constructive notice of the mortgage thus registered. The mortgage contained the usual after-acquired property clause, and we do not understand that it is disputed that the mortgage covered this property. The insistence is that the machinery constituting the steam plant in the power house passed under the lien of the first mortgage, subject to the reservation of title in accordance with the contract between the intervener and Whitley, as before stated. The contract between the Phœnix Iron-Works Company and Whitley was not recorded. Under the original contract, Whitley, the contractor with the Capital Railway Company, was to be paid in cash from time to time during the progress of the work. The company was, however, unable to make cash payments; and after the work was partly completed the 70 bonds secured by the mortgage were delivered to Whitley in lieu of the cash payments originally contemplated, and were used by Whitley to raise money with which to complete and pay for the work done under his contract. The bonds were disposed of to different persons, mainly as collateral security for loans, and are now in the hands of innocent holders, who have, in one form and another, advanced cash for the same. The machinery was set up in the power house in the usual way, on brick foundations, and, of course, not attached to the building otherwise. The court below adjudged that, as between the intervening petitioner and the railway company, the contract created a lien in favor of the petitioner upon the machinery furnished, but further adjudged that this lien was inferior to the lien of the general mortgage; and the case is brought here by appeal. The conclusions of the circuit judge were stated in a written opinion now published. 77 Fed. 529.

D. W. Lindsey, for appellant.

Hornblower, Byrne, Taylor & Miller and T. L. Edelen, for appellee New York Security & Trust Co.

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

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

The learned circuit judge rested his decision in the case upon two grounds: First. That the machinery constituting the steam

plant and motive power, without which the railway company could not be operated, became, when furnished, an essential, integral part of the railway system, and, being a part of the original construction work, passed directly under the terms of the general mortgage, and that the stipulation in the contract between Whitley and the petitioner, retaining title, was invalid as against the first mortgage. Second. It was further held that a contract of this character, retaining title as security for debt, is required to be registered, under the recording acts of the state of Kentucky, and that the contract was for this reason invalid as against creditors, including the bondholders whose debts are by this mortgage secured. Either ground on which the judgment was placed, if legally valid, is conclusive of the case, and renders further discussion of the ruling unnecessary. We may remark that this question is not to be determined by any mere technical theory of what does or does not constitute a fixture, in respect to the ordinary real-estate mortgage, as between the mortgagor and the mortgagee. Nor does the determination of the case depend on any narrow question of mere physical injury to the building in the removal of the machinery placed therein. Decisions in relation to those questions furnish aid, by analogy, in the solution of a problem like the one at bar, but they are not decisive. The property of the railway company, and the uses of the machinery, are different, and this difference in the nature of the property and the uses to which it is put must be taken into account. The business is, moreover, quasi public, and the franchises of this class are granted in the interest of the public. The principle which controls the case, and the reasoning applicable, are fully set forth in Porter v. Steel Co., 120 U. S. 649, 7 Sup. Ct. 1206; Dunham v. Railway Co., 1 Wall. 254; Railroad Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546; Railroad Co. v. Cowdrey, 11 Wall. 459; Thompson v. Railroad Co., 132 U. S. 68, 10 Sup. Ct. 29. In Porter v. Steel Co., 122 U. S. 283, 7 Sup. Ct. 1208, the court said:

"Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by the railroad company, covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affixed to, and a part of, a railroad covered by a prior mortgage, will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract, between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case. Dunham v. Railway Co., 1 Wall. 254; Railroad Co. v. Cowdrey, 11 Wall. 459, 480, 482; U. S. v. New Orleans & O. R. Co., 12 Wall. 362, 365; Dillon v. Barnard, 21 Wall. 430, 440; Fosdick v. Schall, 99 U. S. 235, 251."

As will be observed from the statement of the case, we are dealing with machinery which constitutes stationary, permanent motive power for the entire railway, affixed thereto, and an indispensable part of the railway as originally constructed. In this and other respects the case is clearly distinguishable from that class of cases relating to locomotive engines and other forms of rolling stock, and loose personal property, as to which it has been held that such property passes under the lien of the general mortgage, in the same con-

dition in which it comes to the hands of the mortgagor, and burdened with prior equities and liens, just as it would be burdened in the hands of such mortgagor. The principle is that when the general mortgage covers a railway system, properly described, and on the security and faith of which bonds are issued, and pass into the hands of innocent holders, it is not within the power of the company to displace the lien of the first mortgage, and in that way destroy the security of the mortgage, either by giving a second mortgage on the property or essential parts of the original system, or, indirectly, by making contracts like that now in question, under which, if valid as against the mortgage lien, a similar result would follow. The steam plant and motive power of this railway are stationary, and are just as essential to the operation of the railway as are the tracks. In a system constructed like this, the power house and the stationary machinery which furnish the motive power would be worthless without the railway tracks; and, on the other hand, it is equally true that the railway tracks would be valueless, except as second-hand material, without the power house and motive power. This is quite obvious, without elaboration. There could be no reasonable distinction, in principle, between the right to claim title to machinery, and thereby dismantle a power house, and the right to take up the rails, and thereby render worthless the tracks on which the cars are propelled for the purpose of operation. A doctrine which would permit title to be asserted to the machinery of a power house, which is a fixed part of the railway, thereby taking away the motive power, and deny the same right in respect to the tracks of a railway, would be purely arbitrary. The one is an essential part of the original organic structure of the road or system as a whole,—as much so as the other; and if an essential, integral part of the plant may be taken under the claim of right, this would render the remaining parts of the system worthless. The franchise is made valuable, and furnishes security to the bondholding creditor under the mortgage, only by reason of its use in connection with property; and, if such essential parts of the property may be taken, the franchise would be thereby itself rendered valueless. Monongahela Nav. Co. v. U. S., 148 U. S. 312, 13 Sup. Ct. 622; Chapman Valve Manuf'g Co. v. Oconto Water Co., 89 Wis. 264, 60 N. W. 1004. It is very clear in this case that the entire plant is properly described and conveyed in connection with the franchise. This case would therefore seem to come within the principle on which judgment was pronounced in respect to a similar mortgage, with a similar description, in Andrews v. Pipe Works, 23 C. C. A. 454, 77 Fed. 774; but we need not pursue or decide upon this special phase of the question, as we are of opinion that the case is controlled by the broader proposition announced in the cases before referred to. Whether we say that an indispensable part of the original construction work of the railway or other similar system becomes a fixture, or say that it is affixed to, and is an integral part of, the property, which, as a whole, constitutes the mortgage creditor's security, exactly the same thing is meant. When a necessary part of permanent, original construction work is put in, and becomes part of, the plant or system, such as stationary boilers, en-

gines, rails, sections of bridgework, and the like, it loses its previous character as separate, movable, personal property, and becomes subject to a mortgage properly conveying the entire thing of which such engine, boilers, etc., become permanently part. The view thus taken being decisive of the case, we do not find it necessary to determine the further question whether this contract was invalid, under the laws of Kentucky, for want of registration. There was no error in the decree of the court below, and it is affirmed.

LEDOUX et al. v. LA BEE, County Treasurer.

(Circuit Court, D. South Dakota, W. D. November 30, 1897.)

No. 174.

1. EQUITY JURISDICTION—SUIT BY RECEIVER.
A federal circuit court has power to protect from invasion property within its custody in a cause within its jurisdiction, and, in order to sustain the application of its receiver for such protection, the ordinary grounds of equity interposition need not be set forth.

2. TAX—LIEN ON ASSETS—ENFORCEMENT.
A valid tax upon property of a corporation in the hands of a receiver constitutes a claim upon its assets within the jurisdiction, superior to every other claim except judicial costs. But this lien must be enforced by and under the sanction of the court.

3. SAME—RECEIVER—APPLICATION FOR PROTECTION.
It is the right and duty of a receiver, if he considers the legality of a tax questionable, to apply to the court for instruction or protection.

4. SAME—CONTEMPT.
The rule that unauthorized interference with the possession of property in custodia legis constitutes contempt finds no exception in favor of officers engaged in the collection of taxes.

5. SAME—JUDGMENT OF ASSESSORS—REVIEW.
For relief against excessive or irregular taxation under state laws the citizen must apply to the board constituted to pass upon such complaints, and, in the event of his failure to do so, the judgment of the assessing officers in cases within their jurisdiction is not open to collateral attack.

6. SAME—REAL AND PERSONAL PROPERTY—LISTING.
Certain property in South Dakota belonging to a corporation in the hands of a receiver was annually listed by the company or by its receiver as personal property, and was so assessed. In a suit by the receiver to restrain the sale of property of the corporation for the payment of delinquent taxes, *held* that, even assuming the property to be in fact realty, the facts furnished no basis for an attack on the validity of the assessments.

This was a suit by Albert R. Ledoux, as receiver of the Harney Peak Tin Mining, Milling & Manufacturing Company, and others, to enjoin William H. La Bee, as county treasurer of Pennington county, S. D., from making a sale of certain property for delinquent taxes.

Edwin Van Cise, for complainants.
Edmund Smith and Wood & Buell, for defendant.

CARLAND, District Judge. This is an action brought by complainants for the purpose of enjoining the sale of certain personal property described in the bill of complaint by the defendant William

H. La Bee, acting as county treasurer of Pennington county, S. D. The bill was filed in this court on the 29th day of September, 1897, and on said day, upon an examination of said bill, an order to show cause was granted by the court, requiring the defendant to show cause on a date therein named why a temporary injunction should not issue during the pendency of this action. On the date named in the order to show cause, defendant appeared, filed his sworn answer, and numerous affidavits were submitted, both on the part of the defendant and complainants. The facts upon which relief is sought by complainants having been fully developed on the hearing, it will be proper to consider the merits of the action to a greater extent than is usually the case on motion for temporary injunction.

The bill alleges: That the Harney Peak Tin Mining, Milling & Manufacturing Company is a corporation organized and existing under and by virtue of the laws of the state of New York. That Charles Fletcher, Henry Landon Maud, Charles Edward Denny, Edward Maynard Denny, and John Scudmore Sellon are citizens of the kingdom of Great Britain and Ireland. That Albert R. Ledoux is a citizen of the state of New York, and that said Ledoux was, on the 28th day of June, 1894, duly appointed receiver of all the property of whatever kind and description of the Harney Peak Tin Mining, Milling & Manufacturing Company (hereafter called "Harney Peak Company"), by the circuit court of the United States for the Southern district of New York, and thereupon duly qualified and took possession of all the property of said Harney Peak Company within the last-named jurisdiction. That on July 16, 1894, an ancillary suit was commenced in the United States circuit court for the district of South Dakota, wherein the same complainants that commenced the suit in the Southern district of New York in which said Ledoux was appointed receiver filed a duplicate of the bill of complaint filed by them in the Southern district of New York, and thereupon the circuit court for the district of South Dakota appointed said Ledoux receiver of all the assets and property of every kind and description of the said Harney Peak Company situated within the district of South Dakota; the circuit court for the district of South Dakota not requiring any other bond or qualification on the part of said receiver than had already been had and given in the court of primary jurisdiction except that the circuit court of the district of South Dakota required Ledoux, as receiver, to appoint a resident agent within the district of South Dakota. So far as this court is concerned, it knows nothing of what has been done by said receiver in regard to the assets of said Harney Peak Company within this jurisdiction. No report has ever been made to this court by said receiver, and the present presiding judge of this court did not know of such receivership until the commencement of this action. No complaint was made at the hearing of the joinder with the receiver of the Harney Peak Company, and stockholders therein, with the receiver as complainants, but both sides treated the action as one brought by the receiver alone. The court will also treat it as such, for the reason that, if a receiver was willing to bring the action, it was improper to join the other complainants with him.

From the pleadings and the affidavits submitted by both parties on the hearing of the order to show cause, the following additional facts appear: Upon the appointment of said Ledoux as receiver in this jurisdiction in 1894, said receiver took possession of all the assets and property of whatever kind and description belonging to the Harney Peak Company situated within the district of South Dakota, and continued to hold possession of all of the same until the 22d day of September, 1897, when the defendant, acting as the county treasurer of Pennington county, S. D., seized and took into his possession the personal property mentioned and described in complainants' bill of complaint, and which consists of so many different articles as to render it impracticable to describe them in this opinion. That at the time the order to show cause was issued in this action, which contained a restraining clause, said defendant had advertised said personal property for sale on the 1st day of October, 1897, in order to satisfy the delinquent taxes of the Harney Peak Company due the state of South Dakota and the county of Pennington for the years 1893, 1894, 1895, and 1896, which said taxes, delinquent as aforesaid, amounted in the aggregate to $10,806. As a general rule, the fact that the property seized and advertised for sale is personal property would be sufficient to defeat the complainants in this action, as the remedy at law would be adequate; but this court, having possession of the property and assets of the Harney Peak Company through its receiver, has jurisdiction to inquire into the legality of any claim sought to be enforced against it, or the legality and lawfulness of any invasion of said possession, independent of any grounds of equitable jurisdiction, which must exist in other cases. As said in the case of In re Tyler, 149 U. S. 181, 13 Sup. Ct. 789:

"The property in question was in the custody of the circuit court in a cause within its jurisdiction, and protected by injunction. The power exercised was the power to protect the property in the custody of the court from invasion, and, in order to sustain the receiver's application, the ordinary grounds of equity interposition were not required to be set forth. Whether inadequacy of remedy at law in respect of the disputed taxes, or the requisite jurisdictional amount or diverse citizenship were shown to exist, was not, and could not be, matter of inquiry."

Again, in Ex parte Chamberlain, 55 Fed. 706, it is said:

"There can be no doubt that property in the hands of a receiver of any court, either of a state or of the United States, is as much bound for the payment of taxes, state, county, or municipal, as any other property. Persons cannot, by coming into this court, and, for the promotion of their interests, applying for and obtaining the appointment of receivers, obtain exemption from the paramount duty of a citizen. For this reason receivers in this district pay all just and lawful taxes without asking or needing the sanction of the court, and in their accounts such payments are passed without question. But, on the other hand, receivers are not bound to pay a tax, in their judgment unlawful, without the order of the court; and when they consider the legality of the tax questionable, it is their right—their manifest duty—to apply to the court either for instruction or protection. Especially is this the case when the question arises between the receiver and persons in the state, county, and municipal government as to the proper construction to be given to the law upon which individuals may well differ, and it is his right and manifest duty to go to the court whose creature he is for instruction." Davis v. Gray, 16 Wall. 203; Georgia v. Atlantic & G. R. Co., 3 Woods, 434,

Fed. Cas. No. 5,351; Yuba Co. v. Adams, 7 Cal. 37; County Com'rs v. Clarke, 36 Md. 206; Greeley v. Bank, 98 Mo. 458, 11 S. W. 980; Central Trust Co. v. New York C. & N. R. Co., 110 N. Y. 250, 18 N. E. 92.

This action, brought by the receiver, is therefore properly instituted, and in such form as to allow the legality of the claim for taxes for the payment of which the property has been seized to be determined. This is not a proceeding to punish the defendant for contempt in invading the possession of the court by the seizure of the property in question, and nothing will be said in this opinion upon that feature of the case, any more than to state the law upon the subject, and also to say that, in the opinion of the court, the evidence submitted at the hearing does not show that the defendant really intended to disregard the authority and possession of the court, but was induced to act as he did through false notions as to the power of the receiver. There can be no doubt of the correctness of the doctrine that property in the possession of a receiver appointed by a court is in custodia legis, and that unauthorized interference with such possession is punishable as a contempt; and it cannot be contended that this salutary rule has any exceptions in favor of officers engaged in the collection of taxes. As was said in Re Tyler, 149 U. S. 182, 13 Sup. Ct. 790:

"Undoubtedly, property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever except judicial costs, when the property is rightfully in the custody of the law; but this does not justify a physical invasion of such custody, and a wanton disregard of the orders of the court in respect of it. The maintenance of the system of checks and balances characteristic of republican institutions requires the co-ordinate departments of government, whether federal or state, to refrain from any infringement of the independence of each other; and the possession of property by the judicial department cannot be arbitrarily encroached upon, save in violation of this fundamental principle. The levy of a tax warrant, like the levy of an ordinary fieri facias, sequestrates the property to answer the exigency of the writ, but property in the possession of the receiver is already in sequestration, already held in equitable execution; and, while a lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done, and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty,—an assumption carrying a contempt upon its face."

The legality of the claim for taxes will now be considered. The evidence shows that among the property listed and assessed for taxes against the Harney Peak Company by the proper authorities of the state of South Dakota and the county of Pennington for the years 1893, 1894, 1895, and 1896 were a tin mill at Hill City, S. D., the Etta tin mill in the county of Pennington, and certain buildings situated on the Reder placer claim in said county; that the above-mentioned property was listed and assessed as personal property, and is all situated upon unpatented mining claims; that is, upon land the title to which is still in the United States. The valuation placed upon said property, respectively, for the years mentioned, was as follows: 1893, tin mill at Hill City was listed under the following heading: "Value of all improvements on lands, except plow-

ing, held under law of the United States, and upon which final proof has not been made and accepted,"—and was assessed at $30,000. In 1894 the same property was listed and assessed in the same manner. In 1894 the Etta tin mill was listed and assessed at $16,000. In 1895 the buildings on the Reder placer were assessed at $3,000; and manufacturers' tools, implements, and machinery, engines and boilers, $50,000; value of all improvements on lands, except plowing, held under law of the United States, and upon which final proof has not been made and accepted, $30,000; and the Etta mill at $16,000. In 1896 the buildings on the Reder placer were assessed at $3,000, the Etta mill at $10,000, and manufacturers' tools, implements, and machinery, engines and boilers, $20,500; value of all improvements on lands, except plowing, held under law of the United States, and upon which final proof has not been made and accepted, $10,000. It also appears in evidence that the property herein mentioned as having been listed for taxation for the year 1895 was listed by W. O. Temple, agent for A. R. Ledoux, receiver, and was listed as personal property. The only definite attack upon the taxes which are claimed by the county of Pennington, and to satisfy which property in the hands of the receiver has been seized, is that the items of property above mentioned form a basis for a portion of said tax, and that said property was listed as personal property, when in fact it was real property, and that the valuation thereof for the several years mentioned is excessive.

Subsection 28 of section 16 of chapter 14 of the Laws of South Dakota of 1891 provides as follows: "The value of all improvements, except plowing, on lands held under the laws of the United States, and upon which final proof has not been made and accepted," shall be listed and assessed as personal property. Subsection 28 of section 1 of chapter 27 of the Laws of South Dakota of 1895 is to the same effect; and it would seem that, as the legislature of the state of South Dakota has the power to classify property for the purposes of taxation, it had placed the improvements upon land held as a mining claim, but for which a patent has not yet been issued by the United States, in the list of personal property, for the purposes of taxation. But I do not care, for the purposes of this case, to follow counsel for complainant in a learned discussion as to whether the subsection referred to applies only to agricultural land, and not to mining claims, or as to whether the property assessed, and about which complaint is made, was actually real or personal property. The fact is that it has always been listed and assessed as personal property by the Harney Peak Company, or the complainant, as its receiver, without complaint; that whether it is real or personal property in no way affects the justness of the tax; and that the error, if any, made by the taxing officers, was a mere error in the classification of the property, which would in no way affect the validity of the tax. By subsection 7 of section 43 of the Laws of South Dakota of 1891 the board of assessment and equalization is given full power and authority to correct errors in the listing or valuation of property, whether real or personal. Thus the Harney Peak Company, or the receiver, in any year had the right and opportunity to appear before

the board of assessment and equalization, and have any errors, either in the valuation or listing of the property in question, corrected. It does not appear that anything of this kind was ever attempted, and it is now too late to come before this court, and ask it to interfere with the listing or valuation of this property. Robbins v. Magoun (Iowa) 70 N. W. 700; Wilson v. Cass Co. (Iowa) 28 N. W. 483. In Stanley v. Supervisors of Albany, 121 U. S. 550, 7 Sup. Ct. 1239, it is said:

"In nearly all of the states—probably in all of them—provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgment, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them,—of animals, houses, and lands, in constant use. The most that can be expected from wise legislation is an approximation to this desirable end, and the requirement of equality and uniformity found in the constitution of some states is complied with when designed and manifest departures from the rule are avoided. To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment."

It results from the foregoing that the attack by the receiver upon the claim for taxes made by the defendant cannot be successful, and that said claim for taxes is a claim against the assets in the hands of the receiver of the Harney Peak Company within the jurisdiction of this court, superior to any claim whatever except that of judicial costs. An amendment to the complainants' bill was allowed and filed, wherein the receiver sets forth that he has expended, under the direction of the circuit court of the Southern district of New York, in and about the care, safe-keeping, and protection of the property in his charge, the sum of $24,034.37 over and above receipts coming into his hands from the lease or sale of perishable property, and that receiver's certificates have been issued in the sum and to the amount of $25,000 with which to pay these expenses, and that the enforcement of this claim for taxes will greatly deplete the assets of said Harney Peak Company, and therefore that the claim for taxes ought to be declared inferior to these expenses. It is sufficient, to dispose of this question, to say that it nowhere appears that the property seized by defendant is all the property belonging to the Harney Peak Company in this jurisdiction even. In fact, the original bill states that complainant is advised and informed by the defendant that, if the property so seized by him, and levied upon, shall not prove sufficient to cover the taxes claimed to be due, he will then proceed to levy on other personal property belonging to said Harney Peak Company, and that complainant verily believes that said defendant will do as he threatens to do. The term "judicial

costs," to which the claim for taxes is alone inferior, cannot be held to include the cost of keeping and taking care of unproductive property for over three years by the receiver. Therefore this court is of the opinion that the expenses already incurred and paid by the receiver may be paid out of the assets of the Harney Peak Company, as well as the claim for taxes, so far as anything now before the court indicates.

This court, being in possession of the property of the Harney Peak Company in this district, through its receiver, Albert R. Ledoux, and the defendant being before the court, and it being the opinion of the court that the claim for taxes is a valid one, the court ought to make some order in the premises to protect the rights of all parties concerned; and it believes that in the interests of the orderly administration of justice the following order ought to be made: That the defendant, William H. La Bee, treasurer of Pennington county, S. D., immediately restore to Albert R. Ledoux, or his agent, duly authorized, the possession of the property seized by said defendant; that said receiver, Albert R. Ledoux, his agent, and all persons acting under and by virtue of his authority, be, and they are hereby, forbidden from selling or disposing of any of the assets or property of said Harney Peak Company within the district of South Dakota, for any other purpose than the payment of the claim for taxes herein specified, until the further order of the court; that said Albert R. Ledoux shall, within 10 days from the service of a copy of this order upon said Ledoux or his authorized agent, pay to the treasurer of Pennington county said claim for taxes, and, in default of any money with which to pay said claim, that said receiver sell so much of the assets in his possession belonging to the Harney Peak Company, and situated in the district of South Dakota, as may be sufficient to pay said claim for taxes, or, if sufficient personal property cannot be found, that said receiver sell so much of the real property in his possession in the district of South Dakota, belonging to the Harney Peak Company, as may be sufficient to pay said claim for taxes.

COMMONWEALTH TITLE INSURANCE & TRUST CO. v. CUMMINGS et al.

(Circuit Court, D. Montana. November 1, 1897.)

No. 460.

1. EQUITY PLEADING—PRACTICE IN FEDERAL COURTS—REQUISITES OF ANSWER.
   In the federal courts, equity pleading is not governed by the state codes; and the answer should deny or expressly admit each material allegation of the bill, or, if the facts are not within the knowledge of the defendant, his belief should be stated; otherwise the answer is insufficient.
2. SAME—POWER OF CORPORATION TO CONTRACT—PRESUMPTION.
   It is not necessary for a plaintiff corporation to allege its authority to make the contract sued on, or that any corporation under which it claims had such right, as the contract of a corporation is presumed to be within its powers.
3. SAME—ANSWER OR CROSS BILL—REFORMATION OF INSTRUMENT.
   Such matters as mistake or fraud in the execution of a note and mortgage, whereby they do not express the true contract, should not be alleged in the answer, but in a cross bill for reformation.

I. Parker Veazey, for complainant.
Thos. C. Marshall, for defendants.

KNOWLES, District Judge. In this case the complainant filed its bill of complaint, and the defendants have filed their answer thereto. Complainant has filed its objections to the said answer, and these are presented for consideration. It appears that, as to some of the allegations in the bill, defendants have made no answer. It was evidently the view of the defendants that a failure to make any answer to these allegations, as under the code pleadings, admitted the same. In the federal courts, however, the rule is—as under the equity practice until modified by the codes—that the defendant, in his answer, if he chooses to answer, should either deny the allegations of the bill, or expressly admit them. These allegations could be denied in part and admitted in part, but the answer could not ignore them. If the defendant has no knowledge or information concerning any allegation in a bill, he should so state. In the case of Brown v. Pierce, 7 Wall. 211, the supreme court said:

"The material allegations in the bill of complaint ought to be answered, and admitted or denied, if the facts are within the knowledge of the respondent; and, if not, he ought to state what his belief is upon the subject, if he has any; and if he has none, and cannot form any, he ought to say so, and call upon the plaintiff for proof of the alleged facts, or waive that branch of the controversy."

The same view is sustained in Story, Pl. § 852, and in Beach, Mod. Eq. Prac. § 334.

An answer admitting the truth of an allegation in a bill could be introduced in evidence to prove the fact alleged. It is held in the case of Brown v. Pierce, supra, that if the answer fails to make the admission of the truth of any allegation in the bill, but ignores it, then the plaintiff is bound to prove the same. If the answer does not fully traverse or admit any material allegation of the bill, the remedy is for the plaintiff to except to the sufficiency of the answer.

The question presented in this case, then, is, did the defendants fail to answer the material allegations of the bill? I think, in many respects, they did. Plaintiff sets forth that Michael and Catherine Cummings were husband and wife. This is neither admitted nor denied. I think it should have been. The third allegation in the bill is that the Northwestern Guarantee Loan Company, to whom the note and mortgage named in the bill was executed, was at the date thereof a corporation organized under the laws of Minnesota. This should have been admitted or denied, or the defendants should have stated that they had no knowledge, information, or belief upon that subject. The fourth allegation of the bill shows that the last-named corporation complied with the statutes of Montana in regard to foreign corporations, and their right to do business in this state. I do not think it was necessary that this allegation should have been made. The contract of a corporation is presumed to be within its powers. Hence it is not necessary for a plaintiff corporation to allege its power to contract, or that any corporation under which it claims any right had such power. Express Co. v. Railroad Co., 99 U. S. 199. It ap-

pears, then, that this was an immaterial allegation, and required no answer. The fifth allegation to the bill sets forth the execution of ten coupon promissory notes, of which six were subsequently paid, etc. The answer neither traverses nor admits this allegation. It was defective in this particular. There are certain allegations in the eighth subdivision of the answer which were neither denied nor admitted, and should have been. The allegations in the tenth and fourteenth paragraphs of the bill contain allegations that should have been answered or denied.

All of the allegations in the answer which go to show that, through fraud, defendants were induced to sign a note and mortgage for $6,-100, when in fact they received but $5,000, and the facts that said Ide was an agent of the said Northwestern Guarantee Loan Company, and made these representations at the time defendants signed the said note and mortgage, and the further fact showing that the plaintiff in this cause is not an innocent purchaser or assignee of the same, should be set forth in a cross bill, and a prayer made to have this note and mortgage reformed to correspond with the truth. This matter is discussed to some extent in Beach, Mod. Eq. Prac. §§ 332, 333. It appears to be the better practice to set up such matters as mistake or fraud in the execution of a note and mortgage, whereby the same do not express the true contract, in a cross bill. In the particulars named the exceptions to the answer are sustained.

NEW YORK COMMERCIAL CO. v. FRANCIS et al.

(Circuit Court of Appeals, Second Circuit. December 1, 1897.)

No. 69.

1. CORPORATIONS—RIGHTS OF EQUITABLE OWNER OF STOCK—ATTACHMENT BY CREDITOR OF NOMINAL OWNER.
   Neither by the general rule nor under the decisions of the state courts of Connecticut is the beneficial owner of stock in a corporation precluded from asserting his right thereto by the mere fact that he has permitted it to stand on the books of the corporation in the name of another, as against an attaching creditor of the nominal owner.

2. EQUITY—INJUNCTION—BILL TO PROTECT ATTACHMENT LIEN.
   A plaintiff in an action in the state court, who has, by attachment, obtained a lien on property alleged to belong to the defendant, may, pending the action, and before judgment, maintain a bill on the equity side of the United States circuit court to protect such lien by preventing the threatened sale of the property under an execution issued from that court, whereby the plaintiff's lien would be lost.

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

Bill by the New York Commercial Company against Henry H. Francis and others. From an order granting an injunction pendente lite, defendant Francis appeals.

On June 4, 1896, Henry H. Francis, of Connecticut, brought suit in the proper state court of Connecticut against Joseph P. Earle, of New York, to recover a claim against him individually, and attached 76 shares of the stock of the Seamless Rubber Company, a Connecticut corporation, which stock stood upon

the books of said company in his name. This suit was properly removed by the defendants to the circuit court of the United States for the district of Connecticut. Judgment was rendered by said court, in April, 1897, against Earle. Execution was issued thereon, and on June 4, 1897, Farrell, as deputy marshal, commenced to levy upon the 76 shares as the property of Earle. On June 30 and July 1, 1896, the New York Commercial Company brought two suits in the proper state court of Connecticut against the co-partnership of Earle Bros., of which Joseph P. Earle was a member, to recover claims against the firm, and attached the same 76 shares. These suits are still pending in the state court. On June, 14, 1897, the New York Commercial Company filed a bill in equity in the circuit court for the district of Connecticut against Francis, Joseph P. Earle, and Farrell, alleging that the 76 shares were the property of Earle Bros., and not the property of Joseph P. Earle; that they were about to be sold on execution as his property, whereby the lien of said company would be lost; and praying for an injunction, and other relief. An order for an injunction pendente lite against the sale of said stock was granted, from which order this appeal was taken. On June 28, 1897, the three members of the co-partnership of Earle Bros. filed a petition to intervene in this suit for the protection of their interest in the stock, which application was granted. The brief affidavits for the complainants in the case state that in 1882 Earle Bros. bought with partnership funds 38 shares of the stock of the Seamless Rubber Company; that the certificate was taken in the name of Joseph P. Earle with the understanding that he held the stock in trust for, and that its beneficial ownership was in, the firm; that in 1892 a stock dividend was declared by the rubber company; that an additional certificate for 38 shares, which was issued to Joseph P. Earle, was Earle Bros.' dividend on the stock standing in their name and in the name of Joseph P. Earle; that the beneficial ownership of the entire 76 shares was in the firm, and that the cash dividends on these shares were received and used by it. Francis says, in his affidavit, that before his attachment he ascertained from examination of the public records in the office of the town clerk of New Haven, and from conversation with the officers of the rubber company, that Joseph P. Earle was one of its stockholders, that the company had no notice of any ownership by any one else, that said Earle spoke of the stock as "my stock," and said that he owned the entire capital and property of the firm, and that the other members were merely interested in the profits.

Theo. M. Malthie, for appellant.

Wm. L. Bennett, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts). The affidavits in the record show some of the assertions of the respective parties, but sufficient facts are not given from which a trior can form an opinion as to their truth. The complainant's principal affidavit, which was carefully drawn for the purpose of presenting one aspect of the facts, may be true, so far as it relates to the purchase of the stock, and yet not be inconsistent with the facts which are said to have been stated by Joseph P. Earle, so that the real ownership of the stock, as between the firm and Joseph P. Earle or the other members of the partnership, cannot be ascertained from the papers now in the record. It is, therefore, only possible to state what we deem to be the existing law of Connecticut upon the respective claims of the parties, and we refer particularly to the law of Connecticut, because the early decisions of its courts in regard to the transfer of stock in a corporation depended largely upon the construction which they gave to the legislative acts incorporating the corporations of the state. Formerly, in Connecticut, a strict compliance with the mode prescribed in the act of incorporation for the

transfer of stock was deemed necessary. It was said in one case, in construing the language generally used in the charters, that the transfer on the books of a company "is a fact essentially necessary to originate a title." Northrop v. Turnpike Co., 3 Conn. 544. As the corporate books alone informed the public of any change of possession of stock, it was also held that the withholding from registry of the assignment and transfer of stock by a vendor was a badge of fraud, like his retention of the possession of a chattel which he had sold. The principle is stated in Colt v. Ives, 31 Conn. 35, as follows:

"In the case of purchase of stock in a corporation there must be such a transfer of it as the legislature in the charter or by statute prescribes, and notice of the assignment of choses in action, and the transfer required by statute of corporate stock, stand in lieu of the taking and retaining of the possession of personal chattels sold, being the only possession the nature of the case admits of."

The tendency of the courts of Connecticut was also favorable to attaching creditors as against persons guilty of laches or fraud in the retention of possession of chattels, or in not conforming to the system of registry of the transfers of stock, and it was, therefore, said in Dutton v. Bank, 13 Conn. 498, that:

"An attaching creditor is not bound to look beyond the books of a bank to ascertain whether a debtor has made any assignment of the stock standing in his name. The books of the corporation are the appropriate place to determine the ownership of stock."

A literal adherence to this dictum, as between a creditor and a debtor who had made an assignment of stock in a corporation, and had done all in his power to cause a transfer upon its books, and to perfect the title in the vendee, was not acceded to in Colt v. Ives, supra.

This case does not relate to the right to the ownership of stock as between an attaching creditor of a vendor and a vendee whose title had not been perfected by a transfer upon the books of the corporation, but it relates, as claimed by the complainant, to the equities as between an attaching creditor of the person who has the bare legal title to the stock and the attaching creditor of the person who has the beneficial interest or equity in it, for in Connecticut "any right, legal or equitable, in such stock, may be taken by ordinary attachment." Bank v. Jarvis, 33 Conn. 372; Winslow v. Fletcher, 53 Conn. 390, 4 Atl. 250. It is true that it has been thought, in view of the early decisions which have been referred to, and especially in view of the declaration in Dutton v. Bank, supra, that the rights of a person who, in the absence of actual or constructive fraud, had permitted his stock to stand upon the books of a corporation in the name of a third person, were inferior to those of an attaching creditor of such third person, but such a doctrine is not now in accordance with Connecticut decisions. It was declared in Mowry v. Hawkins, 57 Conn. 453, 18 Atl. 784, that:

"In the absence of fraud, stock may stand in the name of one which belongs to another, without being liable to attachment for the debts of the nominal owner. This must be so as to all creditors who have not been misled or deceived by it, and as to those who are advised as to the true state of the title."

This statement was not absolutely necessary to the disposition of the case, for it was found that the certificate of the attached stock was issued to James D. Mowry, the attached debtor, instead of to James D. Mowry, trustee, by a mistake of the secretary of the company, which Mowry did not notice at the time, and it may fairly be inferred from the known facts in the case that the cestui que trust was also ignorant of it; but the proposition as announced by the court was referred to in Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, and 28 Atl. 104, as established. It is one which we are satisfied is in accordance with the general rule, and with the principles of justice, unless the equitable owner is prevented by an estoppel from showing the truth, or there has been some illegality or violation of a statutory requirement. Cooper v. Griffin [1892] 1 Q. B. 740. In this case the facts in the case are so scantily presented in the affidavits that it is impossible to say what they are. All that can be said is that the complainants made out a bare prima facie case, and, as their statements were not denied by reliable testimony, the order pendente lite was properly made, and should be continued until it is ascertained whether Earle Bros. are the equitable owners of the stock, and, if they are, whether their equities have become subordinate to those of Francis by their laches or by their conduct. The appellee urges that the complainants had no standing upon the equity side of the court, because they had recovered no judgment, and it was not, therefore, apparent that a resort to equity was necessary. The general principle to which reference is made is not applicable here, because, as it is declared in Case v. Beauregard, 101 U. S. 688, "whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies"; and "when the bill asserts a lien or a trust, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference." The bill in this case was one of which the circuit court had jurisdiction. It was not an original suit, but was ancillary, and was filed on the equity side of the court for the alleged purpose of preventing injustice to the complainant by the levy of an execution issuing from the same court. Freeman v. Howe, 24 How. 450; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27. The order is affirmed, with costs.

SANDS v. E. S. GREELEY & CO.

(Circuit Court, S. D. New York. August 10, 1897.)

1. RECEIVERS — INSOLVENT CORPORATIONS — PRESENTATION OF CLAIMS BEFORE MASTER.

   Where abundant notice has been given to all creditors of the proceedings before the master, with full opportunity for all to appear, and the testimony has been taken and closed, and the master's report filed, the proceedings will not be reopened to allow dilatory creditors to appear for the first time, and make objections, and present testimony.

2. SAME—COMPENSATION OF ATTORNEYS.

   Where, pending a receivership, an investigation of the accounts of the corporation is conducted by an expert accountant retained and paid by cer-

tain creditors, which investigation results in the realization of a large sum for the receivership, the expense of such investigation will be charged against the fund and the disbursements of such creditors in that behalf repaid to them out of it.

3. SAME—FOREIGN CORPORATIONS—TRANSMISSION OF RECEIVERSHIP FUNDS.

In view of the settled practice in the Southern district of New York to pay resident creditors in full out of the funds realized in the state by ancillary receivers of a foreign corporation before transmitting any funds to the court of primary jurisdiction, it seems that the whole fund realized cannot be transmitted before making any distribution, so long as any of the resident creditors object thereto.

This was an auxiliary suit in equity, wherein receivers previously appointed in Connecticut for the Connecticut corporation of E. S. Greeley & Co. were also appointed by this court to take possession of its assets in this district. See 80 Fed. 195. The cause is now heard on a motion to confirm the report of the master, and to direct a receiver to transmit the balance of funds to the court of primary jurisdiction in Connecticut.

Frederic G. Dow, for the motion.

John L. Hill and W. B. Putney, opposed.

LACOMBE, Circuit Judge. This is a motion (a) to confirm the report of the master, and (b) to direct the receiver to transmit the balance of the funds in this jurisdiction to the court of primary jurisdiction in Connecticut for distribution. Upon the argument there was practically no objection to the report of the master. Since the argument a letter has been received from the attorney for several creditors, whose claims aggregate a little more than $3,000, asking to be allowed to appear, to file objections, and submit affidavits in opposition. This request is denied. Abundant notice was given to all creditors of the proceeding before the master, full opportunity was given for all to appear, the testimony has all been taken and closed, and the whole proceeding should not now be reopened to allow the dilatory creditors to delay the active ones by belated appearances, objections, and testimony. The report of the master is therefore confirmed, and the accounts of the receiver settled in conformity therewith. The allowances for receiver and his counsel are also settled, as suggested by the master, at $5,000 for each, respectively. Moreover, inasmuch as it appears that by reason of the investigation of the accounts of the insolvent corporation, which was conducted by an expert accountant retained and paid by certain creditors, a large sum of money ($20,000) was realized for the receivership, it is proper that the expense of such investigation should be borne by the fund, and not by individual creditors. The receiver will therefore repay to the attorneys for those creditors their disbursements for such accountant, which the master reports amount to $480.25. The motion to allow a further sum to said attorneys as counsel fee is denied. The allowance to attorneys who conducted the proceedings to recover the $20,000 must be taken as covering all services other than those of the accountant. When the accounts, etc., were sent to the master, he was instructed to report as to the claims of creditors. Hearings thereon have been had,

testimony taken, and proceedings closed. Before the master had begun his investigations preliminary to a report upon said claims, suggestion was made that, with the assent of all, the balance of the funds here would be transmitted to the court of primary jurisdiction. The master, therefore, with the approval of the court, did not increase his own charge by examining the testimony and reporting upon the validity of the several claims and the status of each, and which, if any, might be entitled to priority. It was assumed by the court and the master, by receiver's counsel, and by the great bulk of the creditors, that such transfer of the funds would be assented to by all, and the affairs of the receivership be thereby promptly wound up. Greatly to the surprise of every one, however, the creditor represented by Messrs. Putney & Bishop, whose claim amounts to some $2,300, opposed such transfer, and since the argument a further protest against said transfer has been received from Frederick M. Littlefield, Esq., representing several creditors whose claims aggregate some $3,300, and a like protest from counsel for the General Electric Company, a creditor to the amount of some $3,000. These opposing creditors are residents, and the ground of their objection is that under the practice in this district resident creditors are paid in full before any funds are sent out of the state, or distributed among nonresident creditors. In view of this well-settled practice, it is difficult to see how the motion to transfer the fund can be granted over the opposition of resident creditors, even though they represent but a small fraction of the total indebtedness. The motion, however, will not be now denied, but held under advisement until the next motion day (August 18th), in order to afford an opportunity for the persons interested to arrange for some concert of action. It seems wiser to do so, since it is quite manifest from papers submitted that the objecting creditors do not thoroughly understand the situation, and suppose that, if the fund be not transferred, their claims will be forthwith paid in full. It may be well to set forth that situation fully.

There is a considerable fund in the hands of receivers in Connecticut. There is also nearly $80,000 within this jurisdiction (subject to reduction by payments for receiver, counsel, etc., already approved). The claims of the "resident" creditors aggregate less than $50,000, and in this district the rule of distribution above referred to is well settled. There are, however, some creditors, whose claims aggregate many thousands of dollars, who insist that, although actually nonresident, they are entitled to share on the same basis as the resident creditors. The equity upon which this court protects resident creditors is found in the circumstance that the interference and intrusion of the federal court has deprived residents of the state of their remedies under state laws by attachment or similar process; that, had this court not interfered, such creditors would have secured their claims out of the tangible property of the insolvent within this jurisdiction, and on the strength of which they gave credit to the insolvent. The nonresident creditors above referred to insist that under the laws of the state they, equally with residents, were entitled to the same remedies, and that, therefore, their exclusion

from resort to such remedies gives them the same equity upon distribution. This question has been twice raised in this district, but never decided. The creditors in both cases came together, and all concurred in asking to have the fund transferred to the court of primary jurisdiction. Should this unsettled question be decided adversely to the resident creditors, the amount of dividends to be received by them would be materially altered. Sufficient is at stake to induce the defeated party to take the case to the court of appeals, which has never considered the question.

There are, however, nonresident creditors, who were not, at the time receivers were appointed, in any position to avail themselves of remedy by attachment, etc., in the state courts. Their claims aggregate many thousand dollars. They insist that the rule of distribution followed in this district is inequitable, and not supported by precedent, and it is quite apparent that they have the means and the desire to secure a review of any decision of this court by the appellate tribunal. This question has never been presented to the court of appeals, and in the condition of the calendars many months must elapse before a decision in that court could be obtained. Moreover, the question seems never to have been squarely presented or flatly decided in the supreme court of the United States, and it is a question which must be continually presenting itself in nearly every federal district in the United States. Under these circumstances it is quite conceivable that the supreme court might grant a certiorari, or even that the court of appeals might certify the question to the supreme court. Should the case be carried so far, decision might not be reached for years. Meanwhile the fund would have to remain in the hands of the receiver, or in the treasury of the court. Wholly uninformed as to the creditors who proved their claims in the court of primary jurisdiction, and uncertain as to what basis of distribution might ultimately be decided upon by the court of last resort, it is difficult to see how even a partial dividend could be safely declared. It was undoubtedly an appreciation of these conditions which induced resident creditors, whose claims aggregate many times those of the opposing creditors, to agree to a disposition of the fund which might give them less than they would recover at the end of a prolonged litigation, but would give them whatever they were to receive with reasonable promptness. The agreement which it was supposed had been entered into by all would seem well calculated to commend itself to all interests, and therefore time will be given for a fuller discussion of the situation among the creditors, in the hope that some practical adjustment may be arrived at, which will not embarrass those whose claims are heavy, while those whose interests are small are busied settling academic questions for the benefit of counsel and the future illumination of courts.

HEATH & MILLIGAN MANUF'G CO. v. UNION OIL & PAINT CO.

(Circuit Court, E. D. Wisconsin. November 20, 1897.)

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—ATTACHMENT.

A state statute providing that, on the making of an assignment by a debtor within 10 days after the levy of an attachment, the attachment shall be dissolved, and the property turned over to the assignee (Acts Wis. 1897, c. 334), thereby relegating the attaching creditor to a mere judgment and a participation in the distribution under the assignment, coupled with a release of any balance not thus satisfied, impairs the obligation of contracts, as applied to an attachment founded on an indebtedness contracted prior to the passage of the act.

On petition of the defendant and Frank B. Schutz, assignee thereof under voluntary assignment for the benefit of creditors, for discharge of an attachment issued out of this court, and release of the property attached, pursuant to the provisions of chapter 334 of the Laws of Wisconsin for 1897.

David S. Rose, for petitioners.
Miller, Noyes, Miller & Wahl, for plaintiff.

SEAMAN, District Judge. This action is founded upon an indebtedness alleged to have been contracted prior to April 30, 1897, when the enactment in question came into effect. The writ of attachment was issued and the levy made September 9, 1897, upon an affidavit on behalf of the plaintiff that the indebtedness was fraudulently contracted by the defendant. Within 10 days thereafter the defendant executed an assignment for the benefit of creditors in accordance with the statute, thus bringing the case within the general terms of Acts 1897, c. 334, that, upon the making of an assignment by a debtor within 10 days after the levy of an attachment, the attachment and levy "shall be dissolved, and the property attached or levied upon shall be turned over to such assignee or receiver." Therefore the prayer of the petition must be granted, unless the act is inoperative upon this attachment because it is founded upon contracts entered into before the passage of the act. If application of the statute to such state of facts impairs the obligations of the contract, it is clearly to that extent in conflict with the constitution of the United States, and this involves an inquiry which must be governed by the rules of construction which prevail in the courts of federal jurisdiction. The decisions of the supreme court are both numerous and instructive as to various classes of legislation which are thus inhibited. They clearly establish the doctrine that taking away substantial remedies for enforcement of the contract, without substituting or leaving an adequate remedy in their place, impairs the obligation equally with legislation touching the express terms of the contract; and the opinions define such impairment in broad terms,—as in Bronson v. Kinzie, 1 How. 311, 317, "by burdening the proceeding with new conditions and restrictions, so as to make the remedy hardly worth pursuing,"—apparently covering in their general scope the effect produced by this enactment, when it is considered in all its bearings, with the restrictions imposed for obtaining benefit under the assignment.

Upon the argument of the case at bar it was stated that the question of the constitutionality of this statute was pending in the supreme court of Wisconsin, as affecting execution liens made under judgment by confession entered within 10 days before an assignment, upon judgment notes antedating the law, and that an early decision was expected. In view of the important interests involved, and of the salutary rule that an act of the legislature "must be beyond all reasonable doubt unconstitutional before the court would so declare it" (Sinking Fund Cases, 99 U. S. 700), and of the value, at least strongly persuasive, of a decision by that court either to raise or to solve the possible doubt, I deemed it proper to await such decision before finally taking up the inquiry. The opinion of the court by Mr. Justice Pinney was recently handed down in the case referred to (Bank v. Schranck, 73 N. W. 31), holding that the act impairs the obligations of the contract in question, and it states the rule of decision pronounced by the supreme court of the United States in the following comprehensive terms:

"That the test as to whether a contract has been impaired is whether its value has by legislation been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree, or manner or cause, but of encroaching in any respect on its obligation; dispensing with any part of its force."

It is contended that the case at bar is distinguishable because the interference is with an attachment, and not with the execution of a judgment, which was there involved; and, as a matter of first impression, there seemed to be force in the distinction, the remedy being provisional and statutory, and one not established through the common law, although the writ of attachment is recognized as a proceeding of great antiquity. But in the light of the undeviating line of decisions in the supreme court of the United States, from Bronson v. Kinzie, 1 How. 311, to Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042, including Edwards v. Kearzey, 96 U. S. 595, which is specially applicable, and of the exposition of this rule in the opinion of the supreme court of Wisconsin above cited, I can entertain no reasonable doubt that the inhibition applies to this case, because the statute, as amended, not alone deprives the creditor of his priority under the attachment, but excludes him from all substantial enforcement of his contract, unless he shall come into the assignment proceedings, accept such share as the assets may furnish, and become bound by a release of all remaining indebtedness, as the statute prescribes. This exaction clearly impairs the obligations which entered into the contract when made. He was then assured of the right to save his claim by attachment if it should turn out, as here alleged, that the indebtedness was fraudulently contracted. That contingency presenting itself, he is now met by a legislative provision which attempts to place it within the power of the debtor to thus deprive him of the previously existing right to secure a lien; and not that alone, but he is further deprived of all remedy, save through the source of the assignment, burdened with the conditions referred to. As remarked in Louisiana v. New Orleans, 102 U. S. 203:

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged

to perform it. Whatever legislation lessens the efficiency of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation is to that extent weakened, and the law is in conflict with the constitutional inhibition."

So, the obligation is clearly impaired in this case by discharging the attachment, and leaving the plaintiff without remedy for enforcement, even to the extent of a pro rata share in the assets, except upon release of all which may then remain unpaid. It may be that such provision constitutes an equitable and wise general policy for adoption as to all subsequent contracts, but it cannot be made retroactive, to destroy all effective remedies under pre-existing contracts. And this view is sanctioned by the opinion of Mr. Justice Miller in reference to an attachment under a similar statute, in Sloane v. Chiniquy, 22 Fed. 213, and inferentially in Denny v. Bennett, 128 U. S. 489, 9 Sup. Ct. 134. In the former case he says:

"Undoubtedly such a statute is void as against all creditors who were such before its passage, because it does impair the obligation of the contract as it existed at the time the contract was made. Before the law was passed it was a part of the right of the creditor to attach the property of the debtor under certain circumstances, and to hold it for the payment of the debt; and, apart from an attachment, he had a right to procure an ordinary judgment at law, and to levy upon the property of his debtor. So that, as to all debts arising on contract made before the passage of this statute, the law is inoperative and void as to them."

Although these remarks are obiter, they are of great value, as the deliberate opinion of that great jurist upon a subject which was frequently considered in the supreme court in its various phases during his membership.

It is true that the provision in this act, by which the creditor must become a party to the assignment and bound by the release for deficiency to obtain any share in the assets, is substantially a re-enactment of an old provision in the assignment law, but it is new in the feature which makes the remedy through the assignment practically exclusive, at least so far as concerns the case at bar. The pre-existing and time-honored remedies of execution and attachment are destroyed, and, while the entry of a judgment is not prohibited, the right thereto is of no value, where the debtor is a corporation, a bare entity, stripped of all assets by the assignment, leaving no practical remedy for the creditor.

I have given careful consideration to the argument of counsel in support of this legislation. Its logic is clear, and the citations are in point; but the authorities relied upon, and the argument as well, rest upon an interpretation of the obligations entering into a contract, and of the means of impairment, which is too narrow, in the constitutional sense, and the doctrine that no remedy for enforcing the contract can be taken away, unless another is preserved which is clear and adequate, is either ignored or not accepted in its full scope. I am therefore constrained to hold the statute inoperative so far as concerns the contract and attachment in question, and the petition must be dismissed. So ordered.

HITCHCOCK v. ANTHONY.

(Circuit Court of Appeals, Sixth Circuit. December 7, 1897.)

No. 481.

1. CONTRACT IN RESTRAINT OF TRADE—CONSTRUCTION—VALIDITY.
   The lessee of a dock, upon which he conducted the business of dealing in coal and fish, sold and conveyed certain real estate near by, on which was situated another dock, to a dealer in lumber, the purchaser entering into an agreement at the same time by which he bound himself in general terms not to engage in the coal or fish business for a term of years, or to "do anything that will conflict with the said coal or fish business" of the grantor. *Held*, that such agreement was limited as to locality to the dock situated on the property sold, and was valid.
2. SAME—STATUTE PROHIBITING COMBINATIONS.
   Laws Mich. 1889, Act No. 225, the purpose of which is to prevent combinations or agreements in restraint of competition in trade, does not render invalid an agreement by which one selling property binds the purchaser not to use it for a stated time in carrying on a business in competition with that of the vendor.
3. SAME—VIOLATION OF AGREEMENT—USE OF PROPERTY BY TENANT.
   An agreement by the purchaser of property, that in its use he will not during a stated number of years "do anything that will conflict with" the business of the vendor, is violated by his leasing the property to another, to be used in carrying on business in direct competition with that of his vendor.
4. DAMAGES—BREACH OF CONTRACT—PROFITS.
   In an action to recover damages for breach of an agreement not to use certain property in competition with plaintiff's business, loss of profits in such business in consequence of competing business carried on upon such property may be shown; and for that purpose evidence of the profits of plaintiff's business both before and after the breach of the contract is admissible.

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

This is an action for a breach of contract between William D. Hitchcock, plaintiff in error, and Thomas C. Anthony, defendant in error, whereby said Hitchcock agreed not to engage in certain business for a period of seven years from February 24, 1892. This contract was in writing, and was as follows: "This agreement, made and entered into this 24th day of February, A. D. 1892, by and between Thomas C. Anthony, of Sault Ste. Marie, Mich., and W. D. Hitchcock, of Chicago, Ill.: The party of the first part, Thos. C. Anthony, has this day sold and conveyed unto the said W. D. Hitchcock all the property at Detour, Mich., known as the Hurd & Heinstoin and Moiles property, for the sum of ten thousand dollars; and the said W. D. Hitchcock, party of the second part, agrees with the said Thomas C. Anthony to not purchase or offer for sale any coal, except what coal they may require for their own use, to any steamers, boats, or persons, and also to not traffic in the buying or selling of fish, except fish that may be caught with his own nets, or do anything that will conflict with the said coal or fish business of the said Thomas C. Anthony, and further agrees to not act as general agent and ticket agent, or in any capacity for any steamer or line of boats, nor to do any business whatever with said steamer or boats of any kind, as receiving and shipping of freight, merchandise, etc., except to receive their own goods and merchandise, and ship out same, when necessary, for the period of seven years from date thereof. And, further, that the said party of the second part agrees that while said Anthony gives full warranty deed, as required by said Hitchcock, yet said sale is made with full knowledge of said Hitchcock of the conditions of the deeds given by George Dawson, a former owner, regarding restrictions as to dock or shipping privileges; and said Anthony shall not be held responsible for any damage to said Hitchcock by reason of said restrictions in said Dawson convey-

ances. And, further, that the said Anthony may have the contents of one of the ice houses on said premises the present season, the same having been recently filled by said Anthony, together with the privileges of entering on said premises and getting said ice at his will during the coming season." The declaration alleged that Thomas C. Anthony was the lessee of a certain dock on the St. Mary's river, at the village of Detour, and was engaged in doing a coal and fish business thereon, his principal business being that of supplying coal to steamers. He was also the owner of certain real estate in said village fronting on the river, and upon which was situated another dock suitable for carrying on a like coal and fish business in competition with that conducted by himself. This real estate and appurtenant dock Anthony sold to W. D. Hitchcock for $10,000, and conveyed same by deed of general warranty. It is further averred that, as an additional consideration for said sale and conveyance, said Anthony entered into the agreement above set out, and that said agreement had been violated by leasing said dock to be used for the purpose of carrying on said prohibited business, and that the lessee thereunder had since engaged in the business of selling coal from said dock to steamers, in active competition with same business conducted by plaintiff on his own dock, whereby damages had ensued. There was a verdict and judgment in favor of the defendant in error.

M. F. McDonald and Watts S. Humphery, for plaintiff in error.

H. M. Oren and T. O. Clark, for defendant in error.

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

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The conveyance of this dock to Hitchcock, and his agreement not to engage in a business which should compete with that carried on by Anthony upon another and adjacent dock, bear the same date. This fact, in connection with the manifest purposes of the contract as indicated by its whole tenor, affords prima facie evidence of the simultaneous execution of the two instruments, and that the consideration for the contract was the sale and conveyance of the dock and realty to which it was appurtenant. They really constitute but one transaction, and should be read together.

It has been argued that this contract imposes a general restriction upon Hitchcock engaging in the prohibited business without limitation of territory, and is therefore against public policy and void. Anthony was engaged in supplying coal to steamers passing Detour, and also dealt in fish. This business was essentially one to be conducted upon a dock conveniently situated at Detour. Hitchcock was engaged in manufacturing and dealing in lumber, and the property purchased by him afforded facilities for that business. The business of neither conflicted with that of the other. In this situation Anthony sold to Hitchcock a desirable site for his lumber mill and yard and a dock, which furnished him shipping facilities, and, by a separate writing, bound him not to engage in the line of business which Anthony was conducting. The heart of the agreement lies in the stipulation that Hitchcock will not "do anything that will conflict with the said coal or fish business of the said Thomas C. Anthony." This clause, though an enlargement of the restriction as to detail, implies that the prohibition is not general, but limited. How and what is the limitation? This we must ascer-

tain by taking into consideration every part of the agreement, and ascertaining the meaning of the instrument in the light of the circumstances surrounding the parties at the time. We have already noticed the contemporaneous execution of a deed conveying to Hitchcock certain property fronting on the St. Mary's river and a dock extending out into the river. This deed is recited in the first clause of this contract. The last two clauses directly relate to the property conveyed by that deed. One limits Hitchcock's rights thereunder, while the other grants an easement to Anthony in a matter collateral to the question here involved. The only other paragraph of the agreement contains the stipulation restricting the purchaser of that property from engaging in the coal or fish business, or doing "anything that will conflict with the said coal and fish business of said Anthony." Now, this business which Anthony was conducting was one which could only be conducted upon a dock, and the dock appurtenant to the property conveyed to Hitchcock was so situated as that a similar business could be carried on upon it. The object of Anthony was to prevent competition, not at Detour generally, but by the use of this dock just conveyed to Hitchcock, and adapted to the doing of a competitive business. The circuit judge was of opinion that the circumstances were such as to justify a limitation of this restriction upon Hitchcock to the property so sold to him. To this conclusion we fully agree. Hitchcock's obligation, while widened by the stipulation that he should do nothing which should conflict with Anthony's coal and fish business as to details, is at the same time limited, by implication, in respect of locality. The agreement had reference alone to the uses of the dock sold to him, and bound him to make no such use of that dock, by himself or another, as should result in a competitive coal and fish business thereon.

An agreement prohibiting the use of a particular piece of property in a specific business, or prohibiting one of the parties from engaging in a competitive business for a reasonable time, and within a limited area, if not larger than necessary to protect the other, is a valid and enforceable engagement. American Strawboard Co. v. Haldeman Paper Co. (decided at present term) 83 Fed. 619; Navigation Co. v. Winsor, 20 Wall. 64; Gibbs v. Gas Co., 130 U. S. 396, 409, 9 Sup. Ct. 553; Stines v. Dorman, 25 Ohio St. 580-583; Hubbard v. Miller, 27 Mich. 15; Association v. Starkey, 84 Mich. 80, 47 N. W. 604; Timmerman v. Dever, 52 Mich. 34, 17 N. W. 230.

Neither is this contract void under the Michigan act, No. 225, Sess. Laws 1889. The Michigan statute cited was properly construed by Judge Severens, who tried this case below, when he said that:

> "It is aimed at combinations between parties who, having each a separate business with no interest or concern in that of the other, join together to restrict the output or enhance the prices of goods; and not to cases where one owning a property which he could devote to a given purpose or not, as he pleases, conveys it to another, putting him under a restraint against employing it for such purposes, the vendor having a business which he is interested in protecting."

The breach of this contract averred, was that the defendant below had leased the said dock so conveyed to him to a firm of dealers in

coal "for the purpose of carrying on on said dock a coal and fish business in competition with the coal and fish business of the plaintiff," and that the lessees had thereafter conducted on said dock a competing business in supplying coal to steamers passing Detour. Upon this subject the court instructed the jury, in substance, that if this dock was leased by the defendant with the knowledge that the lessees intended to carry on a coal business in competition with the same business conducted on an adjacent dock by Anthony, and bargained for a rent "based upon the expectation and purpose of employing the premises for that purpose," and it was subsequently so employed, that would be a breach of the agreement "not to do anything which would conflict with the coal and fish business of Anthony." The jury were further instructed that if the lease was made with no purpose or expectation that the dock would be so used, and that Hitchcock "was indifferent to the use to which it should be put," and did not let it with an express intention of enabling them to use the dock in the coal business, the defendant would not be liable. We see no error of which the plaintiff in error could complain. The court throughout treated this agreement as one not attaching itself to the property, but as a purely personal agreement. We need not consider the correctness of this view, as it was the one most favorable to plaintiff in error. Treating it as a purely personal agreement, the stipulation that Hitchcock would do nothing which would conflict with the established coal business of Anthony was clearly broken if he let the premises with the intent that a competitive business should be done thereon, and obtained a rent based on the doing of a business thereon, which would conflict with the business done by Anthony. There was evidence tending to show that the letting was done with the purpose of aiding the lessees in carrying on the same business in which Anthony was engaged, and that the rent stipulated was paid with reference to the doing of that business. This, in our judgment, was a breach of the stipulation against doing anything which would conflict with Anthony's business, and we are not prepared to say that a mere letting free from any restriction as to the use, to one having no notice of the contract under which Hitchcock held the property, would not also be a breach, if such a business was thereafter done on the premises.

Evidence was admitted over objection of plaintiff in error for the purpose of showing a loss of profits in Anthony's coal business as damages resulting from the breach of this contract. This was objected to upon several grounds, namelv: That such loss of profits was not the natural and proximate result of the breach complained of; that the profits of such a business as that conducted by Anthony was dependent on too many contingencies, was speculative and too uncertain to be the basis of any judgment; and, finally, that no damages except nominal damages could be recovered in a case of this kind unless they are stipulated in the contract. It has been sometimes said that the general rule is that anticipated profits cannot be a basis for recovery in any action for a breach of contract. But there is no sufficient authority for so broad a statement, for profits are always recoverable if proximate, natural, and certain. Sedg. Meas. Dam. (8th Ed.) §§ 176, 177, 192, 193.

In Brigham v. Carlisle, 78 Ala. 243, 249, Clopton, J., properly stated the principle when he said:

"Profits are not excluded from recovery because they are profits, but, when excluded, it is on the ground that there are no criteria by which to estimate the amount with the certainty on which the adjudication of courts and the finding of juries should be based."

In Griffin v. Colver, 16 N. Y. 489, 491, Seldon, J., in discussing the supposed rule that profits were not recoverable, said:

"It is not a primary rule, but is a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown by clear and satisfactory evidence to have been actually sustained. It is a well-established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should per se prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative and contingent are not."

Most frequently, profits prevented are excluded as an element of damages, because such an injury was not a normal and proximate consequence of the breach of the contract. Such was the leading case of Hadley v. Baxendale, 9 Exch. 341, where the decision was that loss of profit of a mill was not a natural consequence of a carrier's delay in delivering machinery, the special circumstances not being communicated to the carrier. But the court in that case added that:

"If the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they could reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under their special circumstances so known and communicated."

The general subject was considered in Howard v. Manufacturing Co., 139 U. S. 199, 206, 11 Sup. Ct. 500, and U. S. v. Behan, 110 U. S. 338, 344, 4 Sup. Ct. 81. In the latter case, Justice Bradley, on this subject of damages for a breach including profits prevented, said:

"Profits cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of Masterson v. Mayor of Brooklyn, 7 Hill, 69, 'they are the direct and immediate fruits of the contract,' they are free from this objection. They are then part and parcel of the contract itself, entering into and constituting a portion of its very elements,—something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation."

But in the case before us the very object of the contract which has been broken was to secure the coal business of Anthony against any loss of business and consequent profit which might result from a competitive business conducted on the dock sold by him to Hitchcock. To protect his business, and secure the possible profits resulting therefrom against competition, was the occasion of this agreement; and, if plaintiff in error has knowingly and purposely rented this dock for the purpose of enabling his lessee to carry on a competing coal business, the damages which are recoverable naturally and proximately

include any gain prevented which could be certainly shown to have resulted from the competition. The evidence offered was relevant and competent. It related directly to the business conducted by Anthony both before and after the contract, and before and after its breach, and did not touch any mere collateral business or anticipated collateral profit.

The admission of evidence as to the past profits of that business as bearing upon future profits prevented was not error. It was a most important circumstance, which any business man would look to as a factor in any estimate of the future value of a business; and no reason occurs why a jury may not equally as well look to that element in considering whether there were any profits prevented by competition. Such evidence was admitted in Bagley v. Smith, 10 N. Y. 489, and Reiter v. Morton, 96 Pa. St. 229.

But it is further objected that the evidence upon which plaintiff relied to show loss of profits was vague and speculative, and did not amount to legal evidence of any loss of profits, and that the court should so have instructed the jury, having been so requested. There was evidence of the amount of coal sold by defendant in error to steamers for a series of years before and after this breach, and of a reduction in the profit per ton, caused by the lower price at which the competing dealer offered and sold coal. There was also evidence that while the demand for coal by steamers at Detour increased from year to year, as the tonnage navigating the St. Mary's river increased, the value of Anthony's business declined. This was competent evidence from which the jury might reasonably infer some damage by loss of profit. It was therefore not error to refuse an instruction limiting a recovery to nominal damages.

The question as to whether the verdict was for too great a sum, under the evidence, is not one for our consideration, being one remediable only under a motion for a new trial. The judgment must be affirmed.

SMITH et al. v. SALT LAKE CITY.

(Circuit Court, D. Utah. November 22, 1897.)

1. MUNICIPAL CORPORATIONS—CONTRACTS FOR PUBLIC WORK—CONSTRUCTION.
   A proposal by a city for bids for the construction of an aqueduct required the work to be done in accordance with plans and specifications on file in the office of the city engineer, among which were a number of "instructions to bidders," one of them stating the approximate quantity of each class of work required, but further stating that such estimate was to be used solely in determining "the comparative value of the respective bids." The contractor, in executing his contract as required by the city, was compelled to construct, of certain classes of the work, a quantity greatly in excess of that given in the estimate. *Held*, that such estimate, being essential to enable bidders to act intelligently in bidding, must be construed as a part of the contract, and that the contractor was entitled to recover the reasonable value of such work done in excess of the amount estimated.

2. SAME—PLANS AND SPECIFICATIONS.
   Where a city invited bids for the construction of an aqueduct, to be built in accordance with plans and specifications on file in the office of the city engineer, a survey and location of the line, being necessary to the making

of such plans and specifications, is presumed to have been previously made in giving a construction to the contract let.

8. SAME—CHANGE OF CONTRACT BY PAROL.
The terms of a contract with a city for work, which requires the use by the contractor of a cement equal in quality to the best of a kind specified, cannot be changed by statements made by officers of the city, either before or after the execution of the contract, so as to permit the use of an article in fact inferior to that specified.

4. SAME—PAYMENT.
Where a claim for extra work done under a city contract has been referred to the city attorney for adjustment, it is within his power to authorize the payment of a sum allowed by the city council without prejudice to the claimants' right to demand more.

Action by Joseph H. Smith and others against Salt Lake City. Judgment for defendant, and plaintiffs move for a new trial.

John W. Judd and Oscar Reuter, for plaintiffs.
William McKay and D. B. Hempstead, for defendant.

HALLETT, District Judge. In the month of March, 1891, defendant corporation received proposals for building an aqueduct to convey the waters of Parley's creek into the city of Salt Lake. As described in the notice to bidders, the contract was to be let "for all the labor and materials necessary for constructing the concrete and brick aqueduct, 36 inches in diameter, for transporting the waters of Parley's creek into the city, a distance of about 6 miles, work to be fully completed by July 15, 1891, according to the plans and specifications in the office of the city engineer, room No. 17, City Hall Building." The plans mentioned in the notice show three sections of the proposed aqueduct of brick and concrete masonry, two of them showing work at the manholes and one in general plan. There were also on the same sheet two diagrams of bricks to be used in the work. With the plans there was in the office of the city engineer a paper entitled "Instructions to Bidders," which instructions were numbered from 1 to 22, consecutively, and gave a description of the work, with the usual detail. Paragraph 6 gave approximate quantities of earth and other excavation, and the quantities of concrete, brick, and stone masonry, in the usual form.

Plaintiffs' assignors, E. L. De Bois and Joseph Williams, bid for the entire work, but only the work of construction was awarded to them, and the grading and tunneling was let to other parties. A written contract was made and executed between the parties in the usual form. In this contract the different kinds of work were specified, as in the instructions to bidders, and in the proposal of De Bois and Williams, with the price set opposite to each class of work to be done by the contractors. There was no statement in the contract of approximate quantities, as in the instructions to bidders, but the proposal of De Bois and Williams is referred to, which contains the classification of work as given in the instructions and as set out in the contract. De Bois and Williams failed in the work some time after it was begun, and plaintiffs, having become bound for the due performance of the contract, assumed the management of the business and finished the aqueduct. This suit is to recover

the reasonable value of the work done by the plaintiffs which is alleged to be in excess of the contract, and is usually called "extra work."

The main controversy is over the statement of approximate quantities in the sixth paragraph of the instructions to bidders. The language of that paragraph, preceding the quantities, is as follows:

"For the purpose of arriving at the comparative value of the respective bids, the following quantities will be taken as approximating the actual quantities which the execution of the work will develop, and shall be used for no other purpose in connection with this contract."

Defendant maintains that the effect of this language is to withdraw the sixth paragraph from the contract, leaving that instrument without any statement of quantities, and binding the contractors to build the aqueduct in any form or place, and with any materials, mentioned in the contract, that might be designated by the city engineer. The proposition may be differently stated: That the contract is to be read as providing for the construction of an aqueduct of brick, or concrete masonry, in a trench cut from the surface of the ground, or in one or more tunnels in earth or rock, or on an archway of cut stone, as might be required by the city engineer, without reference to any of the quantities in each class, and for the price stated in the contract for each class.

In any view which may be taken of the contract, this construction seems to be untenable. The sixth paragraph of the instructions must have been made to enable bidders to understand the work which they were to undertake. A survey of the line of the proposed aqueduct, and an estimate of quantities, was essential to intelligent action in the premises. No bid could be made, nor could a contract for the work be made, without such survey and estimate. The city could have required bidders to make their own survey and estimate of quantities, but that course was not adopted. In a published notice the city invited proposals for building the aqueduct "according to plans and specifications in the office of the city engineer." Upon this notice plans and specifications were shown to bidders, and it must be said that any attempt on the part of the city to limit their use is unavailing. If bound at all, the parties were reciprocally bound in respect to the character of the work as in all other features of the contract. To eliminate the sixth paragraph on the ground that it was operative only to enable the city to select the lowest bidder would make the contract unilateral throughout. The contractors would be bound to build any kind of an aqueduct that might be designated by the city engineer, wholly underground, and in tunnels in earth or rock, or upon a stone archway in the style of the Roman Empire, more recently followed in the neighboring state of Mexico.

The principal items in controversy are for cut-stone masonry and rubble masonry, of which only 10 cubic yards of each class, or 30 cubic yards in all, was specified. According to the report of the city engineer, the cut-stone masonry in the work amounted to 535 cubic yards, and the rubble masonry to 403 cubic yards, or a total of 938 cubic yards. Plaintiffs' figures are larger, but it will not be necessary at this time to inquire about the discrepancy.

Obviously, there was a nominal specification of stone masonry in the contract, and a very large and substantial construction of stone was required in the work. We cannot say, as defendant says, that plaintiffs were bound by the contract to build of any of the materials mentioned in the contract, and to any extent, regardless of the quantities mentioned in the contract. There was a material departure from the plans and specifications, which resulted in a new and different undertaking, upon which plaintiffs are entitled to recover the value of the work done by them in excess of the contract. Delafield v. Village of Westfield (Sup.) 28 N. Y. Supp. 440, 77 Hun, 124; Cook Co. v. Harms, 108 Ill. 153; Bridge Co. v. McGrath, 134 U. S. 260, 10 Sup. Ct. 730.

Other considerations lead to the same result with equal force and clearness. The greater part of the extra work for which plaintiffs seek to recover was done in Parley's creek cañon, about one mile in length, on that part of the aqueduct which is furthest from the city. A dam and settling basin, which are not mentioned in the contract, were built at the head of the aqueduct. Several stone culverts, one over Parley's creek, and others over gulches, cutting the side of the cañon, were built in this part of the aqueduct. A large part, perhaps all, of the tunnel work of which plaintiffs complain is in the cañon. At the trial a question arose whether the line of the aqueduct in the cañon, as constructed, had been changed after the date of the contract. On this point the oral testimony was highly conflicting. The city engineer and others, perhaps, testified that no survey had been made on the side of the cañon near the aqueduct until after the contract was let. De Bois and others testified that a survey was pointed out to them a little below the line of the aqueduct as built on the side of the cañon, which they examined with a view to make proposals for the work. All agree that a line in the valley of Parley's creek, and near to the stream, intended for a pipe line, if that plan of construction should be adopted, had been located. Why this should have been done before the date of the contract, and the other left undone, is not explained. The pipe line was simple, and that on the side of the cañon encountered nearly all the obstacles of the entire route. If the city desired to inform bidders of facts upon which they could safely and intelligently undertake the work, the survey and location of the line in the cañon was the most important of all.

However, it is not necessary to discuss at length the evidence on this point, because the contract will be found to settle the question. As stated before, the city invited proposals for building the aqueduct according to plans and specifications in the office of the city engineer, and the contract is that the work shall be done in conformity with the plans and specifications. In this a survey and location of the line in all parts is assumed, inasmuch as plans and specifications cannot be made without such survey and location. Upon the contract alone, without referring to the oral testimony, we must assume that the line of the aqueduct on the side of the cañon, as well as that on the other parts of the line, was surveyed and located be-

fore the contract with De Bois and Williams was made. Delafield v. Village of Westfield (Sup.) 28 N. Y. Supp. 440, 77 Hun, 124; Sexton v. City of Chicago, 107 Ill. 324.

It is not necessary to say that this presumption is conclusive. It is enough to say that it supports the testimony of the bidders that a line was shown them on the side of the cañon somewhat lower than that on which the aqueduct was built, where but little stone or tunnel work was required. The location of the rejected line seems also to be indicated by the statement of nominal quantities of stone and tunnel work in the approximate quantities.

The referee found that the line of the aqueduct in the cañon had not been located at the date of the contract, but was to be thereafter located, and therefore there was no change of line or in the nature of the work after the contract was made. In this there was error. Looking to the contract as well as the testimony, the line in the cañon was changed so as to materially increase the nature and amount of work to be done.

All that has been said in respect to stone masonry is applicable to the matter of putting the aqueduct into tunnels. The quantity specified was small,—in all, 160 yards,—and the work done was greatly in excess of the specification. No doubt is entertained as to the extraordinary cost of the tunnel work over the trench work. So, also, the stone caps for manholes are clearly outside of the contract. There was nothing in the plans or specifications or in the contract to show that the manholes were to have any kind of cap other than the brick of which they were built. Things not mentioned in the contract are not within its terms, and the city could as well demand iron or steel tops for the manholes as to have them cut in stone.

I do not see that the plaintiffs can demand extra pay for laying the aqueduct in deep trenches. Apparently all kinds of trenches, deep and shallow, are within the terms of the contract, and all should stand on the contract price. So, also, as to the use of Utah cement, which it is said was allowed for some time under some understanding with the city engineer, and then forbidden on the ground that it was not of good quality. The contract calls for cement "equal to the best Rosendale," and the declarations of the city engineer or other officer of the city, made before or after the execution of that instrument, cannot be received to change its terms. If I understood counsel at the hearing, it was not contended that Utah cement was equal to the Rosendale. But it was in evidence that, at and before the date of the contract, and perhaps afterwards, one or more officers of the city agreed with some one who had an interest in the contract that Utah cement might be used in the work. And this agreement induced De Bois and Williams to make a lower bid than would otherwise have been made. In so far as such declarations were made before the contract, they were merged in that instrument, and, if made afterwards, the officers had no authority to change the contract then remaining unexecuted. The claim for the extra cost of cement was rightly rejected.

All facts appearing in the record have not been reviewed, but enough has been said to explain the principles under which the plaintiffs may be entitled to extra pay for extra work.

An issue joined on a plea of payment is somewhat apart from the general features of the case, and is now to be considered. In support of the plea, and as a part of its case, the defendant put in a receipt given by the plaintiffs' agent for about the sum of $15,000, which appeared to be in full of all demands. It may be conceded that the receipt was in form and effect one which, unexplained, should be regarded as concluding and settling all questions between the parties. No testimony was offered by the plaintiffs to explain the receipt until, in the course of the arguments of counsel before the referee, defendant's counsel called attention to it, and insisted that it was conclusive of all matters in controversy. Thereupon plaintiffs' counsel moved the referee to reopen the case, and hear testimony of the circumstances under which the money was paid and the receipt therefor taken. In support of the motion, affidavits were filed to the effect that in January, 1892, plaintiffs' claim for extra work was by the city council referred to W. C. Hall, then city attorney of Salt Lake City, "for his decision thereon," and that the city council thereafter allowed the sum of $15,000 to plaintiffs on the contract. An agreement between Hall and plaintiffs' attorney is set out in one of the affidavits, as follows:

"That affiant went to the said Hall, and said to him that his clients had preferred their claim before the board of public works, and that they intended to insist on its payment, but that they were desirous of having the amount allowed by the council paid to them, as they needed it to pay off their hands which had been employed, and for material which had been purchased by them for the work, and they did not desire to be prejudiced in any way in the collection of their claim sued on in this cause; that Mr. Hall said to affiant that the matter had been referred to him, and that he was gratified that a brief of authorities had been presented to him, and that he would pass upon it with a view to arrive at exact justice between the parties, and decide accordingly, and that he would advise the city authorities to pay over the amount of money that they allowed to be due; and that the question of the allowance of the claim for extras could be reserved for future consideration."

Further on plaintiffs' counsel stated in his affidavit that he had forgotten the facts during the trial, and thus failed to put in the evidence at the proper time. Quoting from the record, the motion was overruled in the following terms:

"Which motion was then and there opposed by defendant, and to which offer of proof defendant objected, upon the ground that said Hall, as such attorney for the defendant, had no authority to enter into the said agreement offered to be proved, or any other similar agreement, and could not bind the defendant thereby; and thereupon the referee denied said motion, and sustained defendant's said objection to said offer of proof; to which several rulings of the said referee the plaintiffs then and there severally and duly excepted."

Inasmuch as the statement of facts and circumstances attending the making of the receipt was not denied, the defendant denying only the authority of Hall, we must assume that the receipt was given and taken in the manner and under the circumstances set out in the affidavit. So understood, it is clear that the money was not paid in satisfaction of plaintiffs' demand for extra work, and that the receipt was

not intended to be for such demand, and was not so in fact. Whether Hall, as city attorney, had authority to make the agreement set out in the affidavit, or any agreement, relating to the payment, is not a controlling consideration. The intention not to receive the money in satisfaction of the claim for extra work fully appears in the negotiation with Hall, whatever his authority might be, and it was quite as effective as a protest to the auditor at the time of payment would have been. But there is little room for doubt as to Hall's authority in the premises. The claim for extra work had been in his hands for adjustment, and it was known that it was to be the subject of litigation in the courts. As to the method of proceeding towards an adjustment of differences, and whether the plaintiffs could be allowed to take the amount allowed them by the city without prejudice to their demand for greater compensation, was fairly within the discretion of the law officer of the city government. If the city had made the allowance applicable to all demands, and the plaintiffs had notice of the fact, of course the rule would be different. But this has not been suggested. So far as shown, the auditor had no knowledge of the circumstances, and no intention, except to take the usual receipt in the printed form in use in his office. There is nothing in the transaction to indicate that the auditor or plaintiffs' agent at all expected or intended to settle the differences between the parties. It is clear, therefore, that the receipt is not at all conclusive of plaintiffs' right of action.

Upon all that has been said it appears that plaintiffs are entitled to a new trial upon the issues joined, and an order will be entered to that effect. The findings of the referee and the judgment of the court will be vacated, with costs to abide the event of the suit.

BAXTER v. BILLINGS et al.

(Circuit Court of Appeals, Eighth Circuit. November 15, 1897.)

No. 873.

ATTORNEY AND CLIENT—CONTRACT FOR FEES.

When one agrees to pay a certain compensation for the services in a specified matter of two attorneys named, that contract is not performed, and that compensation cannot be recovered, when one of them dies before the agreement is substantially performed. The contract is one of personal trust and confidence, and its terms are not fulfilled though the surviving attorney associates with himself others of equal or greater ability, and carries the litigation to a successful conclusion.

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

This is an appeal from a decree sustaining a demurrer to and dismissing a bill exhibited in the court below by Joseph N. Baxter against Margaret Billings, Margaret Cavner, Jerome B. Wheeler, and the Aspen Mining & Smelting Company to enforce and foreclose a lien for one-half of the money and property which Margaret Billings was held to be entitled to recover from Wheeler and the Aspen Company by the terms of a decree which was rendered in a suit in equity which she and Margaret Cavner brought against them in the United States circuit court for the district of Colorado. The material facts alleged in this bill as a basis for this relief were these: On June 23, 1887, Margaret

Billings had, and Margaret Cavner thought she had, certain rights in the Emma Mine and its proceeds, which Wheeler and the Aspen Company claimed to own by virtue of an alleged purchase from them. Baxter and one Yonley were attorneys at law and solicitors in chancery, and on that day Margaret Billings and Margaret Cavner made a written contract with them, to the effect that Baxter and Yonley should immediately push to a settlement the claims of Margaret Billings and Margaret Cavner, and, in case a settlement could not be speedily arranged, that they should immediately commence legal proceedings to determine their rights in the property known as the "Emma Mine"; that, in case a settlement of their claims could be made with Wheeler and the Aspen Company, they would pay Baxter and Yonley 20 per cent. of the net proceeds of such settlement; and that, in case no settlement could be arrived at without suit, and a settlement should be obtained after bringing such suit, they would then pay to Baxter and Yonley one-half of the net proceeds of such suit or settlement. Baxter and Yonley endeavored to obtain a settlement of these claims in the year 1887, and failed. On the 1st day of January, 1888, Yonley died. Baxter, with the consent of Margaret Billings and Margaret Cavner, associated with himself such persons as, in his judgment, would best enable him to carry into effect the agreement and the wishes of said Billings and Cavner, and on April 14, 1888, caused a suit to be commenced in the circuit court of the United States for the district of Colorado, in which Baxter appeared as the solicitor of said Billings and Cavner, and prosecuted it until the court determined by a final decree that Margaret Billings was entitled to recover from Wheeler and the Aspen Company a large amount of money and certain shares of stock in the Compromise Mining Company. About July 16, 1892, and before this final decree was rendered, Baxter notified Wheeler and the Aspen Company that he claimed a lien on the interest of Margaret Billings and Margaret Cavner in the suit which he had instituted, and in the amount of money or property which they might recover thereunder, by virtue of the written contract between them and himself and Yonley made on the 23d day of June, 1887. The prayer of the bill was that Baxter might be adjudged to have a lien upon the money and property which Margaret Billings was entitled to receive from Wheeler and the Aspen Company by virtue of her decree against them for one-half thereof, that this lien should be foreclosed, and that Wheeler and the Aspen Company should be enjoined from paying this half to Margaret Billings, and should be adjudged to pay and deliver the same to Baxter in satisfaction of one-half the amount adjudged and decreed to be paid and delivered to Margaret Billings by the decree.

Daniel Prescott, for appellant.

H. L. McNair and T. A. Green, for appellees.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

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

A contract for the professional services of a particular attorney is an agreement of personal trust and confidence. Its chief consideration is the command which the retainer gives to the client over the learning, ability, skill, and experience which his chosen solicitor possesses. An agreement with a lawyer to commence and prosecute a suit is of the same character as a contract with an author to write a book. If the author dies, or abandons his work when it is half written, no substitute or successor can complete the book, and recover its price, because the literary ability of the original author, for the use of which the publisher contracted, has not been, and could not be, applied to it. If a lawyer dies before he has commenced, or before he has prosecuted to a decree or settlement, a litigation which he has undertaken to conduct for a certain compensation, his contract is at an

end, and no one can recover the price it stipulated, because no substitute or successor can supply to his client the use of the learning, ability, and integrity for which he contracted. If, in the case at bar, Margaret Billings and Margaret Cavner had made their contract of June 23, 1887, with Yonley alone, who died in January, 1888, before the successful suit was instituted, it is clear that there could have been no recovery of the compensation stipulated by that contract, either by Baxter or by any other substitute or successor of Yonley, however successful he might have been in its prosecution, because the services contracted for—the services of Yonley—were not rendered. The same fatal objection presents its protest to the actual contract. That was a contract for the services of both Baxter and Yonley. Under that agreement their authority to commence and prosecute the suit was a joint authority, and their duty was a joint duty. A joint authority conferred on two persons can only be exercised by the act of both. An obligation to furnish and apply to the conduct of a lawsuit the learning, ability, and experience of two particular attorneys is not performed by furnishing the services of one of them, although the services of many others of equal or superior ability are also furnished. When one agrees to pay a certain compensation for the services in a specified matter of two or more attorneys or agents whom he selects or names, that contract is not performed, and that compensation cannot be recovered, when any one of them dies, or abandons the agreement, before it is substantially performed, because the services of that one have not been furnished. McGill's Creditors v. McGill's Adm'r, 2 Metc. (Ky.) 258, 260; Morgan v. Roberts, 38 Ill. 65, 85; Moshier v. Kitchell, 87 Ill. 18, 21; Wright v. McCampbell, 75 Tex. 644, 648, 13 S. W. 293; Martine v. Society, 53 N. Y. 339, 342; Salisbury v. Brisbane, 61 N. Y. 617; Insurance Co. v. Wilcox, 57 Ill. 180, 186. The result is that the death of Yonley in January, 1888, is a complete bar to the claim of the appellant to recover, under the contract of June 23, 1887, one-half of the proceeds of the suit instituted in April, 1888.

There are two allegations found in the bill upon which the appellant seems to rely to escape from this inevitable conclusion. One is that, when the contract was made, Margaret Billings and Margaret Cavner especially desired to obtain the services of the appellant, placed special reliance upon his skill and ability as a lawyer, and associated Yonley with the appellant, and made him a party to the contract, at his suggestion. But this averment is not material. It contains no allegation of fraud or mistake in making the contract. The fact remains that the written contract is not for the skill and services of Baxter alone, but for those of Baxter and Yonley; and, where the parties have deliberately put their engagements into writing in such terms as to import a legal obligation, it is conclusively presumed that the whole engagement of the parties and the nature and extent of their undertaking is contained in the writing. Wilson v. Ranch Co., 36 U. S. App. 634, 20 C. C. A. 244, 249, and 73 Fed. 994, 999. The other allegation is that after the death of Yonley, with the consent of Margaret Billings and Margaret Cavner, the appellant associated with himself such persons as would, in his judgment, best enable him

to carry into effect the agreement and the wishes of the clients; that he commenced and prosecuted the suit to a successful issue with their consent, and did every act which it was incumbent on him to do in the premises. But this averment falls far short of an allegation that Margaret Billings and Margaret Cavner, in consideration of these services, undertook or agreed to pay to Baxter alone, or to Baxter and his associates, the same compensation which they had agreed to pay for the services of Baxter and Yonley; and without such an allegation the averment is immaterial. When Yonley died, the contract of June 23, 1887, was at an end. It had no force or virtue after the instant of his decease. Before Margaret Billings and Margaret Cavner could be bound to pay to Baxter or to him and his associates the price which they had agreed to pay for the services of Baxter and Yonley, there must be a new contract between new parties, as complete and definite as that which was originally made. There is no averment in this bill that there was such a contract. The only legal effect which the allegations to which we have referred could have would be to charge Margaret Billings and Margaret Cavner, in a proper case, with a liability to pay to Baxter and his associates what their services were reasonably worth. This bill was not brought for that purpose. It contains no prayer for the recovery of that measure of compensation. It contains no allegation of the value of the services. We are unable to find any ground upon which it can be maintained, and the decree below must be affirmed, with costs. It is so ordered.

FEURER v. STEWART.

(Circuit Court, D. Washington, N. D. November 5, 1897.)

COVENANT OF TITLE—CONSTRUCTION—CONVEYANCE OF TIDE-WATER LOTS.

The owner of lots situated on a tide-water shore, and by the recorded plat extending into the water beyond the line of ordinary high tide, sold the same before the admission of the territory as a state, giving a general covenant of warranty of title "against all and every person and persons lawfully claiming the same, or any part thereof." By the statutes of the territory the owners of shore property were given certain privileges in its use beyond the water line, and by usage were permitted to build manufacturing establishments, extending from the shore to water of navigable depth, and it was for such purpose that the grantee bought the lots. After its admission, the state took possession of and used a part of the lots below the line of high tide. *Held*, that the covenant must be construed in view of the law under which the legal title of the submerged portion of the lots was vested in the general government, for the use of the state, and held to apply only to such rights and privileges as were incident to the ownership of the lots, subject to the paramount title of the state, and not as a warranty against such title.

Action by Louis Feurer against Olive J. Stewart on a covenant of warranty of title in a deed. Heard on demurrer to complaint.

Cox, Cotton, Teal & Minor and White, Munday & Fulton, for plaintiff.

E. S. Pillsbury and Preston, Carr & Gilman, for defendant.

HANFORD, District Judge. This is an action at law to recover damages for the breach of a covenant of general warranty of title

contained in a deed conveying certain lots situated on the shore of the harbor of the city of Seattle. The description of the premises contained in the deed refers to a plat, which shows the lots to be located partly on the land above the line of ordinary high tide and extending into the water; and the complaint alleges that in the negotiations for the sale of the property to the plaintiff, the defendant represented that said lots extended to deep water, or ship channel. The complaint also alleges that the lots were purchased by the plaintiff for use as a site for a large brewing and malting establishment, and that the location was especially valuable for that purpose, which fact was known to the defendant; and that the space between the shore and deep water was of greater value than the land portion of the lots. The deed was executed, and the transaction completed, prior to the date of the president's proclamation admitting Washington into the Union as a state, but after the constitution of the state had been framed and adopted by the people. The complaint recites that by her deed the defendant covenanted and agreed with the plaintiff "that she, her heirs, executors, and administrators, would warrant and forever defend to the plaintiff, his heirs and assigns, all and singular the premises in said deed described, with their appurtenances, against all and every person or persons whomsoever, lawfully claiming or to claim the same, or any part thereof." The complaint also charges that the state of Washington, through its proper officers, has in various ways asserted its ownership and control of that part of the premises situated below the line of ordinary high tide, and has surveyed and replatted the same, thereby appropriating a part of said space for public streets, and has included a part of the space within the harbor area, and has compelled the plaintiff to purchase the remainder from the state; and a breach of covenant is alleged in this: that the defendant has failed to defend the title to that portion of the premises situated in the water, against the claims and paramount title of the state. The defendant has demurred to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action. The complaint shows affirmatively that the plaintiff knew the situation and character of the premises at the time of his purchase, and he must be presumed to have known that in law the title to the shore and bottom of this harbor was then vested in the United States government, in trust for the coming state of Washington, and that he could not, by purchase from an individual, acquire any right to such property maintainable against the state government. He does not pretend that he was misinformed as to the facts or the law, and his attorneys have distinctly disclaimed any right of action to recover damages for fraud or deceit. He stands upon his legal rights, to be measured by the terms of the covenant in the deed which he took from the defendant. Therefore the question in the case is whether failure of the defendant to defend the plaintiff's title as owner, against the acts and proceedings of the state government, constitutes a breach of covenant. By the statutes of Washington territory, owners of property extending to the shore of tide water were authorized to construct and maintain wharves and warehouses, in aid of commerce and navigation; and by common and general usage such owners were also permitted to have manufactur-

ing establishments, covering the space between the shore and water of sufficient depth for purposes of navigation, and no person other than the owner of the shore property could lawfully place any building or structure to interfere with the owner's rights, which were valuable and vendible. Such rights, however, were not adverse to the title which the state, as sovereign, has in the beds and shores of public navigable waters, because subject and subservient thereto. A shore owner could convey his title to such property with a covenant of warranty against lawful claims to the same which might be asserted by other persons, and become liable for a breach of such covenant. Probably these were the rights, and such the liability. which the defendant intended to convey and assume by her deed.

When an estate is conveyed by a deed describing it so that the parties must understand therefrom that the estate is subservient to a superior title, which cannot be extinguished nor acquired, the grantee takes its cum onere, and no right of action can accrue in his favor upon the covenants in the deed, unless in the covenant the grantor specifically agrees to stand liable for losses resulting from the assertion of such superior title. If not mentioned in the covenant, it will be presumed that the parties have made allowance for a known defect of title in fixing the purchase price, and the grantee, having only paid for what he gets, cannot afterwards be heard to complain that he has been damaged by a broken contract on the part of the grantor. This case is distinguishable, by its peculiar facts and circumstances, from all precedents to which my attention has been directed; but the above propositions are applicable here, and the same are, in a measure, supported by the following authorities: Co. Litt. (Butler & Hargrave's Notes; 1st Am. from 19th London Ed.) 384a; 2 Sugd. Vend. (8th Am. Ed.) 230; Montgomery v. Reed, 69 Me. 510–516; Holmes v. Danforth (Me.) 21 Atl. 845; Ake v. Mason, 101 Pa. St. 17; Kutz v. McCune, 22 Wis. 628; Barre v. Flemings (W. Va.) 1 S. E. 731. The words of the covenant seem to indicate an intention in the minds of the parties to restrict the covenant to correspond to the known situation of the premises, so that the liability of the vendor shall not be greater than would be reasonable for her to assume. The covenant is not to defend against all lawful claims, but against all persons lawfully claiming or to claim. Now, the commonwealth is not a person, and its claim of title is not mentioned specifically, nor is it within the general terms of the covenant, if the words are to be considered as having been selected to accurately express the intention of the parties. Rawle, Cov. (5th Ed., p. 171; McBride v. Board, 44 Fed. 17; In re Fox, 52 N. Y. 535; U. S. v. Fox, 94 U. S. 315–321. If the defendant, by her covenant, became broadly liable, as the plaintiff now insists, the contract was ill-advised and improvident on her part, because she at once parted with her possession, and became liable to return the purchase money with interest; and the liability was not contingent, but absolute. This should not free her from an obligation plainly expressed in her contract; but the unreasonableness of the contract, if construed as the plaintiff insists that it should be, may fairly be taken into account in drawing a conclusion as to the meaning of the words employed. There is no rule to justify a construction of the contract, whereby a sub-

stantial change is made in the meaning of words in common use, so as to create a liability for an amount greater than the defendant received as the price of the property. Demurrer sustained.

NORTH AMERICAN LOAN & TRUST CO. v. COLONIAL & U. S. MORTG. CO., Limited.

COLONIAL & U. S. MORTG. CO., Limited, v. NORTH AMERICAN LOAN & TRUST CO.

(Circuit Court of Appeals, Eighth Circuit. December 6, 1897.)

Nos. 911 and 915.

1. CORPORATION SUCCEEDING PARTNERSHIP—ASSUMPTION OF CONTRACTS.
A partnership, which was acting as agent for a foreign mortgage company in making farm loans, made an agreement with such company to collect such loans without charge in addition to the commissions received in making the loans, and to foreclose the mortgages taken, when necessary, without charge for attorney's fees. The partnership was succeeded in business by a corporation formed by the partners, who were its officers and directors, which assumed the balance due from the partnership to the mortgage company on account, and continued the business during the ensuing five years without further agreement, collecting money, and foreclosing numerous mortgages for which no charge was made in its monthly reports. *Held*, that the corporation must be held to have adopted the agreement made by the partnership with reference to such services. and could not, after such a lapse of time, assert a right to compensation therefor.

2. SAME—ESTOPPEL.
Where a partnership acting as agent for a mortgage company in making farm loans agreed to guaranty the title to all lands on which loans were made, a corporation organized to succeed to the business of the partnership, and of which the parties were the officers and directors, which procured legal services in perfecting such titles without any agreement by the mortgage company to pay therefor, will be held to have done so in discharge of the obligations of the partnership, no charge having been made therefor in current accounts rendered to the mortgage company, nor for several years thereafter.

3. REVIEW ON ERROR—RECORD—OPINION OF COURT.
A memorandum of opinion filed by the trial judge is no part of the record in the case, and assignments of error based thereon, and not supported by exceptions properly taken and preserved in the record, will not be considered by the circuit court of appeals. 76 Fed. 623, modified.

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

This suit was brought by the North American Loan & Trust Company, a corporation of South Dakota, hereafter termed the "Trust Company," against the Colonial & United States Mortgage Company, Limited, a corporation of Great Britain, hereafter termed the "Mortgage Company." Both parties have sued out writs of error to reverse the judgment of the circuit court, but the case is before this court for review on a single record. The Trust Company sued the Mortgage Company to recover the sum of $48,729.45 for services rendered for and in behalf of the Mortgage Company. It alleged, in substance, that the Mortgage Company was justly indebted to it to the amount last stated for commissions which it had earned in collecting moneys due to the Mortgage Company, and for services rendered by certain attorneys in foreclosing certain mortgages and in examining titles for the Mortgage Company; also for serv-

ices rendered in collecting rents for the latter company. In its answer to the complaint the Mortgage Company denied all liability to the Trust Company for any of the alleged items of indebtedness, and averred, in substance, that the Trust Company had received full compensation for all services in its behalf rendered. It further averred, in substance, that the Trust Company was the successor in interest of a co-partnership known as the Dakota Farm-Mortgage Company; that the Trust Company and its predecessor in interest, the Dakota Farm-Mortgage Company, had for some years acted as its agents in the state of South Dakota in loaning money on real-estate security, and in collecting the principal and interest due on such loans as they matured; that by the arrangement under which said loans and collections were made by said agents they received full compensation for their respective services by a commission which was paid by the borrowers, either when the loans were negotiated, or from time to time thereafter, as interest on the loans was paid; that by the terms of the agreement under which said agency for the loan of money was created, the agent negotiating the loan was required to guaranty the title to all lands on which loans were made; that by an agreement entered into with the co-partnership known as the Dakota Farm-Mortgage Company, which was binding on the Trust Company as its successor in interest, the latter undertook to foreclose mortgages belonging to the Mortgage Company free of cost to the latter company for attorneys' fees; and that any moneys which had been advanced and paid to attorneys by the Trust Company for foreclosing mortgages and for other services were laid out and expended for services rendered for and in behalf of the Trust Company, and were not a legal charge against the Mortgage Company. The Mortgage Company also filed a counterclaim against the Trust Company, wherein it charged that the Trust Company was justly indebted to it in the sum of $19,881.90 for moneys collected by the Trust Company as agent, which it had not paid over to its principal. A reply was filed by the Trust Company, and the case, by agreement, was sent to a referee for hearing and report upon all the issues.

In due time the referee made and filed his report, wherein he recommended the entry of a judgment against the Mortgage Company in the sum of $13,421.94. The amounts allowed by the referee in favor of the Trust Company were as follows:

For services rendered in the foreclosure of mortgages by advertisement	$ 7,075 00
For services rendered in the foreclosure of mortgages by action.	609 55
For services rendered in procuring deeds to lands from the mortgagors	1,315 00
For services rendered in perfecting titles to lands at the public land office	2,610 00
For commissions for collecting the principal and interest on loans	9,772 38
For services rendered in paying taxes on lands belonging to the Mortgage Company	1,366 00
For services rendered in leasing lands	120 00
Total	$22,867 93

The referee reported that the Trust Company had in its hands the sum of $9,445.99, which it had collected for and in behalf of the Mortgage Company, leaving a balance due to the Trust Company, as above stated, of $13,421.94.

To this report exceptions were filed, and on the hearing of the exceptions the circuit court refused to review any of the findings of fact made by the referee. It held, however, that the referee had erred in his conclusions of law, and it accordingly directed that a judgment be entered against the Trust Company, and in favor of the Mortgage Company, in the sum of $9,327.46. This amount appears to have been arrived at by the court by correcting a clerical error made by the referee, and by charging the Trust Company with the sum of $769.16, in addition to the sum of $9,445.99, found by the referee to be in its hands, and by deducting from the gross amount thus ascertained the sum of $887.70, which the trial court found the Trust Company was entitled to retain as a commission for the collection of interest due on certain loans that had been negotiated by the firm of Donahue & Payne.

John L. Pyle and A. B. Melville, for North American Loan & Trust Co.

L. B. French (A. H. Orvis, on the brief), for Colonial & U. S. Mortg. Co., Limited.

Before BREWER, Circuit Justice, and THAYER, Circuit Judge.

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

The circuit court held that, upon the state of facts found and reported by the referee, the plaintiff below, the North American Loan & Trust Company, was not entitled to charge the defendant below, the Colonial & United States Mortgage Company, Limited, for services rendered in foreclosing mortgages, and that it was not entitled to charge the Mortgage Company a commission for collecting the principal and interest of loans that had been negotiated for and in behalf of the defendant company by the Dakota Farm-Mortgage Company. The circuit court accordingly overruled two findings made by the referee, designated in his report as findings Nos. 45 and 73, wherein the referee had expressed a contrary view, upon the ground that said findings, when read in connection with other parts of the report, were essentially conclusions of law, and in no proper sense findings of fact. Error is assigned because of such action on the part of the trial court. We are not satisfied, however, that the exception is well taken. It appears from the report of the referee that a co-partnership known as the Dakota Farm-Mortgage Company, consisting of several persons, was organized in the year 1882, at Huron, S. D.; that it became the agent of the defendant Mortgage Company in the year 1883 for loaning money in the state of South Dakota, and for the collection of the principal and interest of such loans when due; that in May, 1885, one member of said firm as at first organized retired from the firm, and that two other persons were admitted to membership; that thereafter the reorganized firm continued the business of the old firm under the same firm name, and conducted the business in substantially the same way that it had previously been transacted, and assumed all the liabilities of the old firm; that the reorganized firm continued to act as agent for the Mortgage Company in loaning its money until November, 1887, at which latter date the members of the co-partnership organized a corporation under the name of the Dakota Farm-Mortgage Company, and that all the members of the former partnership became officers and directors of the corporation when the same was organized; that the corporation thus organized assumed the balance of account due to the defendant Mortgage Company, as shown by the last account which had been rendered by the co-partnership, and thereafter, for a period of about five years, made reports to the Mortgage Company, in which it made the same charges against the Mortgage Company for services rendered and expenses incurred in the business of the agency that had been previously made by its predecessor in interest, the Dakota Farm-Mortgage Company; that in January, 1891, the corporation changed its name, and was thereafter known as the

North American Loan & Trust Company; that from the date of its organization in November, 1887, until 1892, the corporation never made any claim in any of the numerous reports which it made to the Mortgage Company for services rendered in collecting the principal and interest of loans that had been negotiated by either of the co-partnerships which transacted business under the name of the Dakota Farm-Mortgage Company, but, during the whole of said period, contented itself with making the same charge for services and expenses which its predecessors in interest had made, and that its predecessors in interest had never made any charge for the species of service last aforesaid.

The referee further found that the Mortgage Company ceased to make new loans about the month of April, 1887; that in October of that year—a month or so before the plaintiff corporation was organized—it became known that many of the loans previously made, which were secured by mortgages, would not be paid, and that it would become necessary to foreclose numerous mortgages; that, in view of such fact, and in view of the fact that the co-partnership was about to become a corporation, L. H. Hole, who was then acting as general manager of the partnership, and who subsequently became president of the corporation, entered into an agreement with the Mortgage Company to foreclose its mortgages, either by suit or advertisement, as might be directed, and that in no case should the attorney's fee provided for in the respective mortgages become a lien or claim against the Mortgage Company, or its patrons, or against the lands foreclosed in the hands of the Mortgage Company, or its clients; that thereafter, between the years 1888 and 1891, many mortgages were foreclosed by attorneys who were employed by the plaintiff corporation, and that in the monthly statements of account thereafter rendered to the mortgage Company no charge was made for the services of attorneys in foreclosing mortgages either by suit or by advertisement.

It is suggested in behalf of the Trust Company that, inasmuch as the referee may not have reported all the facts which were disclosed by the evidence, the general statements contained in paragraphs 45 and 73 of the report, to the effect that the plaintiff did not agree "that there should be no charge for attorneys' fees," and that it did not agree to collect without charge the principal and interest of loans where the money was not reinvested, ought to be accepted as ultimate findings of fact, and for that reason not open to review, either by the trial court or an appellate court. In reply to this suggestion it is only deemed necessary to say that the referee reported the facts which were proven on the trial with unusual fullness and detail, and it seems evident, from an inspection of the report, that the statements contained in paragraphs 45 and 73 are merely conclusions drawn by the referee from the facts theretofore detailed in his report, the substance of which we have already stated. We are furthermore of opinion that the conclusions thus drawn by the referee were erroneous, and that they were not justified by the conduct, dealings, and agreements of the parties as they are disclosed by the report. For a period of about five years the plaintiff company kept

and observed the agreement which was made by its president, L. H. Hole, in October, 1887, relative to the foreclosure of mortgages, and in the meantime it made no charge for legal services rendered in connection with the foreclosure of mortgages, whether they were foreclosed by action or by advertisement. Moreover, L. H. Hole, the president of the plaintiff company, who made the agreement of October, 1887, was one of the attorneys who were employed by the plaintiff to prosecute the foreclosure suits. When the agreement last referred to was made, it was doubtless supposed that very much of the land which would be sold under the mortgages would eventually be redeemed from sale, and that the attorneys' fees earned in foreclosure proceedings would be paid by the mortgagors when the land was thus redeemed. But, be this as it may, it is clear, we think, that after such a long-continued course of dealing, in which the plaintiff company never asserted any right to attorneys' fees, it is now too late to interpose such a claim. In view of the plaintiff's conduct, the conclusion is inevitable that the plaintiff company adopted the agreement which was made by its president shortly prior to its incorporation, and that the services by it rendered in foreclosing mortgages were performed in compliance with the terms of that agreement, which precluded any charge for attorneys' fees.

The same considerations to which we have last adverted apply with equal force to the claim which the plaintiff prefers for compensation for services rendered in behalf of the Mortgage Company in collecting the principal and interest of loans. Neither of the co-partnerships known as the Dakota Farm-Mortgage Company, to whose business the plaintiff company succeeded, ever made a practice of charging for services of that nature; the arrangement being, according to the referee's findings, that the commission received from borrowers when loans were negotiated should be regarded as a sufficient compensation for all services that might be rendered thereafter in making collections of either the principal or interest of loans. The plaintiff company, for five years, pursued the same practice which had been followed by its predecessors, and during that period made collections of principal and interest to the amount of $181,371.31, without asserting any claim for compensation on account of such services. Most of the money so collected it has paid over to the Mortgage Company, and, as the Mortgage Company is itself an agent for the investment of moneys intrusted to it by its customers, it is fair to presume that the Mortgage Company has, in turn, paid the monev to the various persons to whom it belongs. Something was said in argument of the great injustice which would be done by requiring the plaintiff to collect loans without charge, after it was denied the right of reinvesting the moneys so collected; but a greater injustice would be done to the Mortgage Company by requiring it to pay a commission for such collections after it has paid the money to its customers and clients without any knowledge that a claim for such commissions would be interposed. In a variety of ways the collection of moneys belonging to the Mortgage Company may have been a benefit to the Trust Company, but, whether it did or did not derive a benefit from the collections in question,

it cannot be heard at this late day to make a claim for such services. It should have demanded compensation for the services while the same were being rendered, or at least have given notice of its intention to charge for the same. The fact that it made no such demand and gave no such notice, but continued to render the services without charge, fully justifies the conclusion that it considered itself in duty bound to make the collections in question for the purpose of discharging the obligations which rested upon its predecessors in interest, by whom the loans had been negotiated. We conclude, therefore, that the trial court acted properly in overruling the referee's conclusions, as expressed in paragraphs 45 and 73 of the report, and in rejecting the claims to which those paragraphs of the report relate.

Complaint is further made by the Trust Company of the disallowance by the trial court of the sum of $2,610, which was allowed by the referee as compensation for services rendered by the Trust Company in perfecting the titles to certain lands on which money of the Mortgage Company had been loaned by the co-partnership known as the Dakota Farm-Mortgage Company. With reference to this contention it may be said that the report of the referee discloses, in substance, that money of the Mortgage Company was loaned by the co-partnership under an agreement with the Mortgage Company which required the co-partnership to guaranty that the titles to all tracts of land on which money might be loaned were perfect in every respect, and that the mortgages taken thereon in favor of the Mortgage Company were a first charge on the land; that considerable money was in fact loaned by the co-partnership on land, the title whereof was not perfect, by reason of some defect in the proceedings under and by virtue of which the land had been entered at the public land office; that doubts arose as to the validity of such entries, and that the same were suspended by the officers of the land department; that it became necessary to procure evidence to free said entries from suspension and perfect the titles; and that L. H. Hole, who was styled president of the co-partnership known as the Dakota Farm-Mortgage Company, and who was afterwards president of the plaintiff company, was one of the attorneys for whose services in perfecting said land titles the charge now in question is preferred. It has already been stated that the referee's report further shows that all the other members of the co-partnership by which the loans on defective titles had been made afterwards became the officers and directors of the plaintiff company, and therefore had a direct interest in curing whatever defects existed in titles to land on which the co-partnership had loaned the money of the Mortgage Company. The referee does not report or find that the services rendered in perfecting the land titles were rendered in pursuance of an agreement that the Trust Company should be paid for such services, or that charges for such services were made in its monthly reports to the Mortgage Company contemporaneously with the rendition of such services, or that any claim was made on that account until the year 1892, when differences had arisen between the two companies, although the services in question were rendered during the years 1888, 1889, and 1890.

Under these circumstances, we are of opinion that the law will not imply a promise on the part of the Mortgage Company to pay for the services rendered in perfecting the land titles, but will rather infer that such services were rendered by the corporation in discharge of the obligations of the co-partnership. We cannot say, therefore, that an error was committed by the trial court in disallowing this claim, even on the state of facts reported by the referee.

This disposes of the principal errors which have been discussed, but two others remain to be noticed. The referee found that the plaintiff company had collected for the Mortgage Company the sum of $67,-896.99, being the principal of loans that were negotiated by the firm of Donahue & Payne, and that a commission of 3 per cent. thereon, or the sum of $2,036.90, was a reasonable compensation for the services in question. The circuit court did not disturb this finding of the referee. Moreover, counsel for the Mortgage Company concede the Trust Company's right to compensation for collecting the Donahue & Payne loans. It seems, however, that in entering judgment on the referee's report the circuit court disallowed the sum of $9,772.38, which the referee had allowed as compensation for the collection of the principal and interest of all loans, including the Donahue & Payne loans, and that by so doing it deprived the plaintiff company of its commission on the latter class of loans, amounting to $2,036.90. Counsel for the Mortgage Company have suggested that these commissions were allowed to the plaintiff by the referee in making up his report on the Mortgage Company's counterclaim, and in stating the balance of money in the Trust Company's hands which it had not paid over to the Mortgage Company. This suggestion, however, is not confirmed by a careful examination of the referee's report. In view of the manner in which the account was stated by the referee in his report, it seems obvious that the commission due to the Trust Company for collecting the Donahue & Payne loans was not deducted in stating the balance of collections found to be in the Trust Company's hands.

Again, the referee reported that the plaintiff was entitled to compensation in the sum of $1,366 for paying taxes on land belonging to the Mortgage Company, or for buying in such lands at tax sales; also that the Trust Company was entitled to compensation in the sum of $120 for leasing lands belonging to the Mortgage Company, and for collecting the rents which accrued under such leases. These findings by the referee were not disturbed, and in pursuance thereof it seems clear that the plaintiff company should have received credit for both of the last-mentioned sums, aggregating $1,486. The result is that the plaintiff should have received credit for items aggregating $3,-522.90, which were disallowed by the circuit court, and the judgment rendered in favor of the Mortgage Company is, to that extent, excessive. It is not necessary, however, to reverse the judgment of the circuit court because of this error, but, following a practice which was approved by the supreme court in Railroad Co. v. Estill, 147 U. S. 591, 622, 13 Sup. Ct. 444, and by this court in Commissioners v. Sherwood, 27 U. S. App. 458, 468, 11 C. C. A. 507, and 64 Fed. 103, the error may be cured by affirming the judgment for the correct amount due to the Mortgage Company, and disaffirming it as to the residue.

Concerning the writ of error which was sued out by the Colonial & United States Mortgage Company, it will suffice to say that the assignment of errors accompanying that writ is addressed to certain views which were expressed by the trial judge in a short "memorandum of opinion" filed in the circuit court, which has been certified to this court in connection with the record. The opinion in question forms no part of the record, however, and assignments of error based thereon which are not supported by exceptions properly taken at the trial and preserved in the record cannot be noticed by this court. We find nothing in the record proper which would enable us to consider the errors which have been assigned by the Colonial & United States Mortgage Company, the defendant below, wherefore the writ of error which was sued out in its behalf in case No. 915 must be dismissed. It is accordingly ordered that the judgment of the circuit court be affirmed in the sum of $5,804.56, with interest, and that the residue of the judgment rendered by the circuit court in excess of that amount be disaffirmed, and that the costs incurred in this court be equally divided between the parties.

UNION MUT. LIFE INS. CO. v. THOMAS.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 363.

1. LIBEL AND SLANDER—LIBELOUS PLEADING—PRIVILEGE.
   In a suit on a life insurance policy, the defense was that the insured was still living. The company alleged a conspiracy on the part of the plaintiff and her husband, the insured, to defraud the company, and that plaintiff and her attorneys "have no knowledge or information whatever of the death of [insured], but have alleged that [insured] is dead, for the sole purpose of carrying out the agreement, conspiracy, and fraud hereinbefore set out." *Held* libelous and not privileged.
2. SAME—PRIVILEGED MATTER IN PLEADING—RELATION TO ISSUE.
   Matter inserted in a pleading, to be privileged, must be legitimately related to the issues, or so pertinent to the subject of the controversy that it may become the subject of inquiry on the trial.
3. SAME—LIBELOUS PLEADING—PROOF OF MALICE.
   Where a charge in a pleading is libelous, no proof of malice is necessary aside from the intrinsic evidence afforded by the libelous charge itself, and the circumstances under which it was uttered.
4. PLEA FILED BY ATTORNEY—KNOWLEDGE OF CLIENT—PRESUMPTION.
   An answer prepared and filed by the duly-authorized attorney of a corporation in an action pending against it will be presumed, until the contrary is shown, to have been the answer of the corporation, and to contain matter authorized by it as its defense.

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

Crowley & Grosscup, R. S. Jones, and B. A. Crowl, for plaintiff in error.

Harry L. Smith, George H. Walker, and Jesse Thomas, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error, the Union Mutual Life Insurance Company, was the defendant in an action for libel. Its principal assignment of error on the writ of review is that the circuit court refused to instruct the jury to return a verdict for the defendant. The facts, so far as they are pertinent to the present inquiry, are these: In the year 1894 one Johanna C. Martin brought an action in the state of Washington, against the insurance company, to recover upon a policy of insurance issued by the company upon the life of her husband. The company made answer, denying the death of the insured, and alleging as an affirmative defense that the plaintiff in that action and her attorneys had entered into an agreement and conspiracy to defraud the defendant, and that said plaintiff and her attorneys "have no knowledge or information whatsoever of the death of said Jonas Martin, but have alleged that the said Jonas Martin is dead for the sole purpose of carrying out the agreement, conspiracy, and fraud hereinbefore set out." Jesse Thomas, one of the attorneys for the plaintiff in said action upon said insurance policy, thereupon brought an action against the insurance company for damages, alleging that the matter set forth in said affirmative defense was libelous. The insurance company, in its answer to the complaint, relied upon the defenses (1) that the matter so alleged in its answer to the action upon the contract of insurance was privileged matter, and was not actionable; and (2) that the same was inserted in its answer by its attorney without its knowledge or consent. Upon the same grounds, it is now contended that the circuit court should have directed the jury to return a verdict for the defendant.

Contrary to the rule of the English courts, the American courts have established the doctrine that matter inserted in a pleading in court is privileged only when connected with the subject-matter of the litigation. It is perhaps not necessary that it be in all cases material to the issues presented by the pleadings, but it must be legitimately related thereto, or so pertinent to the subject of the controversy that it may, in the course of the trial, become the subject of inquiry. White v. Nichols, 3 How. 266; Hoar v. Wood, 3 Metc. (Mass.) 193; McLaughlin v. Cowley, 127 Mass. 316; Gilbert v. People, 1 Denio, 41; Sherwood v. Powell, 61 Minn. 479, 63 N. W. 1103; Maulsby v. Reifsnider, 69 Md. 143, 14 Atl. 505; Moore v. Bank, 123 N. Y. 420, 25 N. E. 1048. Tested by this rule, the matter alleged by the insurance company in its answer to the suit of Johanna Martin was not privileged. The issue in the action was whether or not the insurance company was liable upon the policy. Its defense was that the insured was still living. Instead of relying upon that defense, it attempted to asperse the character of the attorneys who were conducting the suit, by charging them with libelous matter, which, if true, added in no way to the force of its allegation that the event upon which alone its liability was to attach had not occurred, to wit, the death of the insured. The matter so alleged was not pertinent to the issues in the case, and upon motion it was struck out of the answer by the court. In the case of Moore v. Bank, supra, a bank sued its cashier upon his bond for misappropriation of funds,

and alleged that the funds had been misappropriated "by collusion with the teller." It was held that the allusion to the teller was not a privileged communication, but was prima facie libelous. In Hyde v. McCabe (Mo.) 13 S. W. 875, where it had been alleged, in an affidavit on a motion to require the plaintiff to give security for costs, that the affiant believed the plaintiff to be insolvent, and thereupon the plaintiff's attorney filed a counter affidavit, denying the insolvency, and alleging that the affidavit in support of the motion was "a corrupt, voluntary, and willful case of false swearing," it was held that such averment in the counter affidavit was not sufficiently relevant to the issue to be privileged, and that whether or not affiant made such charge maliciously, without believing it to be relevant, and without reasonable and probable grounds for such belief, was a question of fact, which should have been submitted for trial.

It is contended, also, that the court should have instructed the jury to return a verdict for the defendant, upon the ground that there was no express evidence of malice. The burden of proving actual malice, it is true, rested upon the plaintiff; but he was not necessarily required to introduce, aside from the intrinsic evidence afforded by the libelous charge itself and the circumstances under which it was uttered, extraneous testimony concerning the state of mind or feeling of the members of the corporation towards him, although such evidence would have been admissible. Elam v. Badger, 23 Ill. 445; Garrett v. Dickerson, 19 Md. 418, 450; Weaver v. Hendrick, 30 Mo. 502; Briggs v. Garrett, 111 Pa. St. 404, 2 Atl. 513. The court correctly instructed the jury as follows:

"In a matter of this kind, however, malice may be presumed from the intentional statement of a fact which is not true, and which, at the time the statement was made, was not supported by any evidence or circumstances; in other words, a statement made without probable cause, not believing it to be true. You will take the testimony whether this charge was made without probable cause, and, if it was knowingly made,—willfully made,—you have a right to infer that it was made maliciously."

It is urged, further, that the evidence proved (and that without contradiction) that the officers and agents of the insurance company had no knowledge of the contents of the answer which the company's attorneys had filed in the answer to recover upon the insurance policy. The corporation had its principal office in the state of Maine, and its attorney resided in the state of Washington, where the action was brought. The answer was prepared and sworn to by the attorney. The only evidence afforded by the record concerning the knowledge which the company had of the contents of the answer is that of the attorney who prepared it. He stated that none of the company nor any of its authorized agents knew anything of the contents of the answer before the decision of the motion to strike the same from the files. As opposed to this statement, it was proven that, after the present action for libel was commenced, the attorney wrote to counsel for the plaintiff as follows:

"The information upon which the answer in the suit of Martin v. The Insurance Co. was drawn came from the home office, and it will be necessary to carry on some correspondence, which cannot be done short of sixty days."

It was shown, moreover, that, prior to the preparation of said answer to the action on the insurance policy, the corporation had sent to Seattle a special agent to investigate into the Martin case, and that he had a conversation with the counsel for Mrs. Martin concerning the alleged proofs of the death of the insured. The answer prepared and filed, as it was, by the duly-authorized counsel of the insurance company, in an action pending against it, must be presumed, until the contrary is shown, to have been the answer of the insurance company, and to contain matter duly authorized by it as its defense. We find no error in the action of the trial court in submitting to the jury, as it did, the question whether or not that presumption, so raised by the law, was overcome by the proofs. It is probable that the jury took the view that, notwithstanding the testimony of the attorney for the insurance company to the effect that the company had no knowledge of the contents of the answer after it was prepared, it was nevertheless true, as stated in the attorney's letter, that the contents were furnished him by the insurance company, and that he was instructed to insert in the answer the very defenses which it contained. It is urged by the plaintiff in error that the letter was erroneously admitted in evidence; that it was a letter written from the attorney of the plaintiff in error to counsel for the opposing party in the action, and for the purpose of suggesting a compromise; and that, so far as it contained evidence that the insurance company furnished the contents of the answer, it was hearsay. But the trial court admitted it in evidence only so far as it contained matter that tended to impeach the testimony of the witness, and for that purpose it was clearly admissible.

It is assigned as error that the court permitted the plaintiff to testify to certain statements made to him by one Beebe, who claimed to be an agent for the insurance company, in a conversation had before the commencement of the Martin suit. It is urged that there was no competent evidence that Beebe was such agent. We find nothing in the statements made by Beebe in the conversation as detailed which would prejudice the company's case before the jury. But it is unnecessary to rest our decision of this assignment of error upon that ground. In our judgment, the record contains sufficient evidence that Beebe was, as he represented himself to be, the agent of the insurance company. The deposition of the secretary of the company states explicitly that in 1894 Beebe was sent by the company to Tacoma, to investigate the Martin case; and the evidence of the manager of the company is that the relation of Beebe to the company in the year 1895 was that of "executive special," or, in other words, that he was a special agent to look after all cases where there are losses, and make report to the company. The judgment will be affirmed, with costs to the defendant in error.

FISCHER v. LONDON & L. FIRE INS. CO.

(Circuit Court, D. Kentucky. January 20, 1897.)

FIRE INSURANCE—CONDITIONS—ESTOPPEL—WAIVER.

A policy of fire insurance issued by defendant to plaintiff upon merchandise stipulated that the policy, unless otherwise provided by agreement indorsed thereon, should be void "if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed, on the above-described premises, * * * gasoline, * * *" and that no representative of the company should have power to waive any provision except, in certain cases, by indorsement. In an action on the policy it was alleged in the reply that while plaintiff, a dealer in stoves, had been in the habit, according to general custom, of bringing a small quantity of gasoline to his store from time to time to illustrate the operation of gasoline stoves, this practice and custom were well known to defendant's agent who took the application and issued the policy, and also, both before and after its issue, to the local board of underwriters of which defendant or its agents were members. *Held* that, under the terms of the policy, these facts could not operate against the defendant either as estoppel or waiver.

This was a suit by John Fischer against the London & Lancashire Fire Insurance Company to recover for the loss of a stock of goods.

John Barret and Mason Barret, for plaintiff.

A. E. Willson and Morris B. Gifford, for defendant.

BARR, District Judge. This is a suit on a policy of insurance issued by the defendant to the complainant on a stock of goods located in the city of Louisville, for one year, from the 7th October, 1895, to the 7th October, 1896. A total loss is alleged of the stock of goods, and the suit is for the recovery of $3,000, the entire insurance. The policy covered the following property:

"On stock of merchandise, principally hardware and cutlery, stoves and tinware, and materials used in his business, contained in frame metal-roof building occupied by assured as dealer in above-described goods, with privilege to manufacture tinware by hand power, and upper floors occupied and known as 'Highland Hall,' and situate No. 1,627 Baxter avenue, Louisville, Ky."

And among other provisions in the policy is this:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed, on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding twenty-five pounds in quantity, naphtha, nitroglycerin, or other explosives, phosphorus, or petroleum, or any of its products, of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale, according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight, at a distance not less than ten feet from artificial light)."

And another provision of the policy is this:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of

this policy, except such as, by the terms of this policy, may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

In the original petition the plaintiff has alleged, among other things:

"That no illuminating gas or vapor was generated in the said described building or adjacent thereto for use therein; that there was not kept, used, nor allowed, on said premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding twenty-five pounds in quantity, naphtha, nitroglycerin, or phosphorus, or petroleum, or any of its products of greater inflammability than kerosene oil of the U. S. standard."

The defendant, in its answer, denied "that there was not kept, used, or allowed, on the said described premises, gasoline"; and, in an amended answer, defendant says:

"In addition to keeping, using, and allowing gasoline on said premises, did keep, use, and allow on said premises, in close and hazardous proximity to said gasoline, large quantities of turpentine and kerosene oil, whereby the hazard under said policy was increased, and the said property was greatly endangered by fire; and it says that it was not provided by agreement indorsed on the said policy, or added to it, that there should or could be kept, used, or allowed turpentine or kerosene oil, or either of them, in close proximity to gasoline, nor did the defendant in any manner consent or assent thereto; nor had this defendant notice or knowledge or information that gasoline was kept, used, or allowed on said premises, or that turpentine was kept, used, or allowed, or kerosine oil was kept close by in said hazardous position to the gasoline on said premises."

In the reply, the plaintiff denied—

"That it was expressly stipulated in said policy that the entire policy, unless otherwise provided, indorsed on it, or added to it, should be void if the insured should permit to be kept, used, or allowed, on said premises, gasoline; and denies that this plaintiff did, without the knowledge or consent of the defendant or its agent or agents, or at all, keep, use, or allow, or permit to be kept, used, or allowed, on said premises, large quantities of gasoline, in violation of any provision or stipulation or condition of said policy of insurance sued on, or at all."

By amended reply, the plaintiff alleges as follows:

"Denies that he ever kept, used, or allowed gasoline in the premises insured in the policy herein sued on, except in very small quantities, which was used as follows, namely: Plaintiff, like most other dealers in stoves and tinware, kept for sale in his said store stoves using gasoline as fuel; and it is customary, usual and necessary, as well known to defendant and its agents at the time, for dealers in stoves and tinware to keep and sell stoves using gasoline as a fuel in their stock, and to explain and exhibit the operation of such stoves by a stove consuming gasoline used for that purpose, and for that purpose to bring in from the place where a small quantity of gasoline was kept, which was not in or on the premises insured, a small quantity of gasoline for that purpose; and that N. H. Rehkopf, the general agent of defendant, who issued the policy herein sued on to plaintiff, and who took the application therefor, came to said store to take the application, was a customary and frequent visitor to said store, before the said policy was issued to plaintiff, and personally knew of the custom of plaintiff and other dealers in stoves and tinware, dealing in such stoves, using gasoline. and exhibiting and explaining such stoves, by the use of a small quantity of gasoline, to purchasers. Plaintiff, for further reply, states that the defendant, the London & Lancashire Fire Insurance Company, of Liverpool, England, is a member, or its agents are members, of the Board of Underwriters of Louis-

ville, Kentucky, a fire insurance association formed for the purpose of supervising fire insurance rates, risks, etc.; and that said Board of Underwriters and its agents were, in that regard and for that purpose, the agents of the defendant; and that said Board of Underwriters and agents employed by it for the defendant and other companies associated in said Board of Underwriters did, both before and after the issue of the policy herein sued on by defendant to plaintiff, inspect and examine the property of plaintiff insured in the policy herein sued on, and the premises on which the small quantity of gasoline aforesaid was kept at times; and that the defendant did, through said agents and inspectors of the Board of Underwriters, know and was well acquainted with the custom of plaintiff in keeping such stoves consuming gasoline in stock for sale, and exhibiting the same, and in keeping small quantities of gasoline in a shed not part of the insured premises, at a great distance, to wit, fifty feet, therefrom; and the plaintiff denies that he ever kept, used, or allowed, on the premises mentioned in the policy of insurance herein sued on, large quantities or any quantity of gasoline, except the temporary use of the same, according to the custom of all dealers in stoves consuming gasoline, as hereinbefore expressly set forth, and denies that he kept or allowed on said premises kerosene oil excepting as allowed by the policy."

This amended reply is demurred to, and that is the question now submitted. It will be observed from this statement that the defense made is a violation of the provision in regard to the use of gasoline and other oils that are prohibited, and that the reply seeks to set up an estoppel by knowledge and conduct against this plea. There is no allegation here that the use of gasoline was the cause of the fire, or in any way brought it about; so that the simple question presented is whether the knowledge of the general agent of the fact of the assured using gasoline in the manner set out, and the further fact that the Board of Underwriters of Louisville, of which the defendant company was a member, had knowledge of the fact that the assured used, on the premises, gasoline as described, both before and after the issuing of the policy, is sufficient to make an estoppel or a waiver.

We think the principles announced by the supreme court in the case of Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 462, 14 Sup. Ct. 397, are decisive of this demurrer. In that case the terms and conditions of the policy were that:

"This policy shall be void and of no effect if, without notice to the company and permission therefor indorsed hereon, * * * the premises shall be used or occupied so as to increase the risk, * * * or if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling houses, where not exceeding five days in one year are allowed for repairs."

It appeared that the plaintiff, without the written consent of the defendant, and without its knowledge, employed carpenters and brick masons, and reconstructed and enlarged the vault, and also the foundations were reconstructed and enlarged to correspond with the enlargement of the vault. The time in which the mechanics were employed was five or six weeks, but that was before the fire, and the fire was not caused by anything that was done by the mechanics or in the reconstruction that was made, and this was claimed to have avoided the policy under its terms. The supreme court decided that the policy was avoided, and in the opinion (page 462, 151 U. S., and page 381, 14 Sup. Ct.), among other things, said:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the par-

ties. For a comparatively small consideration, the insurer undertakes to guaranty the insured against loss or damage, upon the terms or 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."

See, also, Lozano v. Insurance Co., 78 Fed. 278; Insurance Co. v. Gunther, 116 U. S. 113, 6 Sup. Ct. 306.

The knowledge of Rehkopf, the general agent, of the custom of merchants in the matter of using and having on the premises gasoline, and the fact that he knew at the time of issuing and delivering the policy that the plaintiff had been in the habit of using gasoline in that way, cannot have any effect either as an estoppel or a waiver, since the terms of the policy are that, "notwithstanding any usage or custom of trade or manufacture," they should not use gasoline, etc.; nor does the allegation of the reply that the Board of Underwriters of Louisville, Ky., had knowledge, both before and after the issuing and delivering of the policy, of this custom or habit of the plaintiff, have the effect either of an estoppel or to waive this provision of the policy, since the language of the policy in express terms required any modification or change in the terms of the policy to be in writing, even though the Board of Underwriters of Louisville be considered either the special or general agent of the defendant company. Its knowledge of what the assured was doing—of the general custom—could not have the effect of either a waiver or of an estoppel.

In West End Hotel & Land Co. v. American Fire Ins. Co. of New York, reported in 74 Fed. 117, 118, the court say:

"The counsel of plaintiff further insisted that as the defendant, under the terms of the policy, had the right to cancel the contract for any unauthorized or unapproved act on the part of the plaintiff, honesty and fair dealing required the defendant to promptly cancel the policy, and return part of the premium to the extent of the relieved risk; and, as this was not done, the plaintiff has reasonable grounds for supposing that defendant acquiesced in the introduction of gasoline fixtures within the laundry building; and plaintiff was thus induced to believe that no further effort was necessary to ratify the insurance in the uncanceled policy, or to obtain other insurance on the premises. As soon as gasoline was kept and used upon the insured premises without the consent or approval of the defendant, the policy was avoided by the express terms of the contract of the parties; and the defendant was under no legal or moral obligation to formally cancel the policy, and return part of the premium. The risk had for a time been incurred, and the policy had been avoided, by the voluntary and illegal act of plaintiff. The defendant did nothing to induce the commission of such illegal act, but, on the contrary, had expressly provided how such act of forfeiture could have been prevented. Upon the most liberal construction and application of the principles of honesty, justice, and fair dealing,

I cannot conceive of any phase of this case that would entitle the plaintiff, which paid $50 as premium for an ordinary risk, to recover $2,500 for the loss of property occasioned by the voluntary breach of its plain and express promissory warranty, without any fault on the part of the defendant, and without the payment of premium for an extrahazardous risk."

We conclude, therefore, that the allegations of the reply as amended do not make out a case of waiving this obligation of the policy, nor do they estop the defendant from pleading it. The demurrer should be sustained, and it is so ordered.

WESTERN ASSUR. CO. OF TORONTO v. J. H. MOHLMAN CO.

(Circuit Court of Appeals, Second Circuit. October 11, 1897.)

No. 142.

1. INSURANCE—CONDITION IN POLICY—BURDEN OF PROOF.
   A provision in a policy of fire insurance that, "if a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease," is a condition subsequent, and in an action on such policy to recover for destruction by fire of the goods thereby insured, where the building in which they were contained fell, the burden is on the insurer to prove as a defense that it fell before the fire.

2. SAME—CONSTRUCTION OF POLICY.
   A provision in the descriptive clause of a fire policy on goods that they are insured "while contained in brick building," etc., does not cast on the insured the burden of proving, in an action to recover for loss of the goods by fire, that the building was standing at the time of the fire, where the policy also contained a separate clause expressly covering the case of a building falling before the fire.

3. SAME—ACTION ON POLICY—PLEADING.
   An allegation in a complaint on a fire policy that the "fire did not happen by * * * reason of any of the causes excepted by the terms of the policy," is unnecessary, and does not change the burden of proof.

4. SAME—INSTRUCTION.
   The refusal of an instruction that the burden was upon the plaintiff on the whole case to prove that the property insured was destroyed by fire was not error, where the evidence showed such fact without conflict, and the only controverted question was as to whether the policy had ceased to be in force before the fire.

5. EVIDENCE—TESTIMONY OF EXPERT—READING FROM SCIENTIFIC AUTHORITIES.
   Upon an issue as to whether a building in which insured property was contained fell before a fire, or as a result of the fire, a civil engineer, testifying as an expert, may read in support of his opinion excerpts from engineering books, recognized as standard authorities, giving the tabulated results of tests made to determine the strength and resisting power of timbers of the kind used in the construction of the building.

6. SAME—EXAMINATION OF EXPERT—HYPOTHETICAL QUESTION.
   A question calling for the opinion of an expert witness as to how long a fire would burn in a specified building before weakening certain posts, which omitted any statement of the part of the building in which the fire originated, was properly excluded.

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

This was an action by the J. H. Mohlman Company against the Western Assurance Company of Toronto on a policy of fire insurance. There was judgment for plaintiff, and defendant brings error.

This case comes here on a writ of error to review a judgment of the circuit court, Southern district of New York, in favor of defendant in error, who was plaintiff below. The action was brought to recover loss under a policy of fire insurance issued by the plaintiff in error, who was defendant below. The relevant parts of the policy are as follows:

"The Western Assurance Company, in consideration of $65 premium, does insure for the term of one year from Nov. 12, 1894, at noon, to Nov. 12, 1895, at noon, against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding $10,000 on stock [here follows the usual percentage co-insurance clause], J. H. Mohlman & Co., as now or hereafter constituted, $10,000 on stock of groceries and other merchandise, not hazardous, hazardous, and extrahazardous, including all material and supplies, the property of the assured, or held in trust or on commission, etc., in the event of loss or damage by fire, all while contained in the brick building situate Nos. 339 Greenwich and 19 Jay St., N. Y. City, occupied solely by the assured. Privileged to use kerosene oil or electricity, etc. This company shall not be liable beyond the actual cash value of the property. [Here follows the usual clause as to appraisement and abandonment.] This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of fraud or any false swearing, etc. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock; or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within-described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage; or if, with the knowledge of insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process, or judgment, or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerin or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights, and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight, or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days. This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or

lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon. If a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease. This company shall not be liable for loss to accounts, bills, currency," etc.

By a rider attached to the policy on or about April 22, 1895, the insurance was transferred to cover similar described property while contained in brick building Nos. 38-40 North Moore street and 156 Franklin street. On April 30, 1895, the property insured was destroyed by fire. At or about the time of the fire the building fell, and the issue of fact in the case was whether the fall preceded the fire, or was itself the result of the fire. Upon this issue the testimony was conflicting, and the verdict of the jury was adverse to the insurance company. The questions presented by the writ of error are solely legal ones, consisting of alleged errors in the charge of the court as given to the jury, in the court's refusals to charge as requested, and in its admission of and refusal to admit evidence.

Michael H. Cardozo and Edgar J. Nathan, for plaintiff in error.
Treadwell Cleveland, for defendant in error.

Before PECKHAM, Circuit Justice, and LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The trial judge charged the jury that the burden of proof rested upon the defendant (the insurance company) to show by a preponderance of evidence that "the fall preceded the fire"; that "this building did not fall as the result of fire." Exceptions to the charge and to refusals to charge the converse of this proposition sufficiently present the question of correctness of this ruling. It will not be necessary to repeat the text either of the charge or of the requests. The trial judge construed the clause referring to a fall of the building as a proviso or condition subsequent defeating any claim of the insured. It it be such, no one here disputes the proposition that the burden of proving the happening of the subsequent condition would rest upon the insurer. The defendant, however, contends that the clause is an exception to the general liability assumed by the insurance company, and that, therefore, it was for the insured to show that the loss did not come within the terms of the exception. The general rule is well expressed by Earl, J., in Slocovich v. Insurance Co., 108 N. Y. 56, 14 N. E. 802:

"Where there is an insurance against a loss by fire, and it is proved or admitted that the property insured has been destroyed by fire, the loss is brought literally and exactly within the terms of the policy. If, in such a case, the insurance company claims to be exempt from paying the sum insured because there has been a breach of some condition contained in the policy, or the violation of some obligation or duty imposed upon the insured by the law or contract, the burden rests upon it to establish the facts which it thus relies upon as a defense to the claim under the policy."

The diligence of counsel has presented a long array of authorities bearing upon this assignment of error. The question has been expressly decided in accordance with defendant's contention in Pelican Ins. Co. v. Troy Co-op. Ass'n, 77 Tex. 225, 13 S. W. 980, and Insurance Co. v. Boren, 83 Tex. 97, 18 S. W. 484, and in accordance with plaintiff's contention in Insurance Co. v. Bamberger (Ky.) 11 S. W.

595, in Blasingame v. Insurance Co., 75 Cal. 633, 17 Pac. 925, and in Insurance Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140.

In the Texas case the policy contained the following provisions:

"(1) This company shall not be liable for any loss or damage by fire caused by means of hurricane. (2) If the building shall fall, except as the result of fire, all insurance of this company on it or its contents shall immediately cease and determine."

The fire occurred during or immediately following a severe hurricane, which at least partially blew the house down, and there was evidence tending strongly to show that the fire had its origin in the breaking of a lamp by falling timbers. The court held:

"The provisions of the policy above noticed are exceptions to the general liability assumed by appellant, and the petition should have averred that the fire did not occur from one of the excepted causes. This was necessary to show a cause of action, for the company did not insure against loss resulting from a fire caused by a hurricane, nor were its policies binding at all for a loss caused by fire occurring after the fall of the house, unless the fall was caused by fire."

In the Kentucky case the policy contained this clause:

"This company shall not be liable under this policy for loss and damage if the building herein described, or any part thereof, fall, except as the result of fire."

The jury were instructed that defendant was not liable for any loss or damage, if the building fell, unless the fall was the result of fire, and that:

"The burden is upon the defendant to show by the evidence that the building, or such part thereof as fell, * * * did not fall as the result of the fire; and, unless the jury believe from the evidence that the said building, or such part thereof as fell, did not fall as the result of the fire, they should find for the plaintiffs."

These instructions were approved by the appellate court.

In the California case the policy provided that the company should not be liable for "loss caused by the fall of any building insured, or containing property insured, by this policy, or by fire ensuing therefrom." The complainant alleged that all the property was totally destroyed by fire, but it was not alleged that the loss was not caused by any of the excepted causes. The complaint was demurred to on the ground that it contained no such allegation, and the demurrer was overruled. On appeal the supreme court sustained the judgment overruling the demurrer, saying:

"One seeking to recover on an insurance policy must aver the loss, and show that it occurred by reason of a peril insured against; but he need not aver the performance of conditions subsequent, nor negative prohibited acts, nor deny that the loss occurred from the excepted risks."

In the Tennessee case the policy provided that:

"If the building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

The defendant demurred on the ground that there was no averment in the declaration that the building insured, or any part thereof,

did not fall except as the result of fire. The demurrer was overruled, and the supreme court, affirming such decision, says:

"It is not necessary that it should have averred the performance or nonperformance of conditions subsequent, nor to have negatived prohibited acts or excepted risks."

The burden of proof has been held to rest upon the defendant under other similar clauses of fire policies; i. e. clauses restricting in some way the liability of the insurer. So, where it was provided that the policy should be void in the event of the insured effecting additional insurance (Clark v. Insurance Co., 9 Gray, 148; Russell v. Insurance Co., 84 Iowa, 93, 50 N. W. 546); also where it is provided that the policy should be void if the property was allowed to remain vacant beyond a limited time (Bittinger v. Insurance Co., 24 Fed. 549); where there was a provision that the policy was executed by the agent and delivered to the insured upon the condition that it should not become effective until it was approved by the home office (Young v. Insurance Co., 59 Conn. 41, 22 Atl. 32); and where it was provided that the company should not be liable to make good any loss or damage by fire which might happen or take place by means of any invasion, insurrection, etc. (Insurance Co. v. Reynolds, 32 Grat. 613). A clause to the effect that the insurer should not be answerable for loss by fire which should happen by any explosion is referred to in two cases cited by defendant (Hayward v. Insurance Co., 7 Bosw. 385, 2 Abb. Dec. 349, and St. John v. Insurance Co., 1 Duer, 371, 11 N. Y. 516) as "an exception to the general language of the previous clause, by which they promise to make good such loss or damage as shall be occasioned by fire." But the point here raised was not before the court. It was conceded in both cases that the fire was the result of an explosion, and the word "exception" is used in the opinions, evidently, not in its technical sense, as contrasted with "conditions," but as a convenient way of expressing the fact that the insured under such a policy would not be liable for all losses by fire. This seems clearly indicated by the sentence from 11 N. Y. 518:

"Hence a loss occasioned by invasion, insurrection, riot, and the like has usually been found excepted in such policies; and although in this, and perhaps in policies generally, the exception in this respect is in terms of losses by fire, the clause would be equally definite and intelligible if those words were omitted in the clause stating the exception."

The academic distinction between an exception and a proviso is thus stated in Bouvier's Law Dictionary:

"An exception exempts absolutely from the operation of an engagement or an enactment; a proviso defeats their operation conditionally. An exception takes out of an engagement or enactment something which would otherwise be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse."

It may not be always easy to apply this distinction in practice (witness the conflicting decisions supra), but no especial help to the solution of the problem is to be derived from cases holding, as do some of those cited on the brief, that, when the insurance is against "perils of the sea," the burden is upon the insured to show

that such perils caused the loss; or that, where insurers engage to be responsible for partial loss only if it amounts to 5 per cent., or the ship be stranded, the insurer must show loss to the specified percentage, or that the ship was stranded; nor that, under bills of lading providing that the carrier should not be liable for loss by fire while in transit, plaintiff, if he seeks to recover for a fire resulting from the carrier's negligence, must show that negligence affirmatively; nor that under a policy insuring against injuries effected through external, violent, and accidental means the burden is upon the plaintiff to show from all the evidence that the death was caused by external, violent, and accidental means. Baker v. Insurance Co., 12 Gray, 603; Paddock v. Insurance Co., 104 Mass. 521; Insurance Co. v. Shaw, 2 Dill. 14, Fed. Cas. No. 14,366; The Neptune, 6 Blatchf. 193, Fed. Cas. No. 10,118; Whitworth v. Railway Co., 87 N. Y. 413; Kaiser v. Latimer, 9 App. Div. 37, 41 N. Y. Supp. 94; Claflin v. Meyer, 75 N. Y. 260; Lamb v. Railroad Co., 46 N. Y. 271; Insurance Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360.

A pertinent case cited on the brief of plaintiff in error is Sohier v. Insurance Co., 11 Allen, 336. The policy in that case insured Sohier, in the language of the opinion—

"Against loss or damage by fire to the amount of *$2,500 on his brick and slate building known as the 'National Theater,' situate on Portland street, Boston, Mass. This policy not to cover any loss or damage by fire which may originate in the theater proper.*"

Some provisos against liability for loss by fire which happens by invasion, riot, and the like are in a later part of the policy. The clause in italics is written in the policy, the rest of the parts quoted being printed.

The opinion proceeds (the italics infra being our own):

"The first question raised by the bill of exceptions is whether the burden of proof was on the plaintiff to show a loss by fire which did not originate in the theater proper. This depends upon the construction given to the clause, 'This policy not to cover any loss or damage by fire which may originate in the theater proper.' If that clause can be regarded as a *proviso*,—that is, *a stipulation added to the principal contract, to avoid the defendant's promise by way of defeasance or excuse*,—then it is for the defendants to plead it in defense, and support it by evidence, but if, on the other hand, an exception, so that the promise is only to perform what remains after the part excepted is taken away, then the plaintiff must negative the exception to establish a cause of action. It is not always easy to determine to which class—whether of provisos or exceptions—a particular stipulation belongs; and *this one is certainly very near the line*. But, after careful consideration, the court are of the opinion that this was an exception to the subject of the contract, and that it put the burden of proof on the plaintiff. The qualification of the contract to which the parties agreed is not inserted with any technical formality or precision. But *it is found between the statement of what is insured and the promise to pay in case of loss, in close connection with, and qualification of, the description of the subject-matter* of the insurance. *The provisos are set forth in a different part of the instrument.* It thus seems to be a direct limitation of the risk against which insurance is effected. The difference would only be a formal one if, instead of the phraseology actually used, the language of the policy had been, 'do insure against loss or damage by fire not originating in the theater proper.' It would illustrate the operation of the phrase in question, and show its effect as an exception, if we suppose it applied to the building insured. If the clause in the policy had been, 'This policy not to cover any loss or damage by fire to the part of the building used as a theater proper,' * * * this would

manifestly have been an exception from the subject-matter of the insurance. And it is in like manner an exception to the risks taken by defendants, *when, in the same part of the policy in which they insure the risk of fire, and in the same connection*, they state, in substance, that it is only fire which does not originate in the theater proper against which they insure."

A similar question has been before the courts in actions upon policies of life insurance, where the contract sued upon contained a clause that it was to be void if insured died of a disease induced or aggravated by intemperance, or was to be null and void if he should die in, or in consequence of, a duel, or in violation of the laws of any nation, state, or province; or, where the clause read, "The self-destruction of the person [insured], whether voluntary or involuntary, and whether he be sane or insane at the time, is not a risk assumed by the company in the contract." In each of these cases it was held that the clause contained a condition, and that it was for defendant to show its breach by a fair preponderance of proof. Van Valkenburg v. Insurance Co., 70 N. Y. 605; Murray v. Insurance Co., 85 N. Y. 236; Goldschmidt v. Insurance Co., 110 N. Y. 628, 17 N. E. 871. And a similar rule of construction has been applied in cases of accident insurance, where the contract provided that the insurance should not extend to cover accidental injuries or death caused by fighting or voluntary exposure to unnecessary danger, nor while the insured was under the influence of intoxicating drinks. See Jones v. Association (Iowa) 61 N. W. 485, where the court says:

"Not one of these conditions was to happen prior to the time the contract between the assured and the company should become binding. * * * The situation then is this: That there was a valid contract of insurance when the policy issued, but it might thereafter, upon the happening of some of these conditions, cease to be enforceable. * * * They were each and all matters of defense available to the defendant, but, not constituting a part of the plaintiff's case, the burden did not rest upon him either to plead or prove them in the first instance."

And in Coburn v. Insurance Co., 145 Mass. 226, 13 N. E. 604, where there was a similar ruling, the court uses this language:

"Stipulations added to a principal contract, which are intended to avoid the defendant's promise by way of defeasance or excuse, must be pleaded in defense, and must be sustained by evidence. They are in the nature of provisos. Exceptions which leave the defendant liable to perform that which remains after the part excepted is taken away are to be negatived."

Some remarks of the court in Freeman v. Insurance Co., 144 Mass. 572, 12 N. E. 372, are most pertinent to the case at bar. The policy insured against bodily injuries "effected through external, violent, and accidental means, within the intent and meaning of this contract, and the conditions hereunto annexed." After the principal clause followed five provisos and eight conditions. The second proviso was: "Provided, always, that this policy is issued and accepted subject to all the provisions herein contained or referred to." The third proviso was: "That this insurance shall not extend to any bodily injury * * * when injury may have happened in consequence of voluntary exposure to unnecessary danger." The first condition was: "The party insured is required to use all due diligence for personal safety," etc. The last condition provided: "The provi-

sions and conditions aforesaid, and a strict compliance therewith during the continuance of this policy. are conditions precedent to the making of this contract." The question presented on appeal was whether the burden of proof was on the plaintiff to show that the insured used "all due diligence for personal safety and protection." The court says:

"The rule of pleading in declaring upon a contract which contains an exception, or a proviso, or a condition is stated in Com. v. Hart, 11 Cush. 130, 134, as follows: 'If such an instrument contains in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something that would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but, if the exception itself be incorporated in the general clause, then the party relying upon it must, in pleading, state it, together with the exception.' It is a general rule of the law of evidence that it is necessary for a party to prove the substance of facts which he is required affirmatively to aver in his pleading. It is true that the policy in the case at bar only insures against bodily injuries effected by the means described 'within the intent and meaning of this contract, and the conditions hereunto annexed,' but this does not change the nature of the conditions. The condition we are considering is essentially an executory stipulation in the form of a condition that Murray shall use all due diligence for his personal safety and protection, and it is the breach of this condition by Murray which the defendant sets up as a defense. We are not aware that it has ever been held that the introduction of the words we have quoted, or other similar words, into the principal clause of a policy of insurance, incorporates into this clause the conditions of the policy, within the meaning of the rule of pleading we have stated; and in some of the decisions, where it has been held that the defendant must plead, or that the burden of proof is on him to show, that a representation was false, or that a stipulation contained in a condition had not been complied with, the policy contained these or similar words in the principal clause. In an action upon a policy which contains many provisos and conditions there is a practical wisdom which courts have recognized in compelling the insurance company to allege and prove the want of compliance with any particular proviso or condition on which it relies."

Examined in the light of these authorities, the clause providing what shall happen in the event of a fall is not difficult of construction. It is not in that part of the policy which insures the risk, nor "in close connection with and qualification of the description of the subject-matter of the insurance," but is placed with the other provisos, in a different part of the instrument. The mere location of the clause is, of course, not controlling, but it has been considered as of some weight in several of the cases cited supra. Nor is it to be construed as if it were removed from its position among the provisos, and incorporated with the clause descriptive of the subject-matter, by the mere use of the words, "except as hereinafter provided." To give these words such an effect would be to incorporate with the descriptive clause all the provisos as to loss caused directly or indirectly by riot or invasion, or by neglect of the insured, or by explosion or lightning, or where there has been other insurance (not notified to company), or where manufacturing is carried on after 10 p.m., or the building stands vacant, etc. The overwhelming weight of authority, as will be seen from the citations supra, is opposed to any such construction. The most important element, however, in determining whether a particular clause expresses a condition or an exception is the nature of the clause

itself. What does this particular clause mean, "If a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease"? Manifestly, it does not merely provide that the insurer will not be liable for the particular variety of loss by fire which results from a fall. It stipulates for very much more, viz. that the contract, which it is expressly provided shall normally continue for a year, shall, in the event of a fall, absolutely cease and determine, so that, if a fall shall take place which in no way injures the property insured, and it be thereafter destroyed by fire happening otherwise than by fall or from prohibited causes, the insurer is nevertheless not liable, because an event has happened which, by agreement of the parties, puts an end to the contract altogether. It is difficult to see how such a clause can be construed otherwise than as a condition subsequent.

To the further argument that the words in the descriptive clause, "while contained in brick building," etc., made it necessary for the plaintiff to show that no fall had destroyed the integrity of the building, a sufficient answer is found in the brief of the defendant in error. A clause drawn expressly to cover the case of a building falling before a fire has been inserted in the contract, and it is to be assumed that the whole intention of the parties on that subject is expressed in such clause.

The circumstance that the complainant alleged that the "fire did not happen by * * * reason of any of the causes excepted by the terms of the policy" did not change the situation in any way. Unnecessary allegations in a complaint need not be proved. Murray v. Insurance Co., 85 N. Y. 239.

It is next contended by defendant that the court erred in refusing to charge, as requested, that:

> "The burden upon the whole case is upon the plaintiff to establish by a preponderance of evidence that the damage sustained was caused by fire, for this is the only risk it was insured against under the policy; and, if all the evidence, when considered together, leaves the jury in doubt as to whether the damage was caused by fire or not, their verdict must be for the defendant."

Manifestly, this is an accurate statement of the law, and presumably the only reason why the trial judge did not include it in his charge was because the question it refers to was completely overshadowed by the other and more important one which has just been discussed. There seems to have been no conflict of evidence at all on this branch of the case. There is no suggestion anywhere in the record that the "damage was not caused by fire." The opening page of the brief filed by plaintiff in error contains this statement: "On April 30, 1895, the property insured was damaged and destroyed by fire." The only question in the case was whether the fall preceded the fire, thus terminating the contract, or whether it did not. There was no contention upon the trial that the agency which destroyed the property was not the fire. If the jury had been required to answer specific questions, and if they had found, first, that the fall did not precede the fire nor result from it, and had found, secondly, that the damage was not caused by fire, it would have been the duty of the trial judge, upon motion, to set aside such finding, since it would be not only against the weight

of evidence, but wholly unsupported by any testimony in the case. Under these circumstances it was clearly unnecessary to instruct the jury as to the academic question upon whom there was imposed the burden of proving that the damage to the property insured was caused by fire. The fact was conclusively proved, and no one questions the accuracy of such proof.

It is next contended that the court erred in refusing to charge the jury that:

"Evên though the jury find that the fire in the building preceded the fall, they cannot award the plaintiff any amount for loss following the fall, unless they find that the fall was the result of fire."

The amount of the loss was not disputed upon the proof, nor, except for the suggestion that the fall preceded the fire, and thus caused the catastrophe, was there any claim that any part of the damage was caused otherwise than by fire. The court had charged the jury that the decision of the case "turns upon your conclusion as to a single issue of fact"; that "the suit was brought to recover a loss which the plaintiff alleges it sustained by the burning of its stock of goods," etc.; that "the plaintiff alleges that on the night of April 29, 1895, while this policy was in force, a fire occurred, in consequence of which its stock of merchandise was nearly wholly destroyed"; that, "according to the theory of the plaintiff,—and there seems to be no dispute about this upon the evidence,—the loss which the plaintiff is entitled to recover, if it is entitled to recover at all, is the sum of $7,744.77, with interest," etc.; that the "simple issue, therefore, for your consideration is that which is presented by this defense: Did the building fall as a result of fire, or did the fall precede the fire?" These parts of the charge were not excepted to, and, having thus substantially covered the point now presented as the proof left it, the trial judge was under no obligation to instruct again upon the same point in the precise language of the request.

The next group of assignments of error raises the question as to the propriety of allowing one of the witnesses, a civil engineer, and expert in heavy construction work, to read excerpts from scientific books when giving his testimony. The general proposition that scientific books are not to be read in evidence is a familiar one, and many citations from text writers and reported cases are found in the brief of the plaintiff in error. Nearly all the reported cases deal with medical works, and most excellent reasons for the application of the general rule in such cases may be found therein. But the rule is not of universal application. It would be a reproach to the administration of the law if it were so. Records of observations are undoubtedly secondary evidence, but, if all such records were excluded from the sources of knowledge available to a court of justice, it would frequently find itself unable to obtain information which was open to every individual in the community. It was been held repeatedly that standard life and annuity tables, showing at any age the probable duration of life, are competent evidence (Railroad Co. v. Putnam, 118 U. S. 554, 7 Sup. Ct. 1); and yet these tables show merely the deductions from records of past transactions, when

neither the record of the transactions nor the individual who has worked out the deductions is called to testify to the accuracy of his work, or to the conditions under which it was performed. So, too, almanacs, astronomical calculations, tables of logarithms, interest tables, weather reports, tables of the rise and fall of the tide, have been admitted in evidence. In an opinion approving of the admission of market reports, upon which the commercial world relies, is found the following pertinent suggestion of Judge Cooley:

"As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries; and courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character." Sisson v. Railroad Co., 14 Mich. 497.

The particular excerpts complained of in the case at bar are these: Certain reports of the United States department of agriculture, prepared under the direction of the chief of the division of forestry, contain tables which comprise the results of over 2,000 tests by the United States government of the crushing strength of different kinds of timber, prepared expressly to increase the knowledge of timbers grown in this country for the benefit of merchants and dealers and builders and engineers. The report is a recognized authority in the engineer's profession. From the tables the witness read the "results of investigation on long leaf pine," which was the kind of timber in the posts the cause of whose giving way was the subject of dispute. The next book produced was Kent's Mechanical Engineer's Pocketbook,—the last edition of 1896,—which, it is not disputed, is a recognized authority. "Every mechanical engineer," says the witness, "has it on his shelf." From a table in this book, giving the crushing strength of timber, the witness read a statement of such strength, per square inch, of the kind of pine of which the posts were made. The third book is Johnson's Strains in Frame Structures, also concededly a recognized authority. It contained similar tables, and a similar excerpt was read. That information of great value is obtained by multiplying such tests and tabulating the results is surely self-evident. Under the rule contended for, that valuable information would be available for the use of a court of justice so long as the men who made the tests and prepared the tabulations were living and producible, but after their death or disappearance the information they had gathered would be lost to the court, although available for every one else in the community, and relied upon by engineers and builders whenever a new structure is in process of erection. Upon the precise point here presented the diligence of counsel has not succeeded in discovering a single authority. We feel, therefore, no hesitancy in so modifying the general rule as to hold that, where the scientific work containing them is concededly recognized as a standard authority by the profession, statistics of mechanical experiments and tabulations of the results thereof may be read in evidence by an expert witness in support of his professional opinion, when such statistics and tabulations are generally

relied upon by experts in the particular field of the mechanic arts with which such statistics and tabulations are concerned.

It is further assigned as error that two witnesses (Bowman and Stanton) called by the plaintiff were allowed to state their opinions as to whether the fall preceded the fire or the fire preceded the fall. It is not objected that the witnesses were not experts, and precisely similar questions had been put by defendant to its own witnesses. It appeared, however, that neither Bowman nor Stanton saw the ruins until long after the fire, and defendant insists that their opinions were, therefore, incompetent. This does not necessarily follow. Although the ruins had been pretty well cleaned up, there were plenty of timber and columns lying down in the bottom, and it is safe to say that the indications afforded by the condition of the columns had much to do with the formation of an opinion. The lapse of time may have rendered the opinion of but little value, but on so much of the testimony as the record contains we are not prepared to say that the trial judge should have excluded it altogether.

The only remaining exceptions are to the refusal of the trial judge to allow defendant's witnesses Cashman and Freel to express an opinion as to "how long a fire would burn in the building before the posts would be weakened," and as to "what time would elapse before fire and smoke would appear." The hypothetical question intended to elicit this information contained, so far as the record shows, no indication as to whereabouts in the building the fire broke out. It is manifest that this is an important—probably the most important—element in the hypothesis, and, without it, any opinion, expert or other, would be mere wild guesswork. The trial judge correctly excluded it.

The judgment of the circuit court is affirmed.

UNION ASSOCIATED PRESS v. TIMES PRINTING CO.

BREWER v. SAME.

(Circuit Court, S. D. New York. October 1, 1897.)

1. FOREIGN CORPORATIONS—SERVICE OF PROCESS—MANAGING AGENT.
In determining whether an agent of a foreign corporation upon whom federal process is served is a "managing agent" of the corporation, within the meaning of a state statute providing for such service, the court will give full consideration to decisions of the state court construing the statute.

2. SAME—STATE STATUTES.
The New York statute providing that service of process upon a foreign corporation can be effected by serving a resident managing agent, only when the corporation has property in the state (Code Civ. Proc. § 432), applies to service of process by a federal court sitting in the state.

These were actions at law, brought, respectively, by the Union Associated Press and William S. Brewer against the Times Printing Company. The cases were heard on a motion to set aside a service of process.

Leopold Wallach, for the motion.

H. H. Walker, opposed.

LACOMBE, Circuit Judge. These actions, brought in this court, were begun by service of the summons on an individual who is concededly not an officer of defendant. Defendant, however, is a foreign corporation, and it is contended that the person served is its "managing agent" here. It is useful, in all cases, to consult the careful opinion in U. S. v. American Bell Tel. Co., 29 Fed. 17, and to restate the three conditions which it is there said must concur or co-exist in order to give the federal courts jurisdiction in personam over a corporation created in another state:

"(1) It must appear as a matter of fact that the corporation is carrying on its business in the state where it is served with process; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there, as a condition, express or implied, of doing business in the state."

The facts are substantially the same as they were in Palmer v. Chicago Herald, 70 Fed. 886, and warrant the conclusion that the defendant does business within this state; and a local law making such corporations amenable to suit here is found in section 432 of the New York Code of Civil Procedure. It is true that the question whether or not the person served is a managing agent of defendant, within the terms of that section, is not presented in this case in the same way in which it was presented in Palmer v. Chicago Herald, although the facts are practically the same. In the Chicago Herald Case the action was begun in the state court, and removed into this court under special appearance, in order to have the service of the summons set aside by this court, although upon the same facts that very relief had been refused by the state court. When this court, therefore, was satisfied that the corporation really did business here, and had thus assented to the state regulation as to service of process, it followed the state court's finding that those facts supported the conclusion that the person served was a "managing agent," within the meaning of the state statute. The case at bar, however, has not been removed from the state; it was commenced here; and in determining whether Van Doren, the person served, was or was not a managing agent, this court is confronted with no adjudication of the state court made in the same action, and on the same facts. Nevertheless, full consideration should be given to decisions of the state court construing the state statute. An examination of the opinion of the supreme court (general term, First department) in Palmer v. Chicago Evening Post, 85 Hun, 403, 32 N. Y. Supp. 992, and of the authorities therein cited, leads to the conclusion that service upon Van Doren was sufficient to hold the defendant. No sufficient reason for giving the statute a different construction is suggested, and the motion is therefore denied.

On Rehearing.

(October 29, 1897.)

Upon reargument defendant contends that, in the former decision upon the motion to set aside process, this court failed to take account of section 432 of the Code of Civil Procedure, which provides that service of process upon a foreign corporation can be effected by service

upon a resident managing agent only when the corporation has property within this state, or the cause of action arose within the state. The cause of action in the cases at bar did not arise within this state, nor is this court satisfied that the defendant has property here. The plaintiff, however, contends that the section above cited does not apply where the question is as to the sufficiency of service of process of the federal court. The court is inclined to hold with the defendant upon this point. The question is by no means free from doubt, but it is one which had better be finally decided before the time of the court and jury is consumed by taking testimony upon the merits, rather than afterwards, especially as, from orders to show cause recently submitted, it appears that there are a dozen or more of similar actions against newspapers located in several different states. The motion to set aside service of the summons is granted.

FONTANA v. CHRONICLE-TELEGRAPH CO.

(Circuit Court, S. D. New York. December 11, 1897.)

SERVICE OF PROCESS—FOREIGN CORPORATIONS—RESIDENT AGENTS.

Debts due a foreign corporation from solvent debtors residing in New York constitute "property within the state," in the meaning of Code Civ. Proc. § 432, authorizing service on a "managing agent" of a foreign corporation having property in the state, under certain circumstances.

This was an action by Alfred G. Fontana against the Chronicle-Telegraph Company. The case was heard on motion to set aside service of summons.

Paul D. Cravath, for the motion.
H. H. Walker, opposed.

LACOMBE, Circuit Judge. It seems unnecessary to add anything to what was said in disposing of similar motions in Union Associated Press v. Times Printing Co., 83 Fed. 822, as the facts, except in one particular, are substantially the same. It appears, however, that there are debts due to defendant from solvent debtors residing in this state. This may fairly be held to be "property within this state," within the meaning of section 432 of the Code of Civil Procedure. The motion is therefore denied.

GRAY v. SMITH et al.[1]

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 359.

1. APPEAL AND ERROR—ERRONEOUS RULINGS—CORRECT JUDGMENT.

If, upon writ of error, upon consideration of the whole findings or facts, and upon a proper view of the law applicable thereto, the judgment is right, it will not be reversed merely because the lower court ruled erroneously upon the law of the case.

[1] Rehearing denied November 1, 1897.

2. BREACH OF CONTRACT—OFFER TO PERFORM—WHEN NOT NECESSARY.

When either party to a contract gives notice to the other that he will not comply with its terms, the other need not, in an action for damages for the breach, aver or prove a tender of performance on his part; but the elements of his damages must be certain, and he must show that facts exist from which it may be clearly deduced that he has suffered loss.

3. VENDOR WITHOUT TITLE—DAMAGE FOR VENDEE'S BREACH OF CONTRACT.

One who makes a contract to sell real estate of which he has no title, nor the certain means of procuring title, has no right to damages if the purchaser withdraws from the contract.

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

Sidney V. Smith and Vincent Neale, for plaintiff in error.
S. C. Denson, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was the plaintiff in an action in the circuit court, brought against the executors of the last will and testament of Edgar Mills, deceased, to recover damages for the breach of a contract of conveyance of real estate. It was alleged in the complaint, in substance, that on October 7, 1891, the plaintiff entered into and signed written agreements with Edgar Mills, whereby he agreed to sell and convey to said Mills, by good and sufficient deed, free of all incumbrance, and the said Mills agreed to buy from him, a certain lot of land situated on Market street, in the city of San Francisco, and that said Mills agreed to pay plaintiff therefor $120,000 in cash, and, in addition, to convey to him in fee, free from all incumbrance, certain tracts of land situate in Colusa and Tehama counties, Cal., aggregating 8,421 acres of land, all of which properties are described in the complaint; that said lot of land in San Francisco was worth to the plaintiff, on October 7, 1891, and thereafter up to the date of breach of the contract, $165,000, and that said 8,421 acres of land were at the same time worth $173,400; that the plaintiff was able, ready, and willing from October 7, 1891, to and until November 18, 1891, to sell and convey to said Mills the said Market street lot, with a good and perfect title, but that on said November 18, 1891, Mills refused to buy the same, or to accept a conveyance thereof, and refused to carry out his agreement, for the reason that the title to said lot was imperfect; that, by reason of such refusal, plaintiff suffered damages in the sum of $128,400. The defendants answered, denying that the plaintiff was able or ready or willing to sell or convey to said Edgar Mills said Market street lot by good or sufficient deed, and denying that said Mills, on November 18, 1891, refused to carry out his part of said alleged contract, and alleging that the plaintiff never at any time had any right, title, or interest in the said Market street lot, and at no time had any right or power to sell or convey the same, or to make a contract to do so. They further alleged that the title to said Market street lot, at the time of said agreements, was vested in Joseph A. Donohoe, except an estate in fee, after the

termination of an estate for the life of one Mary Penniman, in an undivided one-twelfth of said lot, and that the said estate in said undivided one-twelfth was owned by one Robert Penniman and Walter Penniman; and they allege that upon an investigation of the title to the said property, and the disclosure of its condition as aforesaid, it was agreed and conceded by all parties any way interested in the said contract that the title to the said lot was not good, and could not be granted or conveyed to the said Edgar Mills. Thereupon, on October 27, 1891, the contract of sale and purchase was abandoned and rescinded, by the consent of all the parties thereto. A jury trial was waived, and, by stipulation of the parties, the cause was tried before the court.

The findings of the court, so far as they are necessary to be considered on the writ of error, are, in substance, as follows:

On September 16, 1891, Edgar Mills wrote to the plaintiff the following proposition:

"Provided, you take the following described property, situate in Tehama and Colusa counties, as part payment up to one hundred and fifteen thousand ($115,000). I hereby make you an offer to purchase the lot situate on the south side of Market street, in this city [describing the same], at the price of two hundred and forty thousand dollars ($240,000), namely, in cash $125,000, and in land, as above, $115,000. This offer to hold good for three weeks from this date, to enable you to inspect my said lands. Said lands described over page. [Then follows a description of the lands.]"

On October 6, 1891, the plaintiff executed and delivered to the said Edgar Mills a written acceptance of said offer. On October 7, 1891, said Edgar Mills and the plaintiff executed in writing a modification of the foregoing offer and acceptance, whereby the sum to be paid in cash was reduced from $125,000 to $120,000, leaving the total consideration for the Market street lot $235,000. The title to the said Market street lot, at and prior to the commencement of the negotiations, and after the same were broken off, was and remained in Joseph A. Donohoe, Sr. On September 4, 1891, the plaintiff and one J. H. Cavanagh agreed between themselves to share equally the commission payable on the sale of said Market street lot; and on October 7, 1891, the plaintiff acknowledged, in writing, that Cavanagh held an equal interest with himself in the contract with Mills. On September 18, 1891, Cavanagh made a written offer to Joseph A. Donohoe for the purchase of the Market street lot, offering to pay therefor $160,000 cash. Said offer, in writing, was delivered by Cavanagh to one Joseph A. Donohoe, Jr., who was the son and agent of Joseph A. Donohoe, Sr. Donohoe, Jr., knew nothing of the resources or responsibility of the said Cavanagh, and would not enter into a contract to sell to him, but demanded to know of him the name of the proposed purchaser, and was thereupon given the name of Edgar Mills. The said Donohoe Jr., as agent of his father, then executed and delivered to Cavanagh the following paper:

"San Francisco, October 7th, 1891.

"I hereby agree to sell my lot 82 $^{6}/_{12}$ feet, on south side of Market street, immediately east and adjoining the Central Park, between 7th and 8th streets, and running through to Stevenson street, in the rear, to Edgar Mills, for one

hundred and sixty-five thousand dollars, U. S. gold coin ($165,000), payable on delivery of deed after examination of title, say, fifteen days from date. The purchaser to pay half of the taxes for the current year.

"Jos. A. Donohoe, Sr.,
"Per J. A. Donohoe, Jr."

On October 8, 1891, said Edgar Mills was first informed that the Market street lot belonged to said Joseph A. Donohoe, Sr., and was at the same time informed of the execution by him of the foregoing written offer upon his part to sell the same to him, the said Edgar Mills. The interest of Cavanagh in this instrument was thereafter assigned to the plaintiff. Said Edgar Mills never accepted the proposition contained in the said document executed by Joseph A. Donohoe, Sr., under date of October 7, 1891; and neither said Mills, nor said Cavanagh, nor said Gray, ever complied or offered to comply with the terms of said offer. The plaintiff had no right, title, or interest of, in, or to the said Market street lot, save such as he may have gained by or through the several documents above mentioned; and no contract existed between plaintiff and defendants' testator for the purchase of said Market street lot or otherwise, except as therein contained. The plaintiff never paid or offered to pay said Joseph A. Donohoe, Sr., the purchase price demanded by him for said Market street lot, and did not at any time have the means or ability to pay the purchase price demanded by him therefor; and plaintiff never took any steps to procure for the said Edgar Mills the title to the said Market street lot, other than by procuring the above-mentioned written offer of said Donohoe. On November 23, 1891, the said Joseph A. Donohoe, Sr., executed three several deeds of said Market street lot,—one to Edgar Mills, one to J. H. Cavanagh, and one to the plaintiff, Albert E. Gray; tendered the same to the said several grantees, respectively; and demanded from each of them the payment of said sum of $165,000 in gold coin, and one-half the current year's taxes. Each of said grantees refused to accept the said deed or to pay the said purchase price demanded. After the execution by the said Joseph A. Donohoe of said document of October 7, 1891, he delivered an abstract of title of said Market street lot to his attorneys, who, after an examination thereof, wrote on October 23, 1891, calling the attention of Edgar Mills to certain defects which they found in the title and the method of correcting the same. Subsequently, and before November 18, 1891, the attorneys rejected the title to said lot, and reported to said Mills that the title was fatally defective. Thereupon the attorneys of said Mills reported to the plaintiff, stating that they had reported to their client a fatal defect in the title, in consequence of which said Mills had decided not to assume the purchase, and had given notice to Donohoe, Sr., to that effect; whereupon plaintiff expressed his surprise, and said he would see Mr. Donohoe, Sr., about the matter. The said title was not in reality defective, and the said Donohoe had a good, marketable, sufficient, and clear title, deducible of record, to said Market street lot, although, at the time when the said Mills objected to such title, said Donohoe and his attorneys conceded that the objections thereto

made by the attorneys for said Mills were valid, and that said title was in fact defective. The plaintiff herein has not suffered loss or damage through or by any act or omission of the said Edgar Mills, as alleged in the complaint. It is not true that on October 27, 1891, or at any other time, the contract of sale and purchase made between plaintiff and the said Edgar Mills was abandoned or rescinded by the consent of all the parties thereto.

The conclusions of law deduced by the court from the findings are that said plaintiff was never at any time able or ready to convey, or cause to be conveyed, to the said Edgar Mills, the said Market street lot according to the terms of the contract set out in the complaint, and that the plaintiff has suffered no damage; whereupon judgment was rendered for the defendants for costs. 76 Fed. 525.

In the bill of exceptions it is stated that there was no evidence whatever that plaintiff had any financial ability, or that it would have been possible for him to have raised an amount sufficient to pay the price asked by Donohoe for the Market street lot, or that he had completed any arrangement to procure a loan for any amount whatever upon the lands which, under the contract alleged in the complaint, Mills was to convey to him in exchange for the Market street lot. Upon the writ of error in this court it is urged that the circuit court ruled erroneously upon the law of the case in holding that the plaintiff could not recover, for the reason that he failed to prove that he had the "independent ability" to perform the contract, by showing that he had the means to purchase the Market street lot from Donohoe, apart from any benefit to be derived through the cash and the land which were to come from Mills in exchange therefor. If we concede that that ruling was error, it does not follow that the judgment of the circuit court must be reversed. It becomes our duty to consider the whole of the findings, and to determine whether, upon a proper view of the law applicable thereto, the judgment is sustainable. The findings, in brief, are that the plaintiff and Mills had entered into a valid contract, whereby the former was to convey land estimated in the contract at $235,000, in exchange for lands of the latter, estimated at $115,000, and $120,000 in cash. The land which the plaintiff was to convey did not belong to him, and he had not then, nor did he afterwards acquire, any estate or interest therein. He had received a written offer from the owner of the property to sell it for $165,000 cash and one-half the taxes of the current year. The offer was never accepted. It was without consideration. It was a bare offer to sell, and could have been rescinded at any time. In fact, the offer has no bearing upon the decision of this case. It left the property in the same relation to the contract in which it would have stood had there been no such instrument. When Mills withdrew from the contract, he had discovered that the title to the land he was to purchase was not in the plaintiff, but was in Donohoe. It is true that he did not place his refusal to perform upon that ground, but on the ground that the title in Donohoe was found to be defective; but that fact is immaterial so far as this case is concerned. The case presented for our consideration, therefore, is one in which the plaintiff made a contract to sell real estate of which he was not the owner, and in which he had no right, title, nor

interest, nor the ability to compel, by the law or otherwise, a conveyance from the owner.

It is contended by the plaintiff in error that the refusal of Mills to be bound by his contract, before the time for its completion had arrived, excuses the plaintiff from showing or proving that he had the ability to perform the contract upon his part. It is true that where the vendor of property, before the arrival of the time for the completion of his contract of sale or conveyance, disables himself from performing by disposing of the property to another, the purchaser may at once bring his action, and he need not aver or prove tender of the purchase money upon his part, nor his ability to carry out the contract; and, where either party to a contract gives notice to the other that he will not comply with its terms, the other is excused from averring or proving a tender of performance. But, in any case of action upon a contract, the elements of the plaintiff's damage must be certain, and the facts must exist from which it may be deduced that he has suffered loss. One who makes a contract to sell property of which he has no title, nor the certain means of procuring title, presents no facts upon which damage to him may be predicated if the purchaser withdraws from the contract. The pleadings and the finding in this case leave it uncertain whether the plaintiff could ever have acquired title to the Market street lot. So far as the performance of his contract was concerned, he was in no better attitude than one who has disabled himself from carrying out a contract of sale by selling the property to another.

In Bigler v. Morgan, 77 N. Y. 312, the court said:

"However positively a vendee may have refused to perform his contract, and however insufficient the reason assigned for his refusal, he cannot be subjected to damages without showing that he would have received what he contracted for had he performed,"—citing Heron v. Hoffner, 3 Rawle, 393, 400; Bank of Columbia v. Hagner, 1 Pet. 464; Traver v. Halsted, 23 Wend. 66.

In Eddy v. Davis, 116 N. Y. 247, 251, 22 N. E. 362, 363, the court said:

"The formal requisite of a tender may be waived, but, to establish a waiver, there must be an existing capacity to perform. Here there was no existing capacity, as, having sold all the adjacent lands, plaintiffs could not perform their covenant to keep open a right of way back of defendant's store."

In Townshend v. Goodfellow, 40 Minn. 312, 41 N. W. 1056, the court said:

"And one who speculates upon that of which he has no control or the means of acquiring it is not a bona fide contractor. But the general rule is that, where a contract is entered into in good faith, it is not necessary that the vendor be actually in the situation to perform it at the time it is entered into, provided he be able at the proper time to place himself in that situation."

In Burks v. Davies, 85 Cal. 110, 24 Pac. 613, the court cited with approval the rule of the English courts that:

"Where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor is it in his power, by the ordinary course of law or equity, to make himself so, though the owner offer to make the seller a title, yet equity will not force the buyer to take; for any seller ought to be a bona fide contractor, and it would lead to infinite mischief if an owner were permitted to speculate upon the sale of another's estate. Tendring v. London, 2 Eq. Cas. Abr. 680."

Of similar import are Carpenter v. Holcomb, 105 Mass. 285; Lawrence v. Miller, 86 N. Y. 131; Nelson v. Elevating Co., 55 N. Y. 480.

None of the cases cited by the plaintiff in error sustain the doctrine which he contends for. Among others is cited the case of North's Adm'r v. Pepper, 21 Wend. 636, where it was held, that if a purchaser of property gives notice to the vendor that he has abandoned the contract, and will not accept a conveyance, it is sufficient to support an action of covenant by the vendor to allege the fact that he has received such notice, and it is not necessary that he aver a tender of the deed or readiness to perform, nor that he had title to the premises which he had agreed to convey. But the court in that case expressly recognized the principle that, if the vendor had not the title nor such contractual relation thereto as to render it certain that he could procure the same, he had no ground upon which to recover damages, and held that, in the case of notice of refusal to perform the contract upon the part of the purchaser, it would be a sufficient defense to an action by the vendor to plead that the latter had no title. The case at bar comes directly within the principle declared in that case. It is alleged in the answer in the record in this case that the plaintiff had no title to the Market street lot, and that allegation is affirmatively sustained by the findings. Judgment will be affirmed, with costs to the defendants in error.

In re PRICE.

(Circuit Court, S. D. New York. November 23, 1897.)

1. CRIMINAL LAW—REMOVAL OF OFFENDERS—NECESSITY OF EXAMINATION.

   A person arrested in any state on a bench warrant issued by the supreme court of the District of Columbia, on an indictment there found, can only be removed to that District for trial by proceedings under Rev. St. § 1014, which require an examination in accordance with the practice of the state where the arrest is made.

2. SAME—SUFFICIENCY OF SHOWING.

   A complaint charging theft, under Rev. St. § 5356, committed in the District of Columbia, testimony tending to prove such theft, and an indictment showing that the prisoner is wanted in that District, constitute a sufficient showing to warrant his removal there to answer the charge.

Application by John Price for a Writ of Habeas Corpus.

J. Laflin Kellogg, for the motion.
Max J. Kohler, Asst. U. S. Atty., opposed.

LACOMBE, Circuit Judge. The return of the marshal shows that he holds two original bench warrants against defendant, issued out of the supreme court of the District of Columbia on indictments, and also a warrant of removal, signed by the United States district judge in this district, directing his removal to the District of Columbia; the warrant of removal having been issued under section 1014 of the United States Revised Statutes. It will not be necessary to enter into any discussion of the proposition advanced by the district attorney,

that bench warrants of the supreme court of the District of Columbia run into every district of the United States, and that, under them, individuals may be seized and transported to Washington without any examination, either as to identity or probable cause, conducted by some proper judicial officer in the district where they may be seized, in accordance with the provisions of section 1014. The method would, no doubt, be "expeditious, logical, and certain." It would also be intolerably oppressive, and, in the absence either of express legislation or controlling authority, this court is not prepared to assent to the proposition here advanced. In so doing, it concurs with the views expressed by the district court in Re Dana, 68 Fed. 893. The warrant of removal, however, seems to have been properly issued in conformity with the provisions of section 1014. A complaint, sworn to on information and belief, was presented to the United States commissioner, who issued thereon a warrant for the arrest of Price. This complaint averred that on March 31, 1897, he did, in the city of Washington, District of Columbia, "unlawfully and feloniously steal, take, and carry away 1,330 U. S. notes of the denominations and values of five dollars each, 317 United States notes of the denomination and value of one dollar each, 105 United States silver coins of the denomination and value of twenty-five cents each, 23 U. S. silver coins of the denomination and value of ten cents each, and 17 U. S. nickel coins of the denomination and value of five cents each, all lawful money of the United States, of the goods, chattels, and money of one Arthur O. Babendrier." Price was arrested, and demanded a hearing, and the commissioner proceeded to take testimony both as to identity and probable cause. Babendrier and three other witnesses were examined, and the commissioner found that there was probable cause, and committed Price to the custody of the marshal until the warrant for his removal should be issued by the district judge. The testimony is not strong, but it does tend to show the commission of the offense charged; and, under well-settled rules, the finding of the commissioner as to probable cause should not be disturbed. It is contended that the district judge overruled this finding, but the record does not bear out the contention. There seems to have been a curious failure of the indictments found in Washington to properly charge the offense. The first indictment charged larceny of silver certificates only, and a second indictment presents the same defect. The third indictment, however, charges a taking and carrying away of 105 silver quarters, 23 silver dimes, and 17 nickel five-cent pieces, with intent to steal and purloin, under section 5356, Rev. St. U. S. We have, then, a complaint charging the theft of some coins and several hundred dollars more, evidence tending to show such theft, and an indictment showing that the prisoner is "wanted" in Washington to stand trial for stealing the coins. Inasmuch as the statute (section 5356) makes no distinction between grand and petit larceny, the offense charged in the indictment is the same offense as was charged in the complaint upon which prisoner demanded a hearing, and as to which the commissioner has found probable cause. The district judge treated the indictment merely as proof that the prisoner was wanted

for the offense charged in the complaint, and, probable cause being established otherwise than by the indictment, properly directed removal. A number of wholly unnecessary amendments seem to have been moved for before the commissioner, but their granting or denial in no way changes the situation. I further concur with the district judge in holding that the original complaint sufficiently charged an offense under section 5356. It averred that the offense was committed in the District of Columbia, and all federal courts take judicial notice that said District is within the exclusive jurisdiction of the United States. The writ is therefore discharged. Whether the prisoner will be remanded to the custody from which he was taken, or be detained in custody by this court pending appeal, will be determined when it appears whether or not an appeal is contemplated.

UNITED STATES v. YONG YEW.

(District Court, E. D. Missouri, E. D. November 23, 1897.)

1. DEPORTATION OF CHINESE—CERTIFICATE OF IDENTITY.
   In order to make a certificate of identity required by Act July 5, 1884, § 6 (23 Stat. 115), relating to Chinese immigration, prima facie evidence of the holder's right to come into this country as a merchant, it must conform strictly to the requirements of the statute as to its contents, so as not to permit of evasion or deception.

2. SAME—MERCHANT—LABORER.
   Even if the certificate of identity of a "merchant" of China is in due form, he may enter this country only for the purpose of prosecuting his business as a merchant here; and if, upon his arrival, he immediately proceeds to and continues in employment as a laborer, such fact has a strong retroactive bearing as evidence of the intent with which he came here.

3. SAME.
   Respondent, a Chinaman, came to this country for the first time in June, 1897. From that time until his arrest on September 9, 1897, under the statute relating to Chinese immigration, he worked in a laundry in Hannibal, Mo. He testified that he had an interest of $1,000 in the Chinese grocery business conducted under the name of One Lung at 43 Mott street, New York City. *Held*, that this did not constitute him a "merchant," under Act November 3, 1893 (28 Stat. 7), but that he was a "laborer," within section 2, and so liable to deportation.

4. SAME—TRICK OR EVASION—VIOLATION OF STATUTE.
   It is as much a violation of the Chinese exclusion acts for a laborer, who by any trick or evasion secures an entry to our ports, to remain in the United States, as it would have been to originally land on our shores.

This was a proceeding, under the Chinese exclusion laws, to procure an order for the deportation of one Yong Yew.

William H. Clopton, U. S. Dist. Atty., and Walter D. Coles, Asst. U. S. Dist. Atty.

Rufus E. Anderson, for respondent.

ADAMS, District Judge. Section 13 of the act of congress approved September 13, 1888 (25 Stat. 476), provides that:

"Any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested upon a warrant issued upon

a complaint, under oath, filed by any party on behalf of the United States, * * * and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

Pursuant to the provisions of this act, complaint was duly filed before United States Commissioner Moore charging that the respondent is a Chinese person not born or naturalized in the United States, and unlawfully in the United States and not lawfully entitled to be and remain therein. Warrant was duly issued on this complaint, and the respondent was arrested and brought before the commissioner, where, upon a hearing duly had, it was found and adjudged that the respondent was not entitled to remain in the United States, and he was ordered to be deported to the country whence he came. From this judgment an appeal was duly prosecuted to me, as judge of this district.

At the hearing the respondent testified as follows:

"I was born in Hong Kong, China, and am twenty-three years old. I first came to the United States in June, 1897. I had never been here before. I went from Hong Kong, China, to Havana, Cuba; and, after remaining in Havana some time, I came from Havana, Cuba, to New York City, in June, 1897. I went from New York to Quincy, Illinois, and from there to Hannibal, Missouri. I have been in Hannibal since June, and have been in Sang Woo's laundry, helping him, as he is a friend of mine. Before coming to the United States, I was a tea merchant in Hong Kong, China. I now have an interest of $1,000 in the Chinese grocery business conducted under the name of One Lung at 43 Mott street, New York."

Further proof shows that the respondent secured entry into the United States, at the port of New York, under a certificate of identity issued by the Chinese consul general in Havana, Cuba. In this certificate, respondent is certified to have been a "merchant" at Hong Kong from the year 1894. It is therein further certified that the nature and character of his business was an "exporter of teas," and the value of his business is therein certified as follows: "His share in the firm of We Chong & Co., Hong Kong, China, $1,000." The proof further shows that the respondent, soon after his arrival in this country, in June, 1897, went to Hannibal, Mo., where he immediately began to work as a laundryman in the laundry of Sang Woo, and that he continued to so work continuously until September 9, 1897, the date of his arrest by the United States marshal under the commissioner's warrant. The question is, is this person, under the proof above detailed, entitled to remain in the United States?

By the provisions of the treaty between the United States and China promulgated October 5, 1881 (22 Stat. 826), it was agreed between the two high contracting parties that the immigration of Chinese labor to this country might be regulated, limited, or suspended, but not absolutely prohibited. Article 1 of this treaty provides as follows:

"Whenever, in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or

threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it."

Article 2 of said treaty provides:

"That Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

The preamble of the president's proclamation of date October 5, 1881, promulgating this treaty as an accomplished compact between the two countries, is as follows:

"Whereas, the government of the United States, because of the constantly increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon such immigration, now desires to negotiate a modification of the existing treaties which shall not be in direct contravention of their spirit: Now, therefore," etc.

With a view to execute certain stipulations of this treaty, the congress of the United States, by an act approved May 6, 1882 (22 Stat. 58), enacted, among other things, as follows:

"Section 1. That from and after the expiration of ninety days next after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States."

Section 6 of the last-mentioned act of congress is as follows:

"That in order to the faithful execution of articles 1 and 2 of the treaty in this act before mentioned [referring to the treaty promulgated on the 5th day of October, 1881], every Chinese person other than a laborer who may be entitled by said treaty and this act to come within the United States, and who shall be about to come to the United States, shall be identified as so entitled by the Chinese government in each case, such identity to be evidenced by a certificate issued under the authority of said government, which certificate shall be in the English language or (if not in the English language) accompanied by a translation into English, stating such right to come, and which certificate shall state the name, title, or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, and place of residence in China of the person to whom the certificate is issued, and that such person is entitled conformably to the treaty in this act mentioned to come within the United States. Such certificate shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs, or his deputy, of the port in the district in the United States at which the person named therein shall arrive."

The next legislation on the subject in question is found in an act of congress approved July 5, 1884 (23 Stat. 115). By the provisions of this last-mentioned act, section 1 of the act of May 6, 1882, is amended so as to suspend the immigration of Chinese laborers to the United States for the period of 10 years after the passage of this last-mentioned act, and, in the event any Chinese laborer may have come to the United States, to render it unlawful for him to remain within the United States. Section 6 of the act of 1882 is amended

so as to prescribe, as an additional requirement in the certificate of identity (in the event the person applying for such certificate claims to be a merchant), that the same shall state "the nature, character and estimated value of the business carried on by him prior to and at the time of his application." Such was the legislation on this subject up to the passing of the act of September 13, 1888, supra. At the time this bill was pending before congress, a treaty, before then negotiated between the United States and China, was under consideration of the two governments for ratification or rejection; and the congress of the United States, in the belief, doubtless, that it would finally be ratified, undertook in and by the act of 1888 to legislate in a comprehensive way on this subject, and, in and by the last section of the act, repealed the provisions of the prior acts of congress of May 6, 1882, and July 5, 1884, supra, but in terms provided that such repeal should take effect upon the ratification of the then pending treaty. This treaty was never ratified, and as a result the former acts were not repealed, and the act of September 13, 1888, went into effect unconditionally. As a result, the legislation on this subject is somewhat confused. The former acts, in so far as they are not modified or repealed by implication, are in force; and the court must consider them, as well as the act of September 13, 1888, already referred to, and the subsequent acts of May 5, 1892, and November 3, 1893, in order to ascertain what the law is on the subject in question. Section 1 of the act of May 5, 1892 (27 Stat. 25), extends the time within which Chinese laborers are prohibited from coming into this country for a period of 10 years after its passage. Section 2 of this act provides:

"That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws [referring to any and all laws then in force] to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country."

Section 2 of the amended act of November 3, 1893 (28 Stat. 7), defines the terms "laborer" and "merchant," as employed in any and all of the legislation on the subject, as follows:

"The words 'laborer' or 'laborers,' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen," etc. "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."

To illustrate and emphasize the general policy of the laws of the United States, reference may be appropriately made to the recent treaty between the United States and China promulgated December 8, 1894. Article 1 provides that for a period of 10 years, beginning with

the date of the exchange of the ratifications of this convention, the coming, except under the conditions hereinafter specified (which are immaterial for the purposes of this case), of Chinese laborers to the United States, shall be absolutely prohibited. Section 5 of this treaty recites the legislation of congress of the United States found in the acts of May 5, 1892, and November 3, 1893, already referred to, and contains an agreement on the part of the Chinese government to their strict enforcement.

From the foregoing provisions of law, it is manifest that, under the sanction and with the approval of the Chinese government, the United States has devised and put into operation an internal policy to effectually prevent the immigration of Chinese laborers into this country, and to effectually prevent Chinese laborers from remaining in this country in the event they improperly or unlawfully come here. Concurrent history, of which the court takes judicial cognizance, teaches that the mischief sought to be remedied by this legislation was to prevent the demoralizing effect upon American laborers of competition with Chinese laborers, and also to prevent the demoralizing effect of Oriental civilization, habits, customs, and morals upon the people of this country. In construing such legislation, it is clear that I must have constantly in mind the mischief sought to be remedied, and the object sought to be accomplished. A résumé of the legislation already detailed at some length, so far as applicable to the case under inquiry, is as follows: That for a period extending at least 10 years after the 7th day of December, 1894, the date of the exchange of ratifications of the last-mentioned treaty by the two governments of the United States and China, no Chinese laborer is permitted to come into this country, or, if perchance he may so come, to remain within the territorial limits of the United States. This prohibition is limited to laborers. A Chinese "merchant," if he be such within the definition of that term as found in the act of November 3, 1893, supra, is permitted to come into this country and remain here; and a certificate of identity, containing, among other things, the nature, character, and estimated value of the business carried on by him, is made prima facie evidence of his right to enter the territory of the United States as a merchant. The method of enforcing this legislation is a trial before a justice, judge, or commissioner of the United States, and, upon an adjudication that any Chinese person is not lawfully entitled to be or remain in the United States, a removal of such person from the United States to the country from whence he came.

Respondent claims that, within the meaning of the treaties and laws aforesaid, he was a merchant in China at the time of his departure for the United States, and has produced the certificate of identity already referred to, and claims it to be his protection. This is unsatisfactory for the following reasons: First. This certificate does not clearly conform to the requirements of section 6 of the act of congress of July 5, 1884, supra, under the provisions of which it derives whatever potency it has. This section provides that, if the applicant claims the right of entry because he is a merchant, he shall, among other things, state the nature, character, and estimated value of the

business carried on by him prior to, and at the time of, his application aforesaid. The first of these requirements is claimed to have been met by the following language found in the certificate: "Nature and character of business in Hong Kong, exporter of teas." This, by liberal interdment, may be considered as a compliance with the first requirement. The next requirement is that the certificate shall state the "estimated value of the business carried on by him prior to, and at the time of, his application." This is claimed to have been met by the following statement found in the certificate: "Value of his share in the firm of We Chong & Co., Hong Kong, $1,000." This statement is very vague and uncertain. It may or may not relate to the business of "exporter of teas," as specified. It may or may not relate to any business "carried on by him." He might have had an interest of $1,000 in a firm or corporation in whose business he in no manner is actively engaged, and, from the evidence which I have heard in this and several other cases, I am quite disposed to believe that such is the case. It is very common practice for Chinese, in this country, as well as for other people, for that matter, to invest money in some merchantile pursuit, and devote their personal energies to other enterprises. Again, even if I am to assume that his interest in the business of "exporter of teas" is in connection with the house of "We Chong & Co.," and that he had a $1,000 interest in that business (all of which would be the result of a forced construction of the language employed in the certificate), this would not be a compliance with the law. He should have made known "the estimated value of the business carried on by him," and not "his undivided interest" in it. Enough has already been said in relation to this matter to show that the certificate in question is so left as to permit evasion and deception. This will not do. To make this certificate prima facie evidence of respondent's right to come to this country as a merchant, it must conform strictly to the requirements of the statute as to its contents.

The respondent next claims that he was a merchant in New York at the time of his arrest at Hannibal, Mo., and was therefore not a laborer, within the meaning of the laws governing the case. He alone testifies to this fact, and his testimony is entirely unsatisfactory. He says, "I now have an interest of $1,000 in the Chinese grocery owned and conducted under the name of One Lung at 43 Mott street, New York." This evidence, even if I felt disposed to credit his uncorroborated statement, does not constitute him a merchant. It does not show that he was not engaged "in the performance of any manual labor except such as is necessary in the conduct of his occupation as such merchant," as required by section 27 of the act of November 3, 1893, already quoted. Far from this, he was at the time of his arrest, and had been ever since his arrival in this country, engaged in the business of laundryman at Hannibal. This makes him a laborer, within the meaning of section 2, supra. U. S. v. Wong Ah Hung, 62 Fed. 1005; Lew Jim v. U. S., 14 C. C. A. 281, 66 Fed. 953; Lai Moy v. U. S., 14 C. C. A. 283, 66 Fed. 955. Again, considering the public policy of the United States, as asserted and assented to in the

several treaties already referred to between the United States and China, and the repeated and emphatic declarations of such policy by the congress of the United States, as found in the several acts to which I have already called attention, I am disposed to so rule this case as to really subserve that policy. Chinese labor and Chinese civilization are not wanted in this country, and, if Chinese laborers unlawfully secure entry to our ports, they are not entitled to remain here. This is clearly contemplated and repeatedly expressed in the several treaties and acts of congress already referred to. Accordingly, I hold that it is as much a violation of the Chinese exclusion acts above referred to for a laborer, who by any trick or evasion secures an entry to our ports, to remain in the United States, as it would have been to originally land on our shores. The certificate of identity issued to respondent by the Chinese consul at Havana, even if sufficient in form and substance to constitute a prima facie case in favor of the respondent's right to enter this country as a merchant, is at best but prima facie evidence. It may be controverted. Now, construing all the legislation on this subject in the light of our internal policy as already stated, I am disposed to hold that the law, properly and effectually construed, contemplates that a merchant of China may enter this country only for the purpose of prosecuting his business as a merchant here. He may not, under pretense of being a merchant, secure entry as such, intending immediately to become and continue a laborer. I do not wish to be understood as holding that a Chinese person, who has been a merchant in his own country, and enters the United States in good faith, intending to continue the business of merchandising here, and who in like good faith enters upon that business, but, through adversity or other sufficient cause, is unable to continue, and who enters other employment for a time, is liable to deportation. But I believe that in all cases when a Chinese person enters as a merchant, and soon ceases to be one, and becomes a laborer, the facts should be carefully scrutinized; and if, as in the case of this respondent, he immediately proceeds to, and continues in, employment as a laborer, such fact ought to have a strong retroactive bearing on the intent with which he came here. And if, from all the facts of the case, it can be determined that he used his former mercantile occupation as a pretext to come here, with the real intent and purpose of laboring, only, when here, such former occupation should not shield him, even if his certificate of entry be correct in form and substance. Such, I think, is the case of this respondent. Conceding full faith and credit to his certificate of identity, his conduct, in proceeding immediately to work as a laborer, and continuing so to do up to the time of his arrest, belies his pretensions as a merchant. The prima facie case made by his certificate is overcome by the facts. He is not lawfully entitled to be or remain in the United States. An order will be made for his removal from the United States to China, and the same will be executed with all convenient speed by the marshal of this district.

UNITED STATES v. FAY.

(District Court, E. D. Missouri, E. D. November 11, 1897.)

Post Office—Scheme to Defraud—Indictment—Statute.

A "scheme to defraud," within the scope of Rev. St. § 5480, relating to the use of the mails for improper purposes, involves the element of some plausible device, reasonably calculated to deceive persons of ordinary comprehension and prudence; and manifest hoax or humbug, which belies the known laws of nature, is not an indictable offense under that section.

William H. Clopton, U. S. Dist. Atty.
Chester H. Krum, for defendant.

ADAMS, District Judge (orally). This is an indictment under section 5480, Rev. St., charging the defendant with having devised a scheme to defraud, involving the use of the United States postal establishment. The scheme, as charged, is to impose upon the credulous by pretenses that he, the defendant, had some mysterious, superhuman power; among other things, to penetrate with mental vision into the bowels of the earth, and discover the location there of supposed hidden treasures. It is charged in the indictment that, in furtherance of this scheme, the defendant wrote to one Howard, of Phelps county, Mo., advising him of his possession of these powers, which he represented to be higher than mortal, and assuring him that for $50 he would positively find certain treasures vainly supposed to be hidden away somewhere underneath the earth's surface on Howard's farm. The money was paid, the treasures were not found, and this indictment is the consequence.

A motion to quash is filed, and defendant's counsel, in support of it, contends that the facts alleged constitute no scheme to defraud, within the true meaning of the act of congress on the subject. There is undoubtedly a scheme here, but is it a scheme to defraud? Such a scheme manifestly must involve something in the nature of a plausible device,—some such device as, in itself, is reasonably adapted to deceive persons of ordinary comprehension and prudence. A manifest hoax and humbug, like a proposition to take a person on a flying trip to the moon, to fit out a traveler for a submarine voyage to China, or any other scheme which belies the known and generally recognized laws of nature, cannot, in the nature of things, deceive any rational being. I regard the scheme set out in this indictment as one of this class. The law in question deals with and contemplates rational beings. I cannot believe it possible that a rational being, possessed of ordinary prudence and sagacity, could or would be deceived by any such irrational, visionary, and stupid pretense as was made by the defendant in this case. Even if the particular pretense and promise held out to Howard might, by itself, be considered sufficient to deceive an ordinarily prudent person, the balance of the nonsense found in the defendant's advertised scheme ought to have been a sufficient warning. I do not need to refer to it. There is a marked distinction between a case of this kind, involving, as it does, a physical impossibility, and

one related to religious, moral, or ethical tenets. A scheme to defraud, planting itself upon, and seeking to take advantage of, such tenets, entertained as they are by large numbers of people, has been held to be within the contemplation of the federal statutes, and with this class of cases I have no fault to find. But they afford no authority for indictment in this case. Because there is no scheme set out in the indictment reasonably adapted to deceive persons of ordinary prudence, I am of the opinion there is no scheme to defraud, within the meaning of the statute in question, and the motion to quash is sustained.

THE INTERNATIONAL et al.

CONNELLY v. THE INTERNATIONAL et al.

(District Court, E. D. Pennsylvania. November 30, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—DREDGES AND SCOWS.

Dredges and scows are vessels, and are not dutiable as "goods, wares, and merchandise," under the tariff laws. U. S. v. Dunbar, 14 C. C. A. 639, 67 Fed. 783, distinguished.

This was a libel in admiralty by N. K. & M. Connelly against the dredge International and scows No. 1 and No. 2.

Frank P. Prichard, for libelant.

Francis F. Kane and James M. Beck, for respondent.

BUTLER, District Judge. Are dredges and scows vessels, or goods, wares and merchandise, and subject to the duty imposed by congress on the latter description of property? This is the only question presented. While it has not been directly passed upon by the courts, it has, I think, been indirectly decided. Dredges and scows are held to be water craft; they are intended for, and subject to, use only upon the water, and are consequently so shaped and constructed as to be navigated. That they are without independent means of propulsion is immaterial. In this respect they resemble barges and similar vessels. They are held to be within the jurisdiction of admiralty, subject to the laws of navigation generally, and to the provisions of our statutes relating to the subject. As authority for this statement it is sufficient to refer to the following cases: The Mac, 7 Prob. Div. 126; The Hezekiah Baldwin, 8 Ben. 506 [Fed. Cas. No. 6,449]; Endner v. Greco, 3 Fed. 411; The Alabama, 22 Fed. 449; The Pioneer, 30 Fed. 206; The Walsh Brothers, 36 Fed. 607; Aitcheson v. Endless Chain Dredge, 40 Fed. 253; The Atlantic, 53 Fed. 607; The Starbuck, 61 Fed. 502; Saylor v. Taylor [23 C. C. A. 343] 77 Fed. 476.

It is urged, however, by the respondent that this view is inconsistent with section 3 of the Revised Statutes. I do not so regard it. The section reads as follows:

"The word 'vessel' includes every description of water craft or artificial contrivance used, or capable of being used, as a means of transportation on water."

Dredges and scows are "water craft" and valueless except as such; and are "used or capable of being used as means of transportation." It is for these reasons the courts have held them to be subject to admiralty jurisdiction and to the laws of navigation. It is earnestly contended that they are not used, and cannot be used, as "means of transportation." Scows, however, carry cargoes. It is immaterial that the cargoes are generally mud. They are also "capable" of carrying coal, iron and other merchandise. Dredges transport their crews, coal and other supplies, and are "capable" of being used to transport other things. The section applies to whatever falls naturally within the scope of its terms; and scows and dredges do. We cannot limit the scope by speculating about the intent of congress for the purpose of subjecting such water craft to taxation under the provision of tariff laws, which impose a tax on foreign "goods, wares and merchandise." The ordinary sense of the latter terms (and they are used in this sense) does not embrace water craft of any description whatever. The language of the supreme court in the recent case of The Conqueror, 166 U. S. 110 [17 Sup. Ct. 510], on this subject is as applicable here as it was there. The question was not involved in U. S. v. Dunbar [14 C. C. A. 639] 67 Fed. 783, on which the respondent relies. There the dredge was *entered by its owner as an imported article* and claimed to be exempt from duty by the "free list." The collector decided otherwise, and the owner appealed. The only question, therefore, was whether the decision was right; no other could possibly be raised. The property must necessarily be treated as entered. The immaterial statement in the opinion that it was properly entered as an article of foreign manufacture, that it was not a vessel, is entitled to no weight; and the fact that the statement is predicated on the circumstance that the dredge was without independent "means of propulsion" demonstrates its fallacy.

WESTERN ELECTRIC CO. v. WILLIAMS-ABBOTT ELECTRIC CO. et al.

(Circuit Court, N. D. Ohio, E. D. December 2, 1897.)

No. 5,678.

1. PATENTS—CONSENT DECREE—PLEADING.
In a suit to enjoin an infringement of letters patent, the fact that a consent decree has previously been procured against a third person, who is neither defendant nor privy, is not material, and, if averred in the bill, will be struck out on motion.

2. SAME—INTERFERENCE PROCEEDINGS.
The same rule applies to averments of interference proceedings, for they raise a presumption of the validity of the patent only as against the parties thereto and their privies.

This was a suit in equity by the Western Electric Company against the Williams-Abbott Electric Company and others for alleged infringement of a patent. The cause was heard upon exceptions to the bill, accompanied by a motion to strike out certain allegations.

Barton & Brown, for complainant.
E. A. Angell, for respondents.

RICKS, District Judge. Exceptions are filed to the bill in this case, accompanied by a motion to strike from the bill the averments setting forth the facts connected with four consent decrees entered in United States circuit courts in the several districts described. It is averred that this recital of the proceedings wherein consent decrees were entered can have no place in this proceeding, except to influence the court upon an application for a preliminary injunction, and on such hearing they would have little weight, because decrees entered by consent are subject to suspicion, and are often recorded by collusion and unfair negotiations between the parties. I do not see that these averments are material to the issues in this case. The facts stated are, of course, within the knowledge of the complainant, and can easily be averred and supported by affidavit; but the respondents know nothing about such decrees, and would either be compelled to aver that they knew nothing concerning the facts, and therefore could not deny, or go to the expense of ascertaining, the facts, and pleading the results of such an investigation. It is bad pleading to make an issue of facts which are not material to such issue. It is not contended that the defendants in any of those suits where consent decrees were entered are in any way connected with the defendants or their privies, and they are not, therefore, bound by any such proceedings. I think the motion to strike out those averments ought, therefore, to be sustained.

The next question for consideration arises upon the motion of the respondents to strike out from the bill paragraph 5, which sets forth certain interference proceedings in the patent office. The purpose of expunging impertinent matter from the bill is to keep all irrelevant and redundant matter from the pleadings. In this case the paragraph is not one of great length, and, so far as the same is ob-

jectionable on the ground that it increases the irrelevant matter in the bill, its length would not be a very serious objection. But it is well, in all cases, to keep the pleadings strictly within the rule. Now, in this case, it is not averred that the respondents or their privies in any way took part in the interference proceedings in the patent office. The result of that interference was the granting of letters patent to Elisha Gray on December 23, 1884. As between the same parties, interference proceedings in the patent office are binding; but, as to outside parties, they may have persuasive force, or not, according to the merits of the interference proceedings. For what purpose are the averments concerning that proceeding inserted in this bill? If they are placed there for the purpose of being used in case an application for preliminary injunction should be made, they will prove of little value or use. Judge Lacombe well says in the case of Edward Barr Co. v. New York & N. H. Automatic Sprinkling Co., 32 Fed. 79, that:

> "The complainant relies upon a successful interference in the patent office, in which one Bishop was a party. That such a successful interference is sufficient ground for presuming the validity of a patent is abundantly settled by authority, with one restriction: Namely, that such presumption arises only against the parties to the interference and their privies."

As the averments concerning these interference proceedings are not binding upon these parties, it is wrong to make an issue concerning them, and to compel the respondents to go to the expense of meeting them in the pleadings. The motion to strike from the bill is therefore sustained.

THE KNICKERBOCKER.

DARLING v. THE KNICKERBOCKER et al.

(District Court, E. D. New York. January 25, 1894.)

MARITIME LIENS—SUPPLIES—DREDGES, SCOWS, ETC.

A dredge, tugs, scows, water boats, etc., composing a dredging plant, cannot be treated as a single vessel, so that supplies furnished to any one of them, without showing which, will constitute a lien payable out of the proceeds of all, under the New York statute giving a lien upon a domestic vessel for provisions supplied to such vessel.

Eighteen libels were filed against a fleet of boats composing a dredging plant,—a tug, a dredge, several scows, water boats, etc.,—for wages, for supplies, for repairs, and for other services. The libels for wages were consolidated by order of court, and, no one opposing, a decree was made for the amounts found due. The men were hired to work on the plant, and served indiscriminately on all the boats. Several libels for towage of the dredge and scows back and forth from New York to Port Jefferson Harbor, on Long Island Sound, where a contractor employed the plant in dredging work for some time, were also filed; and, without opposition, decree was also made for the sums found due for towage. The fleet was sold by order of the court, and the proceeds of sale paid into court as a single fund. Subse-

quently judgment creditors of the contractor intervened for their interest, and, without contest as to the other claims, or objection to their payment out of the fund, opposed the libels for supplies and repairs, claiming that there was no lien therefor on the fleet conjointly, as a domestic vessel. The opinion given below in one case was considered to control them all, and the others were thereafter discontinued. The remainder of the fund in court was then paid to the judgment creditors on their petition.

Thos. J. Ritch, Jr., for certain libelants.

Alexander & Ash, for other libelants and for interveners.

BENEDICT, District Judge. This is an action to enforce a lien upon the above vessels jointly, for supplies furnished by the libelant. He claims a lien by virtue of the statute of the state of New York, the vessels being domestic vessels. The theory of the libel seems to be that this fleet of boats should be treated as one vessel, and, the supplies in question having been bought for the fleet (although used on some of the vessels, and not on others), this gives the libelant a lien therefor upon all of the vessels jointly. This proposition cannot be maintained. The statute of the state of New York creates a lien upon a vessel for provisions supplied to such vessel, and not otherwise. It is impossible to say from the evidence here what part of the supplies in question, or whether any of them, was used to provision any particular vessel. The evidence will not permit holding that the vessels proceeded against were so employed as to constitute in law a single vessel; but, if such a case be possible, the statute of the state makes no provision for a lien upon several vessels so employed. The testimony fails to designate the vessel which was supplied with provisions furnished by the libelant. Doubtless, the provisions were used to supply the needs of men employed on some of the vessels proceeded against, but which of the vessels was supplied by the libelant does not appear. The libel must be dismissed, but without costs.

THE ANGLER.

VAN HOESEN v. THE ANGLER.

(District Court, E. D. New York. March 13, 1894.)

MARITIME LIENS—WAIVER—INNOCENT PURCHASERS.

A delay of over two years in attempting to assert a lien for damages for wrongful discharge of a pilot *held* to be a waiver thereof as against purchasers of the vessel who bought her while the lien claimant was suing the owner personally, without giving notice to the purchasers of an intention to hold the vessel, so that they had no opportunity for taking indemnity against the claim.

This was a libel by Francis Van Hoesen against the steamboat Angler, to enforce a lien for damages.

Alexander & Ash, for libelant.

Goodrich, Deady & Goodrich, for claimants.

BENEDICT, District Judge. This is an action to enforce a lien on the steamboat Angler for damages arising from the discharge of the libelant from the service of the boat before the expiration of his term of service. The libelant was hired as pilot by the then owner of the boat, one Foster, on February 11, 1889, and on July 11, 1890, he was discharged by Foster. In October, 1890, the libelant sued Foster in the state court to recover the same demand here presented. In January, 1892, the steamboat was transferred to a corporation, who are now her owners. In December, 1892, the libelant obtained judgment against Foster in the state court, and on December 27, 1892, he filed his libel against the steamboat in this action. The proofs in regard to the transfer of the boat to the corporation warrant the conclusion that the claimants were bona fide purchasers for value. They purchased the steamboat with no notice that the libelant claimed to have a lien upon her, but with notice that he had sued the former owner for his demand. When the claimants purchased the boat they paid all outstanding debts presented, and the demand of the libelant would then have been paid if it had been presented. It was not presented, and instead it was prosecuted against Foster. Any sum recovered by the libelant in this action will be so much lost to the present owners, for they are without security. Under these circumstances, I am of the opinion that the libelant should be held to have waived his lien against the boat by allowing it to remain dormant for over two years. The cases cited by the libelant are clearly distinguishable from the present case. Here no excuse is given for the libelant's delay to prosecute his claim for over two years; and this delay is coupled with the fact that in the meantime he put his claim in suit against the owner, and gave no notice of an intention to hold the boat, and coupled with the further fact that by withholding such notice he deprived the claimants of the opportunity of seeing that his claim was paid at the time of the transfer of the boat or taking indemnity against it. In such a case it would be inequitable to cause the claimants to pay the libelant's demand. The libel is accordingly dismissed, with costs.

THE ALEXANDER BARKLEY.

FLANNERY v. THE ALEXANDER BARKLEY.

PENNSYLVANIA R. CO. v. SAME.

(District Court, E. D. New York. February 2, 1894.)

1. TOWAGE—NEGLIGENCE OF TUG—RESPONSIBILITY OF PILOT—CONCLUSIVENESS OF DECREE.
   A default decree against a tug for damages caused to her tow by stranding is not conclusive of negligence on the part of the pilot in charge of the tug, so as to preclude him, after obtaining a decree against the tug for his wages, from denying such negligence in a contest between himself and the owner of the tow as to whose decree should be first paid out of the proceeds of the tug.

2. MARITIME LIENS—PRIORITY.
   A decree for pilot's wages is entitled to be first paid out of the proceeds of a tug, as against a decree for damages to her tow by stranding, where it appears that the stranding was not caused by the pilot's negligence, but by negligence of the tow's master.

These were libels in rem by John Flannery and by the Pennsylvania Railroad Company, respectively, against the steam tug Alexander Barkley. The cause was heard upon the question of the distribution of the proceeds of the tug.

John A. Anderson, for Flannery.
Robinson, Biddle & Ward, for Pennsylvania R. Co.

BENEDICT, District Judge. John Flannery filed a libel against the tug Alexander Barklev to recover wages due him as pilot. He had a decree in his favor by default. The Pennsylvania Railroad Company, owner of the schooner Gale, also filed a libel against the steam tug Alexander Barkley to recover damages caused by the negligence of the tug to the schooner Gale while in tow of the tug. In this suit, also, a decree was entered in favor of the libelant. The vessel having been sold, and the money in court being insufficient to pay both the decrees, the case comes before the court on the question of priority between the two decrees. On the part of the Pennsylvania Railroad, it is insisted that its claim has a priority over the claim of the pilot, because the accident in question was caused by the negligence of Flannery at the time in charge of the tug as pilot. Reference was ordered to take testimony upon the question whether the accident was caused by the fault of John Flannery. The reference was had, and the commissioner submitted the testimony, with the opinion that the accident was not caused by the negligence of John Flannery. It is now contended before the court that the Pennsylvania Railroad Company having obtained a decree of this court based upon an allegation of fault on the part of the steam tug Alexander Barkley, and it appearing that Flannery was in charge of the tug at the time, it is not open to be denied that the fault was the fault of John Flannery. But the decree obtained by the Pennsylvania Railroad Company by default is not conclusive upon John Flannery, and it was open to him, notwithstanding the

decree, to contend in this proceeding that the stranding of the schooner was not caused by his fault. His contention on this point has been supported by the opinion of the commissioner; and such is my opinion. The immediate cause of the stranding of the schooner was the hoisting of the schooner's sail by the master thereof before the tow had passed the reef. This was done under the permission of Flannery given to the master of the schooner, to hoist his sail as soon as they were clear of the reef. The master of the schooner undertook to use his own judgment as to when they were clear of the reef, and the sail was hoisted, without any direction from Flannery, by the master of the schooner, acting upon his own judgment that the tow was clear of the reef, when in fact the tow was not clear of the reef; and consequently the schooner touched upon the reef. The negligence that caused the collision was the negligence of the captain of the schooner in hoisting his sail before the tow was clear of the reef, and not any negligence on the part of Flannery. Flannery is therefore entitled to be paid his wages, first, out of the proceeds; and the remainder must be paid to the Pennsylvania Railroad Company on their decree.

THE ANCHORIA.

MULVANA et al. v. THE ANCHORIA.

(Circuit Court of Appeals, Second Circuit. December 1, 1897.)

No. 14.

SHIPPING—NEGLIGENCE—INJURY TO PASSENGER.

The existence of a wet place on the floor about the water cooler in the steerage, caused by carelessness of passengers in using the cooler, is not proof of such negligence as will render the ship liable for personal injuries caused by the slipping of the steward thereon so as to spill hot gruel upon a passenger. The probability of such an accident is too remote to make the failure to keep the floor constantly dry negligence in the protection of passengers. 77 Fed. 994, affirmed.

Appeal from a decree of the district court for the Southern district of New York, which dismissed the libel of James Mulvana, for himself and as father of his infant, Patrick Mulvana, who were passengers on board the steamship Anchoria, against the vessel, to recover damages for injuries to the son which were alleged to have been received in consequence of the negligence of the steerage steward of the vessel while on her voyage. 77 Fed. 994.

E. B. Whitney, for appellant.

C. C. Burlingham, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The general account of the injury is stated by the district judge as follows:

"On the evening of September 22, 1894, about 8 o'clock, the libelant's son, about three years of age, a passenger, with his father and mother, on board the steamer Anchoria, from Londonderry to this port, while sitting on the star-

board side of the starboard table in the steerage, near the forward end, at his evening meal, was scalded upon the face and neck by the splashing of hot gruel from the bucket in which the steward was supplying it to the steerage passengers."

The libelants' witnesses say that, as the steward was passing around the end of the bench upon which the child was sitting, he slipped and fell, and, in falling, hit the bucket against the end of the bench, so as to throw the hot gruel upon the right side of the neck and face of the child. They say that he slipped and fell upon a wet place upon the floor, which was caused by the drip from a water cooler which was near by, in the corner of the steerage, and at the right hand of the child. The steward's account of the occurrence is that as he was passing in the rear of the table, and after he had served the child, one of two little girls who were at play behind the tables ran against the bucket, in a little lurch of the ship, so as to splash its contents upon him and the child. The district judge did not find definitely which version was correct, but, assuming that the cause of the accident was a slip upon the wet floor, did not think that a case of negligence was made out. It is true that there was a dripping from the water cooler, which was caused, as the father says, because the children, who went there to quench thirst, did not turn the faucet so that the water could not drip. The steerage passengers also threw the slops of tea, which they had made for themselves, into the pail under the faucet. Each morning the wet place was scrubbed and dried, and a pail was placed under the faucet, but the pail was sometimes, in the course of the day, moved out of place. We agree with the district judge that the cause of the slip is not clear from the testimony, but, as the witnesses for libelant are in the majority, we are willing to assume that it was caused or was aided by a wet floor, which was wet by the passengers' careless use of the water cooler and the pail.

The libelant invokes the proper and rigorous obligations of care and caution which the law imposes upon carriers of passengers for hire, and which are stated in Pennsylvania Co. v. Roy, 102 U. S. 451, Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, and The City of Panama, 101 U. S. 462, and says that the carelessness of the steward in permitting the existence of a wet spot upon the floor was an act of negligence which renders the ship liable. It is probably true that a carrier of passengers for hire is bound to use care to overcome or obviate the known ordinary carelessness of the passengers, and, if a wet floor was dangerous, it would not be an adequate excuse for not guarding against the danger that it was caused by their known and continuous carelessness. The reason which excuses liability for this accident was presented by the district judge, and it is that no danger was to be apprehended, and that the danger of a grown man's slipping by reason of a wet spot upon the floor, and hurting a passenger in his fall, was so remote that the failure to keep the floor in a state of perpetual dryness, while it may be evidence that passengers were not prevented from a disagreeable tendency to a lack of neatness, is no evidence of negligence on the part of the officers or stewards of the ship in the protection of passengers against injury. The decree of the district court is affirmed, with costs of this court.

CREAGH v. EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES.

(Circuit Court, D. Washington, N. D. November 30, 1897.)

1. REMOVAL OF CAUSES—NOTICE OF PETITION.
   In causes removable from the state to the federal court, under the statute, the right to remove is absolute, and the proceeding therefor ex parte, and no notice to the adverse party is required.
2. SAME—BY NONRESIDENT DEFENDANT.
   The fact that a defendant sued by an alien in the state court is a resident of another federal district does not affect his right to remove the cause, if one over which the circuit court would otherwise have had original jurisdiction; the filing of the petition and bond for removal being a waiver of the right to object to the jurisdiction on that ground.
3. SAME—DIVERSITY OF CITIZENSHIP—SUIT BY ALIEN.
   A suit by an alien against a citizen who is a nonresident of the state in which the action is commenced is removable by the defendant on the ground of diversity of citizenship.
4. SAME—EXISTENCE OF CONTROVERSY.
   Where a petition by defendant for removal states that there is a controversy between the parties involving the requisite amount, it is no objection to the removal that defendant has filed no pleadings from which such controversy appears.

Action by John Creagh against the Equitable Life Assurance Society of the United States. Heard on motion to remand to state court.

John Arthur, for plaintiff.
Thomas R. Shepard, for defendant.

HANFORD, District Judge. This action was commenced in the superior court of the state of Washington for King county. The defendant filed a petition and bond, and obtained an order of said court removing the same to this court. In his complaint the plaintiff pleads a contract in writing, by which he was constituted the defendant's agent for the province of British Columbia, and was to receive certain profits and emoluments, to accrue from insurance in the defendant company to be effected through said agency within the territory assigned to him, and alleges breach of said contract on the part of the defendant, by which plaintiff has been damaged to the amount of $19,537.45, in which sum he prays for judgment, with costs. The defendant's petition for removal of the cause to this court sets forth that the amount in controversy exceeds $2,000; that the plaintiff is a citizen and resident of the province of British Columbia, and a subject of Victoria, queen of Great Britain; and that the defendant is a corporation organized and existing under the laws of the state of New York, and not a resident or inhabitant of the state of Washington. The plaintiff has moved to remand the case to the superior court, in which it was commenced, upon several specified grounds, but I will only refer to those which were relied upon in the argument, viz.: First. Notice of the removal proceedings was not given to the plaintiff or his attorney. Second. Both parties are nonresidents of this district. Third. In a suit by an alien plaintiff against a citizen, the law does not authorize removal by the defendant. Fourth. No answer, plea, or demurrer having been filed, it

does not appear by the record that there is any controversy, and the law does not confer jurisdiction upon a circuit court of the United States, on the ground of diversity of citizenship, unless there is an actual controversy to be litigated, which must appear by the record when the jurisdiction is first invoked.

1. The law provides only for ex parte proceedings for the removal of causes into the circuit courts of the United States. The statute provides, and the decisions hold, that the filing of a proper petition and bond, within the time limited, in a case which is removable under the law, does ipso facto oust the state court of its jurisdiction. When the petition and bond shall have been made and filed in the state court, "it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit." The right of removal is absolute in causes which may be removed, and questions as to the right of removal, and the sufficiency of the petition and bond in each case, can be determined only by the circuit court. Therefore notice to the plaintiff of proceedings prior to filing the transcript in the circuit court could avail nothing if given. The only notice provided for by statute or rule of court is contained in the seventy-fourth rule adopted by this court, which is as follows:

"Whenever the proper proceedings have been perfected in a state court to remove a case from such court to this court, pursuant to any statute of the United States, either party may at any time thereafter, as of course, file the transcript required by law in this court, and serve written notice of such filing upon the adverse party, or his attorney."

The purpose of this rule is to enable either party to speed the cause. Under the statute, a party who removes a cause is bound only by the conditions of his bond to file the transcript and have the cause docketed on the first day of the next succeeding term, but the rule authorizes either party to have the transcript filed and the cause docketed immediately after the petition and bond have been filed in the state court.

2. Notwithstanding the nonresidence of the parties, the plaintiff, being an alien, might have commenced this action by original process in this court, and the defendant might have entered an appearance, and, by pleading to the merits, have waived the privilege of objecting to a determination of the controversy by this court, on the ground that it is not an inhabitant of this district, and, that privilege being waived, this court would have full jurisdiction to proceed to a final determination of the rights of the parties. Gracie v. Palmer, 8 Wheat. 699; Pollard v. Dwight, 4 Cranch, 421; Barry v. Foyles, 1 Pet. 311; Toland v. Sprague, 12 Pet. 300–330; Ex parte Schollenberger, 96 U. S. 369–378; Construction Co. v. Fitzgerald, 137 U. S. 98–113, 11 Sup. Ct. 36; Railway Co. v. McBride, 141 U. S. 127–132, 11 Sup. Ct. 982; Railroad Co. v. Cox, 145 U. S. 593–608, 12 Sup. Ct. 905; Southern Pac. Co. v. Denton, 146 U. S. 202–206, 13 Sup. Ct. 44; Railway Co. v. Saunders, 151 U. S. 105, 14 Sup. Ct. 257; Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286; Railway Co. v. Davidson, 157 U. S. 201–208, 15 Sup. Ct. 563; Improvement Co. v. Gibney, 160 U. S. 217–220, 16 Sup. Ct. 272. I am not certain that I have found all of the decisions of the supreme court on this exact point. In

searching for them, and in citing the above list, I have been impelled by curiosity, rather than a sense of necessity, to mass the authorities. It is an interesting fact that the supreme court has been called upon to reiterate so many times the clear declaration of the law by Chief Justice Marshall in the case of Gracie v. Palmer. In the case of Trust Co. v. McGeorge it was expressly ruled that the waiver may be made when the question arises where neither of the parties are residents of the district. The case being one of which the circuit courts of the United States are given jurisdiction by the first section of the act of March 3, 1887, as corrected and amended by the act of August 13, 1888 (25 Stat. 433, 434), the defendant had the right to remove it into this court under the provisions of the second section of said act; for by filing the petition and bond for removal it has waived the right to challenge the jurisdiction of this court, on the ground that the action was not commenced in the district whereof it is an inhabitant, as effectually as that privilege might be waived by any other form or manner of submission to the jurisdiction. Stalker v. Palace-Car Co., 81 Fed. 989.

3. The right of removal in this case was not claimed on the ground of alleged local prejudice in the community, which might be supposed to operate to the disadvantage of the defendant, but solely on the ground of diversitv of citizenship, and in such cases the law makes no distinction between aliens and citizens. The right of removal is given to a defendant who is a nonresident of the state in which the action is commenced, whether such defendant be an alien or a citizen of another state. The authorities cited by counsel on this point are decisions in cases of removal on the ground of local prejudice, and cases under different statutes than the one which governs this case.

4. If there is no controversy between the parties, the plaintiff had no occasion to commence this action. His complaint sets forth a claim of rights on his part to be protected, and wrongs on the part of the defendant to be redressed, by the judgment of the court; and the petition for removal states that there is a controversy between plaintiff and defendant, and that the amount and value involved therein exceeds $2,000. I can find no ground for indulging a hope that there may be no controversy between the parties to this action, nor for supposing the record to be defective. Motion to remand denied.

In re ASPINWALL'S ESTATE.

(Circuit Court, W. D. Pennsylvania December 18, 1897.)

No. 20.

REMOVAL OF CAUSES—JURISDICTION OF FEDERAL COURTS—PROBATE PROCEEDING.

A proceeding in the orphans' court in Pennsylvania on appeal from a decision of the register of wills admitting a writing to probate as a will is one in rem, heard in the exercise of the probate jurisdiction of the court, and is neither a suit at law or in equity cognizable by or removable to the federal courts.

Sur motion to remand to state court.

A. P. Burgwin, for petitioner.
John G. Johnson and Dalzell, Scott & Gordon, for executor.

ACHESON, Circuit Judge. It may confidently be affirmed that a proceeding to establish and probate a will is not a suit at law or in equity, of which a circuit court of the United States, under the act of March 3, 1887, as amended August 13, 1888, has original cognizance, or can acquire jurisdiction by removal from a state court. Case of Broderick's Will, 21 Wall. 503; In re Frazer, Fed. Cas. No. 5,068; Reed v. Reed, 31 Fed. 49; In re Cilley, 58 Fed. 977; In re Foley, 76 Fed. 390, 80 Fed. 949. What, then, is the nature of the proceeding here in question?

The register of wills of Allegheny county, Pa., against the caveat of Mrs. Mary C. Delafield, admitted to probate a writing purporting to be the last will of Anna R. Aspinwall, deceased, and issued letters testamentary thereon to the executor therein named. From this decision of the register an appeal was taken by Mrs. Delafield to the orphans' court of Allegheny county. Pending proceedings upon this appeal in the orphans' court, Mrs. Delafield presented her petition to that court, for the removal of the cause into this court, upon the ground of diverse citizenship between the proponent of the will and the contestant. Now, the orphans' court is a special statutory tribunal, having under the law of Pennsylvania exclusive cognizance of appeals from the decisions of the register in the matter of the probate of wills and the granting of letters testamentary. In performing its appellate functions in such a case, the orphans' court undoubtedly exercises probate jurisdiction. The subject-matter involved in the appeal is the validity of the contested instrument as a will. The proceeding upon the appeal is in the nature of a proceeding in rem, and, when a final decree is reached, it is conclusive on all the world. In re Miller's Estate, 159 Pa. St. 562, 28 Atl. 441.

The supreme court of Pennsylvania, in Re Miller's Estate, 166 Pa. St. 97, 111, 31 Atl. 63, said:

"The appeal brings the rem—the will—within the jurisdiction of the orphans' court. The court then proceeds by its process to bring the persons interested in the res before it; so that all may be heard before the final decree is made, and be bound by it when made."

Such being the character of this proceeding, the federal decisions above cited are directly against our jurisdiction. Nor is this conclusion at variance with the rulings in Gaines v. Fuentes, 92 U. S. 18, and Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, that, where by the law of a state suit may be maintained in a state court to annul the probate of a will, such a suit may be maintained in a federal court, where the parties on the one side and the other are citizens of different states. The proceeding upon this appeal is not such an annulling suit, nor is it analogous to such a suit. It is a part of the probate proceedings for the establishment of the contested instrument.

As these views are conclusive against the jurisdiction of this court, it is not necessary for us to consider the other reasons assigned for

remanding the cause. And now, this 18th day of December, 1897, it is ordered and adjudged that this proceeding be, and the same is, remanded to the orphans' court of Allegheny county.

WHITELEY MALLEABLE CASTINGS CO. v. STERLINGWORTH RAILWAY SUPPLY CO.

(Circuit Court, D. Indiana. December 16, 1897.)

No. 9,518.

REMOVAL OF CAUSES—WAIVER.

Appearing in the state court, filing a demurrer to the complaint, and procuring an order discharging an attachment by giving the necessary bond therefor, all before the time at which the defendant is required by the state practice to answer or plead, is not a waiver of the defendant's right to remove, when no action was taken on the demurrer in the state court.

Gregory, Silverburg & Lotz and Gavin, Coffin & Davis, for plaintiff.
Woollen & Woollen, for defendant.

BAKER, District Judge. On July 14, 1897, the plaintiff filed its complaint against the defendant in the circuit court of Delaware county, Ind., to recover damages in the sum of $3,500 for an alleged breach of contract. The complaint is in two paragraphs. The first paragraph sets out the contract and counts upon its breach. The second paragraph is a common count for goods, wares, and merchandise sold and delivered. On the same day proceedings in attachment were instituted against the defendant as a nonresident of the state, and the Lake Erie & Western Railway Company was duly garnished as a debtor of the defendant. The plaintiff indorsed its complaint as provided by law, requiring the defendant to appear to and answer the same on September 22, 1897, the same being the fifteenth judicial day of the September term, 1897, of the Delaware circuit court. On July 26, 1897, the plaintiff filed its affidavit showing that the defendant was a nonresident of the state, and procured an order for the service of the summons on the defendant by publication. The summons was published requiring the defendant to appear and answer the complaint on September 22, 1897. On August 14, 1897, the defendant entered its appearance and filed its demurrer to the complaint. At the same time the defendant filed a bond, as provided by law, for the dissolution of the proceedings in attachment and garnishment, and moved the court to accept the bond and discharge the proceedings. The court accepted the bond, and discharged the proceedings in attachment and garnishment. No action was asked for or taken on the demurrer in the state court. All these pleadings were filed and proceedings had at the April term, 1897, of the Delaware circuit court. On September 7, 1897, being the second judicial day of the September term, 1897, of the Delaware circuit court, no further proceedings having been had in said court than are above stated, the defendant filed in said court in said cause its verified petition, accompanied by a sufficient bond, asking for the removal of the case into the circuit court of the United States for the district of Indiana. The petition sets

forth all the facts required by law to authorize such removal, and the state court entered an order directing the cause to be removed into this court.

The provisions of the Indiana Code of Practice pertinent to the subject are set out in the case of McKeen v. Ives, 35 Fed. 801, 802.

The defendant now moves the court to remand this cause to the state court for the following reasons: First, because the defendant entered a full appearance in the cause in the state court, and filed therein its bond in discharge of the attachment proceedings had in said cause, and secured the approval of such bond, and an order of the court discharging such attachment proceedings; second, because the defendant, while said cause was pending in the state court, entered its full appearance therein, and filed a demurrer to the complaint.

The time fixed by indorsement on the complaint, and by the summons served by publication, for the defendant to appear and answer, was September 22, 1897. Neither the law of the state nor any rule of the state court required the defendant to answer or plead to the complaint prior to that date. The act of March 3, 1887 (24 Stat. 552, § 3), and the act of August 13, 1888, to correct the enrollment of the former act (25 Stat. 433, § 3), provide:

"That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."

The defendant filed its petition and bond on September 7, 1897, 15 days before the time fixed by the act of congress when its right of removal would have expired. It is contended, however, that it had lost its right of removal by filing its bond, and procuring an order discharging the proceedings in attachment, and by filing a demurrer to the complaint. If the right of removal has been lost, it arises from the waiver of such right by procuring the discharge of the attachment proceedings, and by filing its demurrer before the time when it could have been required by the law of the state or the rule of the court to answer or plead to the complaint. Waiver is usually a question of intent, and knowledge of the right, and an intent to waive it, must be made plainly to appear. Such intent is usually to be determined from the acts and declarations of the party. It is not to be determined by the secret purpose or understanding of the party, but is to be ascertained from his acts and declarations. To make out a case of abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part. The filing of the bond and procuring the order discharging the attachment were proceedings collateral and incidental to the suit, and every right in respect to the cause of action disclosed in the complaint remains unaffected thereby. These proceedings do not evince a plain purpose to waive the right of removal. Furthermore, by the act of March 3, 1875 (18 Stat. 471, § 4), the validity of attachments in the state courts, and of

all bonds, undertakings, or security given by either party, is preserved after removal. This is persuasive evidence that congress did not intend that the giving of such bonds should bar the right of removal.

The filing of the demurrer is the filing of an answer, within the meaning of the removal act. Martin's Adm'r v. Railroad Co., 151 U. S. 674, 686, 14 Sup. Ct. 533. But that act does not provide that the petition for removal shall be filed in the state court before the filing of an answer or plea. It provides that the petition for removal may be filed at the time or at any time before the defendant is required by law or rule of court to answer or plead to the complaint. The mere act of filing a demurrer in the state court, upon which no action is invoked or had, is not clear, unequivocal, and decisive evidence that the defendant intended to move such demurrer to a hearing in the state court. The act is equivocal, and is as consistent with the intention to move it to a hearing after removal as before. To operate as a waiver, the act of the party must be irreconcilably repugnant to the assertion of his legal right. The mere filing of an answer or demurrer does not, in the opinion of the court, present a case of such irreconcilable repugnancy. Perhaps, if the demurrer had been argued and decided before the time for removal had expired, it would have constituted a waiver, and would have barred the right of removal. Martin's Adm'r v. Railroad Co., supra. The following cases more or less directly support the foregoing views: Gavin v. Vance, 33 Fed. 84, 92; McKeen v. Ives, 35 Fed. 801; Tan-Bark Co. v. Waller, 37 Fed. 545; Conner v. Coal Co., 45 Fed. 802; Garrard v. Silver Peak Mines, 76 Fed. 1; Purdy v. Wallace, Müller & Co., 81 Fed. 513; Goldey v. Morning News, 156 U. S. 516, 15 Sup. Ct. 559. The motion to remand is overruled.

EIGHMY v. POUCHER.

(Circuit Court, N. D. New York. January 3, 1898.)

REMOVAL OF CAUSES—ACTION AGAINST UNITED STATES OFFICIAL.

An action against a United States district attorney for malicious prosecution will not be remanded to the state court when all of the proceedings in the criminal action were by United States officials, in a federal court, for a violation of federal laws.

This was an action by John W. Eighmy to recover damages from William A. Poucher for malicious prosecution. The cause was removed from the supreme court of New York to the United States circuit court, and plaintiff moves to remand.

John W. Eighmy, in pro. per.

W. F. Mackey, for defendant.

COXE, District Judge. The defendant, while acting as United States district attorney for this district, caused the plaintiff to be indicted, arrested and tried for an alleged violation of the pension laws. At the trial the court directed a verdict of acquittal. This action is for malicious prosecution based upon the foregoing facts. It was

brought originally in the supreme court of the state, and was removed by the defendant to this court upon the ground that he was a United States official acting under the constitution and laws of the United States. The plaintiff now moves to remand.

The defendant, who caused the complaint to be made against the plaintiff, the marshal, who arrested him, and the judge, who tried him, were all federal officials. The grand jury which found the indictment was impaneled in a court of the United States. The laws, which it was charged the plaintiff violated, were laws of the United States. The department to which, it was alleged, he transmitted false papers, was a department of the United States. In short, all the proceedings against the plaintiff were by United States officials in a United States court for violation of United States laws. The trial of this action, therefore, may involve and draw in question directly or indirectly the federal laws, practice and procedure, the validity of the organization of the grand jury and the title, authority and power of several executive and judicial officers of the general government. These are all questions for the courts of the United States to determine. Without pursuing the discussion further it is thought that the facts bring this cause directly within the reasoning of Tennessee v. Davis, 100 U. S. 257; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658; Houser v. Clayton, 3 Woods, 273, Fed. Cas. No. 6,739. As the complaint alleges "that during all the time and times above mentioned the said defendant William A. Poucher was United States attorney duly commissioned by the United States" the deplorable result of Walker v. Collins, 167 U. S. 57, 17 Sup. Ct. 738, need not be apprehended. The motion to remand is denied.

SECCOMB v. WURSTER, Mayor, et al.

(Circuit Court, E. D. New York. December 22, 1897.)

1. STREET RAILROADS—GRANTING OF FRANCHISE—INJUNCTION—RIGHTS OF ABUTTING OWNER.

   The mere granting of consent by the local authorities to the building and operation of a street railroad does not constitute irreparable injury to abutting property, so as to entitle an owner to maintain a suit to enjoin such action.

2. JURISDICTION OF FEDERAL COURTS—TAXPAYER'S SUIT.

   Under the New York statutes authorizing suits by taxpayers (Laws 1881, c. 531; Laws 1887, c. 673; Laws 1892, c. 301), although the entire body of taxpayers in a city, the city itself, and the general public may be interested in the result, a complainant cannot be compelled to admit others as co-complainants; and a federal court has jurisdiction of such a suit where the requisite diversity of citizenship exists between the parties to the record.

3. TAXPAYERS' SUITS—RIGHT TO PRELIMINARY INJUNCTION.

   In a taxpayer's suit under the statutes of New York to restrain an alleged illegal official act, which, if illegal, could not confer any rights nor work irreparable injury to complainant, to entitle the complainant to a preliminary injunction the right to such relief must be made clear and certain.

4. FEDERAL COURTS—CONSTRUCTION OF STATUTE—DECISION OF STATE COURT.

   A decision of an appellate court of the state construing a state statute will be followed by a federal court in determining a motion for a prelim-

inary injunction in a taxpayer's suit, though the question has not been settled by the state court of last resort.

5. STREET RAILROADS—GRANTING OF STREET FRANCHISE—CHARTER OF GREATER NEW YORK.

That section 74 of the Greater New York charter (Laws 1897, c. 378), which prescribes the procedure in granting franchises in the streets of the city, took effect upon its passage, instead of coming into force with a majority of the charter provisions, on January 1, 1898, is not so clear as to warrant a federal court, in the absence of a construction by the state courts, in restraining by a preliminary injunction the action of the municipal authorities in granting a franchise to a street railroad in accordance with the provisions of previously existing statutes, where such injunction would have the effect to prevent any action by such authorities during the remainder of their official existence.

6. SAME—CONSENT TO USE STREETS—PROCEDURE OF CITY COUNCIL.

Under section 92 of the New York Railroad Law, which requires public notice to be given of the time and place of the first consideration by a committee of the common council of an application for consent to use streets for railroad purposes, the fact that after such notice has been given and hearings had, and while the matter is still in the hands of the committee, its membership is changed in part, the council remaining the same, does not necessitate a new notice, nor render the action of the council after the committee has made its report invalid.

7. SAME—INJUNCTION AGAINST GRANTING FRANCHISE—LEGALITY OF INCORPORATION.

That a street-railroad company is without the certificate of the board of railroad commissioners required by section 59 of the railroad law, showing that it has published its articles of incorporation as therein required, and that public convenience and necessity require the construction of such railroad, does not, under the conflicting decisions of the state courts, so clearly incapacitate such company to receive a franchise to use the streets of a city as to justify a court in restraining the city authorities from granting such franchise by a preliminary injunction in a taxpayer's suit.

This was a bill by Mary T. Seccomb against Frederick W. Wurster, as mayor of the city of Brooklyn, David S. Stewart and 27 others, constituting the board of aldermen, and the East River & Atlantic Ocean Railroad Company, to enjoin the granting of a franchise to the defendant railroad company in certain streets in Brooklyn.

This is a motion for an injunction pendente lite, as prayed in the bill. The suit was originally begun against the mayor and the board of aldermen only, and relief prayed for against them. Subsequently, and before the argument of this motion, the railroad company, upon its own application, and with the consent of the solicitors for the complainant, was joined as a party defendant. All the defendants are citizens of the state of New York, and residents of the Eastern district. The complainant is a citizen of the state of Connecticut, resident of Washington, in said state. The suit is brought to prevent the defendants, members of the board of aldermen, from voting to pass a certain resolution adopted by said board of November 29, 1897, over the veto of the mayor, and also to prevent said defendants, members of the board of aldermen, from "passing or adopting any resolution whatever granting or purporting to grant to the East River & Atlantic Ocean Railroad Company, aforesaid, any franchises or rights whatsoever, except in conformity to and in compliance with sections 73 and 74 of chapter 378 of the Laws of 1897 of the State of New York, known as the 'Greater New York Charter,' and section 92 of the railroad law of the state of New York." The complainant avers that she is the owner of real estate situated on Hicks street, in the city of Brooklyn, which is assessed in the amount of $25,000, upon which she is liable to pay, and has paid, the tax annually imposed; that the East River & Atlantic Ocean Railroad Company was organized on or about November 15, 1895, and made application, on or about February 3, 1896, to the board of aldermen, for con-

sent and permission to construct, maintain, and operate a street-surface railway through certain streets and avenues, which are set forth in detail in the complaint; that on February 3, 1896, this application was referred by the board of aldermen to its committee on railroads, which committee gave public hearing upon said application, on certain days in 1896, specifically set forth. It is further averred that on or about January 4, 1897, the said board elected a new president from its body, who, on or about January 12, 1897, appointed new standing committees, among others a committee on railroads; apparently this committee consists of seven members, and five of those composing the present committee were also members of the committee of 1896; that the committee on railroads, as constituted during the year 1897, presented a report, on or about November 29, 1897, recommending the granting of the application of the defendant railroad company; that thereupon a resolution embodying said report and granting said application was adopted by the said board; that no public hearings, either before the board or the committee, were had, other than those above referred to, which were had in the year 1896. The complaint charges that the said resolution of the board is illegal and void, for the reason that said petition was not considered after due public notice, as required by paragraph 92 of the railroad law of the state of New York. It further charges that the action of the board in passing such resolution was illegal, null, and void, because in contravention of section 59 of chapter 565 of the Laws of 1892, which provides that no railroad corporation thereafter formed shall exercise the powers conferred by law on such corporation until the directors shall cause a copy of its articles of association to be published, and until the board of railroad commissioners shall certify that such publication has been made, etc.

Various other specifications of illegality are set forth in the complaint, a brief statement of which will be found in the following opinion. The most important of these, and the one to which argument has been more particularly addressed, is the averment that the said resolution is illegal, null, and void, because it is in contravention of paragraphs 73 and 74 of the Greater New York Charter (Laws 1897, c. 378). These sections are as follows:

"Sec. 73. After the approval of this act no franchise or right to use the streets, avenues, parkways or highways of the city shall be granted by the municipal assembly to any person or corporation for a longer period than twenty-five years, but such grant may at the option of the city provide for giving to the grantee the right on a fair revaluation or revaluations to renewals not exceeding in the aggregate twenty-five years. Such grant, and any contract in pursuance thereof, may provide that upon the termination of the franchise or right granted by the municipal assembly the plant, as well as the property of the grantee in the streets, avenues, parkways and highways with its appurtenances, shall thereupon be and become the property of the city without further or other compensation to the grantee; or such grant and contract may provide that upon such termination there shall be a fair valuation of the plant and property which shall be and become the property of the city on the termination of the grant on paying the grantee such valuation. If by virtue of the grant or contract the plant and property are to become the city's, without money payment therefor, the city shall have the option either to take and operate the said property on its own account, or to renew the said grant for not exceeding twenty years upon a fair revaluation, or to lease the same to others for a term not exceeding twenty years. If the original grant shall provide that the city shall make payment for the plant and property, such payment shall be at a fair valuation of the same as property excluding any value derived from the franchise; and if the city shall make payment for such plant and property it shall in that event operate the plant and property on its own account for at least five years, after which it may determine either to continue such operation on its own account, or to lease the said plant and property and the right to use the streets and public places in connection therewith for limited periods, in the same or similar manner as it leases its ferries and docks. Every grant shall make adequate provision, by way of forfeiture of the grant or otherwise, to secure efficiency of public service at reasonable rates, and the maintenance of the property in good condition throughout the full term of the grant. The grant or contract

shall also specify the mode of determining the valuations and revaluations therein provided for.

"Sec. 74. Before any grant of the franchise or right to use any street, avenue, parkway or highway shall be made, the proposed specific grant embodied in the form of an ordinance with all of the terms and conditions, including the provisions as to rates, fares and charges, shall be published at least twenty days in the City Record and at least twice in two daily newspapers published in the city to be designated by the mayor at the expense of the proposed grantee. Such ordinance shall on its introduction and first reading be referred by the municipal assembly to the board of estimate and apportionment, who shall make inquiry as to the money value of the franchise or privilege proposed to be granted and the adequacy of the compensation proposed to be paid therefor, and no grant thereof by the municipal assembly shall be made except on terms approved by vote or resolution of the board of estimate and apportionment, entered on the minutes or record of such board, and every ordinance containing or making such grant shall require the concurrence of three-fourths of all the members elected to each branch of the municipal assembly as shown by the ayes and noes there recorded and the approval of the mayor, and thirty days at least shall intervene between the introduction and final passage of any such ordinance. It shall require a vote of five-sixths of all the members elected to each branch of the municipal assembly to pass such ordinance over the mayor's veto. This act shall apply to any renewal or extension of the grant or leasing of the property to the same grantee or others."

The complaint further avers that there is sufficient ground to believe that, unless restrained by injunction, the board of aldermen will pass the resolution over the veto of the mayor; and that, in the event of their being restrained by injunction from such action, there is good reason to believe that they will adopt a new resolution, granting to the said railroad company the consent of the local authorities to the construction and operation of their road for the period of 25 years. The application for preliminary injunction is supported by affidavits.

Cameron & Hill and Fred. K. R. Coudert, for complainant.
Joseph A. Burr, Corp. Counsel, for mayor, etc., of city of Brooklyn.
Luke D. Stapleton, for certain defendants.
James C. Church, for defendant East River & A. O. R. Co.

LACOMBE, Circuit Judge (after stating the facts). There was some discussion upon the oral argument as to whether complainant brought this suit as a taxpayer, under the express statutory provisions authorizing such suit (Laws 1881, c. 531; Laws 1887, c. 673; Laws 1892, c. 301), or as an individual abutting owner, to prevent some anticipated injury to her individual property. The complaint is evidently framed as a taxpayer's bill under the statute. It contains the averments as to payment of taxes which said statute calls for; and it is thought that upon the oral argument it was conceded by complainant that this is a taxpayer's suit, under these statutes. It will be treated as such in this opinion, for under any other theory the relief asked for by way of preliminary injunction would be premature. There is nothing to show that the granting of a consent to build and operate a street railroad by the local authorities contrary to the provisions of law will work irreparable injury to the abutting owner. When the railroad company, relying upon such consent, may undertake to build its road, such abutting owner may apply for relief; but that time may never come, and, until some danger peculiar to the abutting property is threatened, the owner of such property is in no position to demand a preliminary injunction peculiarly for its protection.

It is contended in opposition to the motion that, if complainant is suing under the taxpayer's act, the suit is one in which the parties in interest on the complainant's side are in reality the city of Brooklyn and the general body of taxpayers therein, and that the federal court would have no jurisdiction of such an action. The statute gives to any person whose assessment shall amount to $1,000, and who shall be liable to pay taxes on such assessment, and shall have paid them within one year, an independent right to sue and to prosecute the suit thus brought, without being compelled to allow other parties in interest to come in and join themselves as co-complainants. It is true that the city of Brooklyn, other taxpayers therein, and, indeed, the public generally, are interested in the result, possibly more interested than this complainant; but, so long as she chooses to prosecute this suit as sole complainant, none of those thus interested can become parties to the record on the complainant's side of the controversy. This is determinative of the objection. "In controversies between citizens of different states, the jurisdiction of the federal courts depends, not upon the relative situation of the parties concerned in interest, but upon the relative situation of the parties named in the record. * * * If [parties plaintiff] are personally qualified by their citizenship to bring suit in the federal courts, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified." Coal Co. v. Blatchford, 11 Wall. 175; Pennington v. Smith, 24 C. C. A. 155, 78 Fed. 399. The taxpayer's act expressly gives the right in a proper case to maintain an action to prevent any illegal official act. It is the theory of the act that, when it shall appear that proposed official action is illegal, the courts may prevent the taking of such action, although, being illegal, it would, if taken, confer no rights upon any one. In order, however, to entitle the complainant bringing suit under the provisions of that act to a preliminary injunction, the right to such relief must be made clear and certain.

The following excerpt from an opinion of the state supreme court, rendered in a case where consent to the operation of a street railroad was sought for, well expresses the principle which should govern upon applications of this sort. The decision was at special term, but the opinion, written by an able, careful, and experienced judge, has apparently never been questioned:

"An injunction pendente lite should only be granted in a case like the present, where the plaintiff clearly shows the official action complained of was illegal. Great injury would here result to the defendant corporation from the granting of such an injunction, while no irreparable injury would result to the plaintiff or the taxpayers generally for its refusal. The injunction sought pendente lite is precisely the same as the injunction prayed for in the complaint herein. The plaintiff thus asks us on motion to give him the equivalent of the final judgment upon a trial of the action. It is plain that, if his charges of illegality are sustained, the taxpayers will lose nothing by the proposed sale. If, on the other hand, they are not sustained, the defendant corporation will lose all it has thus far attained by the proceeding in question, and will be compelled to proceed de novo. These considerations are conclusive against the present application; for it is entirely clear that such a case of illegal official action as would justify the sweeping injunction asked has not been made out." Abraham v. Meyers (Sup.) 23 N. Y. Supp. 226, 228.

Such is the state practice, and in this circuit the federal courts do not grant injunctions pendente lite, which may change the defendant's position to his hurt without securing to the plaintiff any right not already abundantly protected, except where the right to such relief is clear.

In the case at bar, if the contemplated action of the board of aldermen, as local authorities, giving consent to the construction and operation of a road, be an exercise of power which they now possess, and which is in no way prohibited, the granting of an injunction pendente lite would not only postpone the exercise of that power, but would absolutely prevent any such exercise, since it is conceded that, after midnight on the 31st of December, whatever present powers in that regard may be possessed by the board of aldermen will cease and determine. Irreparable injury would thus be worked to the defendant railroad company. If, on the other hand, injunction pendente lite were refused, and the board of aldermen should thereupon grant the consent, and it should eventually be held by the court of last resort that such an act on their part was an illegal one (which is what complainant claims it is), no rights either of the complainant, of the city of Brooklyn, or of the taxpayers therein, would be in any wise impaired or affected by the refusal of the injunction, for such illegal consent would not be worth the paper on which it was written.

The ground upon which complainant most strenuously relies is the assumed prohibition in sections 73 and 74 of the Greater New York Charter (called hereinafter the "New Charter"), which are quoted above. As will be seen, section 73 begins as follows, "After the approval of this act, no franchise or right to use the streets, avenues, parkways or highways of the city shall be granted by the municipal assembly to any person or corporation for a longer period than twenty-five years," and proceeds with detailed provisions as to renewals, and as to disposition of plant upon termination of the franchise. In the recent case of Gusthal v. Board, 48 N. Y. Supp. 652, the appellate division of the supreme court, First department, has construed this section, holding that this prohibition against granting a franchise or right to use the streets for more than 25 years is now in force. As the decision of an appellate court of the state construing a state statute, the conclusions in the Gusthal Case may be followed by this court upon such a motion as this, although the question be not as yet settled by the state court of last resort. Briefly stated, the reasoning by which this conclusion was reached is as follows: The new charter contains the following section:

"Sec. 1611. For the purpose of determining the effect of this act upon other acts and the effect of other acts upon this act, this act shall, except as in this section is otherwise provided, be deemed to have been enacted on the first day of January, in the year 1898. This act shall take effect on the first day of January, 1898: provided, however, that where by the terms of this act an election is provided or required to be held or other act done or forbidden prior to January 1, 1898, then as to such election and such acts, this act shall take effect from and after its passage, and shall be enforced immediately, anything in this chapter or act to the contrary notwithstanding."

It is apparent from this section 1611 that the legislature contemplated that the act contained some prohibitive provisions which were

to go into effect immediately on the passage of the act. The existing condition of affairs as to franchises was, from the city's standpoint, unsatisfactory. The creation of the greater city would make such franchises more valuable, and induce a "pressure upon all those various municipalities which for a short time possessed the right of granting permanent franchises, to grant such franchises to corporations, before the statute creating the Greater New York took effect." The phrase "after the approval of the act" is a peculiar one. It must be presumed that it was coupled with the provisions of this particular section, not idly, but for some intelligent purpose. In terms, the section forbids the doing of an act after the approval of the new charter (May 4, 1897). Therefore we have an instance of "an act forbidden prior to January 1, 1898"; and, by virtue of section 1611, so much of the charter as in terms forbids such act takes effect upon the passage of the statute. To the suggestion that the prohibition was by its terms one operative only upon the "municipal assembly,"—a body which would not come into existence until January 1, 1898,—it was replied that the important words of the section were those declaring the intention of the legislature that, as to the power of granting franchises for more than 25 years, this section shall be taken out of the general provision by which the act was to take effect on January 1, 1898, and that this paramount intent must control the inconsistent subordinate provision.

The next question to be decided is whether section 74 is also now in force, and whether the grant of consent to a street-railroad company by the local authorities in the city of Brooklyn, in conformity to the provisions of law existing before the passage of the new charter, will be an illegal act, unless such consent be granted in strict conformity to the provisions of section 74. It is thought that, for the purpose of determining its effect upon prior acts, this section 74 must be deemed to have been enacted on January 1, 1898, for the following reasons:

First. This section, unlike the other, does not contain any words declaratory of the paramount intention of the legislature that it shall go into effect on the approval or on the passage of the act.

Second. Section 74 is not an essential and necessary adjunct to section 73. Section 74 provides that, before any grant of a franchise to use a street shall be made, certain specified provisions of such proposed grant shall be published for a specified time "in the City Record," and in two daily newspapers; that the proposed ordinance embodying the consent shall be referred "by the municipal assembly" to the "board of estimate and apportionment," who shall make certain specified inquiries; that no grant of such consent shall be made except on terms approved by the "board of estimate and apportionment." Finally, it provides that such grant or consent shall require the concurrence of three-fourths of all the members "elected to each branch of the municipal assembly," and further provides for a veto by the mayor, and for a vote passing the ordinance over such veto.

It will be observed that this is a regulation of the method in which consents may be granted. It is one thing to prohibit the granting of any consent whatever for a period of more than 25 years, and it is a

different thing to provide in what manner consents for a period, however short, shall be obtained.

Third. The language used in section 74 manifestly contemplates a state of affairs to come into existence only when the new charter takes effect. The detailed provisions above referred to show this plainly. The "municipal assembly," composed of two branches, each meeting and voting independently of the other, is a new creation. The publication of the "City Record" is provided for elsewhere in the new charter, and so is the creation of a "board of estimate and apportionment," with functions extending throughout the territorial limits of the new city. In construing section 73, the single secondary phrase "municipal assembly" might fairly be subordinated to the paramount intention expressed elsewhere in the section. In section 74, however, we have a succession of propositions which can hardly be called secondary, and no paramount intention inconsistent with those expressed in the section.

Fourth. If section 74 be construed as complainant contends it should be, the result will be to hold that the Greater New York charter absolutely suspends the grant of any street-surface railroad franchise within the territory constituting Greater New York, by some at least, if not by all, of the local authorities within said territory, between May 4, 1897, and January 1, 1898. Within that territory there now exists no "municipal assembly" composed of two branches. There is a board of estimate and apportionment in the city of New York, and another such board in the city of Brooklyn. Whether or not there be one in Long Island City this court is not advised, but certainly among the other political communities occupying the territory within the limits of the new city, and not within those of the existing cities, no such board is to be found. There is a publication known as the "City Record" in the city of New York. There is no such paper published in the other communities. If, therefore, the provisions of section 74 must be followed literally, or even substantially, in granting consents during the period between the passage of the act, on the 1st of January, no such consents can be granted at all, at least within a considerable portion of the territory to be occupied by the new city.

Fifth. The new charter was prepared by a board of eminent gentlemen of large experience in municipal legislation, and such charter was passed by the legislature as it came from the hands of the commission with no material change. The primary function of the commission was to prepare a body of statute law under which the new city, consolidated from the several political communities already existing, was to have its life. Any regulation, modification, or repeal of the laws in force in such original communities, before they should become welded into the new city, is legislation, germane, indeed, to the subject with which the commission was dealing, but not essentially embraced therein. It must be assumed that this eminent body of experienced men appreciated the difference between permanent legislation for the new city and temporary legislation for the original communities out of which the city was to be formed; and it might fairly be supposed that if the gentlemen who drafted this act and the

legislature who passed it intended to prohibit absolutely and peremptorily the granting of franchises in the whole or in a part of such territory intermediate the passage of the act and January 1, 1898, they would have expressed that intention with no uncertain sound. There is nothing startling or unreasonable in the proposition that section 73 is to go into effect at once, and section 74 only when the new city comes into existence. Having prohibited the local authorities in the original communities from granting franchises for more than 25 years, the legislature might, without any inconsistency, leave them in all other respects free to exercise the powers which they already possessed during the remaining eight months of their existence. It is quite conceivable that within the territorial limits of the new city there may be many local communities now existing which have absolutely nothing in common with their future fellow citizens, and which will have nothing in common with them for years to come, except the bond of political union into a new municipality. It would not be surprising to find the legislature leaving to such communities, within the 25-year limit, the power during the brief period which must elapse before consolidation to determine for themselves what may be the immediate needs of their particular locality in the matter of street-surface railroads, instead of relegating the whole matter to the decision of new boards, in which the delegates from such local communities might be hopelessly outvoted by other delegates, who may not have so intelligent an appreciation of the needs of the locality.

Sixth. It is contended that, inasmuch as section 74 forbids the doing of certain acts therein specified, the language of section 1611 makes it operative immediately upon the passage of the new charter. Section 74 contains an express prohibition in the phrase, "No grant by the municipal assembly shall be made except on terms approved by vote or resolution of the board of estimate and apportionment." It also contains an implied prohibition, for the use of the phrase, "Before any grant shall be made, * * * [such grant] shall be published," etc., necessarily imports a prohibition against making grants without publication. The difficulty, however, with the argument from section 1611, is that it does not provide that the new charter shall take effect from its passage "where, by the terms of this act, an act is forbidden," but only "where, by the terms of this act, an act is forbidden prior to January 1, 1898"; i. e. is forbidden during the period subsequent to passage, and prior to January 1st. But section 74 does not, "by its terms," forbid any act during said period.

In conclusion, therefore, while the decision of the appellate division in the Gusthal Case, holding that section 73 is now in force, is well within the limits of judicial construction as expounded by the courts of last resort (People v. Commissioners of Taxes, 95 N. Y. 558; People v. Lacombe, 99 N. Y. 43, 1 N. E. 599; Church of Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 511), and will be followed here, it is thought that the further proposition contended for is close upon the extreme border line, and by no means so clear as to warrant the granting of an injunction pendente lite, in view of the possible results indicated at the outset of this opinion. In the absence of any

state authority supporting such proposition, this court must decide the question here presented in accordance with its own opinion, uninfluenced by the well-recognized doctrine that state court construction of state statutes will ordinarily be followed. In view of the fact that this same question is now before the appellate division, it would apparently be best to await its decision; but the time left before the end of the year is so short that it would be unjust to the defendant company to curtail such time by any order of this court, upon any doubtful construction of the law.

The remaining points which have been argued may be briefly disposed of.

Section 92 of the railroad law provides that, before acting upon an application for consent, the local authorities shall give public notice thereof, and of the time and place when it will be first considered. It further provides that, whenever the consent of the common council of the city is applied for, the "first consideration" of which notice is required may be by a committee of such common council. The common council in the city of Brooklyn took office in January, 1896, for a period of two years. Public notice, in a proper form, by advertisement, was duly given of a first consideration before the railroad committee of that board, early in 1896, and hearings thereon were had before such committee. The common council, remaining unchanged in the meantime, has selected from its members a new president for the year 1897. It has substituted a new member on the railroad committee in the place of one who died, and, in reorganizing such committee for the year 1897, has made one further change in its membership. The notice of the time and place when the application for consent is to be first considered seems to have been in strict conformity to the provisions of the section. The common council which directed the giving of such public notice is the same common council that is now about to pass upon the application. In the absence of any authority sustaining such proposition, it is very far from clear that a change in the membership of the railroad committee will operate to make the action of the common council illegal.

It is further contended that the grant in question is illegal and void, for the reason that "it includes portions of streets and avenues not included in the defendant railroad company's certificate of incorporation." This quotation from the brief asserts the existence of a fact which is disputed in the answer and affidavits. In the absence of the original certificate of incorporation or a certified copy thereof, this court is not prepared to decide such disputed question of fact in favor of complainant upon ex parte affidavits.

It is further contended that the defendant railroad company was without capacity to apply for or accept the grant of a franchise to build and operate its road. Complainant relies on section 59 of the railroad law, which provides that no corporation hereafter formed under the laws of this state shall exercise the powers conferred by law upon such corporation until the directors shall cause a copy of the articles of association to be published in one or more newspapers, nor until the board of railroad commissioners shall certify that such publication has been made, and that public convenience and necessity

require the construction of such railroad. Concededly, the defendant corporation holds no such certificate. The question is not a new one. It was considered in the case of a steam railroad in People v. Board of Railroad Com'rs, 4 App. Div. 259, 38 N. Y. Supp. 528, 861; and compliance with the provisions of the section above referred to was held to be a condition precedent, even to the existence of a railroad corporation. The converse was held in the case of a street railroad by the supreme court in Erie county in McWilliams v. Jewett, 36 N. Y. Supp. 620. The opinion in Re Empire City Traction Co., 4 App. Div. 103, 38 N. Y. Supp. 983, looks in the same direction, although it is not precisely in point, since the conclusion arrived at is based upon another section of the railroad law, not presented in the case at bar. Suffice to say that, in face of the conflict of authority in the state courts above indicated, it is by no means entirely clear that the action of the common council would be illegal, upon the theory that the defendant railroad company was without capacity to apply for or accept the grant.

The application for an injunction pendente lite is granted as prayed for, so far as the provisions of section 73, prohibiting the grant of a franchise for more than 25 years, are concerned. In all other respects the motion is denied, and the preliminary stay vacated.

McDONNELL v. BURNS et al.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1897.)

No. 894.

1. PROMISSORY NOTE—EFFECT OF INDORSEMENT AND TRANSFER BY COLLECTING BANK.
   The indorsement of a note without recourse, after maturity, by a bank to whom it was sent for collection, to one paying full value therefor, but who prior to said transfer was a stranger thereto, is not a payment of the debt, but is a valid transfer of the note with its security.
2. SAME—PRIORITY OF PAYMENT.
   When several notes, falling due at different times, are secured by a chattel mortgage, the note first maturing is entitled to priority of payment out of the mortgaged estate.
3. FIXTURES—CHATTEL MORTGAGE ON MACHINERY.
   A chattel mortgage covering machinery afterwards placed in a mill is prior to a deed of trust executed after the mortgage, and conveying the mill property, when the grantor, who was also the mortgagor, treated such machinery as personalty, and the trust deed recites that it is subject to the mortgage.

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

Charles A. Bishop, Cromwell Bowen, and H. K. White, for appellant.

W. P. Hall and Vinton Pike, for appellees.

Before SANBORN and THAYER, Circuit Judges.

PER CURIAM. This is an appeal from a decree of the circuit court for the foreclosure of a chattel mortgage and a sale of the mort-

gaged property. Upon an examination of the evidence in the record, and the questions of law presented thereby, we are convinced that the statement of facts made by the court below is correct, that its decree is right, and that the reasons for the decision it rendered are as clearly and forcibly expressed in its opinion as we could state them. The statement and opinion of the circuit court are accordingly adopted by this court. They are as follows:

"Statement of the Case.

"This controversy grows out of the following state of facts: On the 16th day of April, 1891, S. J. Burns & Co., a firm name composed of S. J. Burns alone, bought a lot of machinery from the Des Moines Manufacturing & Supply Company of Iowa for use in a mill at St. Joseph, Mo., at and for the sum of $10,000, for which he executed to said Des Moines Company his three several promissory notes, for $3,333 each, payable in 8, 16, and 24 months, respectively, after date, with interest at 8 per cent. per annum, at the National Bank of St. Joseph, Mo. To secure such notes he executed a chattel mortgage to said Des Moines Company on said machinery, etc., in said mill building. Before the maturity of either of said notes the Des Moines Company, by indorsement in blank, transferred said notes to the complainant, McDonnell. Some time after the execution of said mortgage said Burns executed a second mortgage to Jefferson Hosea, trustee, for the benefit of the defendant the Ayr Lawn Company, which last-named deed of trust covered the real estate and building as well as the machinery therein. Upon the maturity of the first of said notes the complainant placed the same in the hands of the People's Savings Bank of Des Moines, Iowa, for collection, which was sent by said last-named bank for collection to the Saxton National Bank of St. Joseph, Mo. It presented the note for payment to the maker, but it was not paid by the maker. Shortly thereafter a representative of the National Bank of St. Joseph appeared at the Saxton Bank, and offered to take up said note on behalf of the said Ayr Lawn Company on condition that the Saxton Bank would transfer to the Ayr Lawn Company said note by indorsement, without recourse, which the latter bank at first hesitated to do; but, the said representative of the National Bank of St. Joseph declining to take the note on any other condition, the cashier of the Saxton Bank, after consultation with its president, accepted the money, and indorsed the note, as cashier for said bank, without recourse. The money thus paid was furnished by the Ayr Lawn Company, and the purchase was made by it on its own account, and the note taken by it as security. The money was thereupon transferred by the Saxton Bank to the Des Moines Bank, and by the latter paid over to the complainant. At or about the time of the maturity of the remaining notes in the hands of the complainant he visited St. Joseph for the purpose of seeing about the collection thereof, when he learned for the first time of the facts and circumstances under which the money was obtained for the first note, and the fact of the transfer by the Saxton Bank to the Ayr Lawn Company; the complainant hitherto being under the impression that the note had been paid by the maker, Burns. Burns having failed to pay said notes after their maturity, the complainant, McDonnell, has brought this bill in equity for the collection of the two notes yet owned by him, and for a foreclosure of said mortgage, and sale of the property to enforce the payment thereof. Prior to this suit the Ayr Lawn Company had foreclosed the deed of trust aforesaid given to it by said Burns, and at the sale thereunder the respondent known as the 'Burns Estate' became the purchaser of the property described in said deed of trust, and received the trustee's deed therefor. The bill claims that the first note in question was in fact, so far as the complainant is concerned, paid off, and that the mortgaged property is discharged from the lien therefor. The defendant the Ayr Lawn Company, on the other hand, claims that it became the purchaser and owner of said first-named note, and that the same is a lien on said property secured by the first-named chattel mortgage, and prays for recognition and enforcement thereof against said property, and that the same be paid first out of the proceeds of the sale under such foreclosure. The defendant Burns estate sets up in its answer the facts aforesaid respecting its

purchase under the second deed of trust, and claims that the machinery, etc., described in the first chattel mortgage, was of the nature of permanent fixtures, appurtenant to the building, the title to which passed under the deed of trust under which it claims.

"Opinion.

"PHILIPS, J. I do not think this case turns upon the question, as suggested by the learned counsel for complainant, whether or not an agent to whom a note is sent for collection has authority to negotiate and transfer it so as to pass the title thereto as against the owner, the transferee knowing at the time the character in which the agent held it, nor whether the agent on such unauthorized transfer could escape his liability to account therefor to the owner, either for the proceeds or as for the conversion. It may be conceded that such an agent is without authority, as against the principal, to transfer the title to a third party. Bank v. Davis, 14 N. J. Eq. 286; Meade v. Brothers, 28 Wis. 689; Rowland v. Slate, 58 Pa. St. 146; Goodfellow v. Landis, 36 Mo. 168; Smith v. Johnson, 71 Mo. 382; Quigley v. Bank, 80 Mo. 289. But the question presented, under the facts of this case, is whether or not a promissory note secured by a mortgage, and indorsed in blank by the payee, and sent to a bank for collection, which bank accepts the money thereon from a third party to whom it indorsed the note, without recourse, such third party furnishing his own money and taking the note as security therefor, is thereby extinguished as a lien on the mortgaged property. The evidence does not sustain the broad statement of complainant's counsel, in their brief, that, when the cashier of the collecting bank indorsed and delivered the note to the agent of the Ayr Lawn Company, he advised him of the lack of authority of the collecting bank to so transfer the note, or that he did so at the purchaser's risk, or the like. The substance of the evidence on this point is given by McAlister, the cashier of the Saxton Bank, as follows: A representative of the National Bank of St. Joseph called to take up the note, requesting that it be not canceled; that it be transferred without being canceled. 'We at first refused to accept payment that way, and my recollection is that the assistant cashier of the National Bank of St. Joseph, Mr. Enright, insisted that we take the money that way; that was the only way he would pay it. After consulting with our president, we accepted payment, and transferred the note without recourse.' When the holder of the note was informed by Enright, who was acting for the Ayr Lawn Company, that he wanted the note indorsed, and would not take it in any other way, to which the collecting bank consented, it was evidence clearly indicating that the transaction was not designed to liquidate the debt, but rather a purpose to hold as a security for the money thus advanced. The note bore the indorsement in blank of the original payee and of the complainant, McDonnell; and, although McAlister held it for collection through his bank, that was not sufficient, as matter of law, to advise the purchaser that the Saxton Bank would not accept the money save in extinguishment of the debt. The note did not lose its character as negotiable paper by being past due. By the very act of indorsement the holder warrants that the note is genuine, and is precisely what it purports to be on its face,—a valid, living debt. 1 Daniel, Neg. Inst. par. 607, p. 700; Bank v. Smiley, 27 Me. 225; Challiss v. McCrum, 22 Kan. 121; Lomax v. Picot, 2 Rand. (Va.) 260. The law of this case, in my opinion, is settled by the discussion in Dodge v. Trust Co., 93 U. S. 379. It matters not that that was a case between the holder of the note, who had taken it by purchase from the collecting bank, and the maker of the note. The court expressly said: 'By law a collecting bank is the agent of the holder of the note, and in no sense the agent of the maker.' The court further observes that there would be no impropriety in and no objection to 'a transfer to a third person paying the money instead of a technical payment and discharge of the note. It is to be observed, also, that payment technically can only be made by a party to a bill, or by a stranger supra protest. Such parties may either pay in satisfaction of the note, or pay and hold as by transfer, leaving it an existing security. It can therefore make no difference to the holder whether, when taken by a stranger, it is taken and held as upon a transfer or in satisfaction of the instrument. The negotiability of a bill or note remains after maturity, as before, subject to the equities between the parties.' The court,

after adverting to the rule of law that an agent to whom a note is sent for collection cannot transfer or pledge the same either in payment of his own debt or for his own benefit, and that such transferee with knowledge, or after maturity, acquires no title as against the true owner, yet, in respect of a third party who takes the note from the collecting agent, the court distinctly says that 'where the intention to continue the existence of the note, and not to cancel it by payment, is made evident, when the money is paid to the collecting agent appointed to receive, and the owner of the note receives the money due to him, the authorities sustain the transaction as a purchase.' In such cases the question is simply one of intention. If the party who furnished the money intends thereby not to satisfy the debt, but to acquire the purchase for himself, and it is transferred to him, the debt is continued, and inures to the benefit of such purchaser. This proposition is broadly asserted and maintained by the supreme court throughout the opinion, and by the citation of numerous authorities. This, too, is the doctrine of the supreme court of this state. Swope v. Leffingwell, 72 Mo. 348. See, also, the following cases: Barney v. Clark, 46 N. H. 514; Wilcoxon v. Logan, 91 N. C. 449; Ramsey v. Daniels, 1 Mackey, 16; Rand v. Barrett, 66 Iowa, 736, 24 N. W. 530; Horton v. Manning, 37 Tex. 23; Brice's Appeal, 95 Pa. St. 150. What right has the complainant, as against the party thus taking the note, to complain of the transaction? He got the defendant's money, and not that of his debtor. He has not returned the money nor offered to do so. True it is that he may not have the same amount of security for the payment of the two remaining notes in his hands had the first note in fact been paid and discharged by the debtor. But he has not been prejudiced or injured nor misled by any act of the Ayr Lawn Company. He has the same security for the debt to-day that he had when the Ayr Lawn Company purchased the first note. By his own act in placing the note, with the blank indorsement of the payee, in the hands of the bank, without more, he invited the public to take it without knowledge of any restrictions on the power of the bank to transfer it. It does seem to me that in such conjuncture the equities are all in favor of the Ayr Lawn Company. If the complainant has any grievance to complain of in that transaction, it should rather be of the collecting bank, who, it seems from the evidence in the case, did not advise the bank at Des Moines, in transmitting the money, of the circumstances under which it was collected, nor of the fact of the transfer of the note to the Ayr Lawn Company. Had complainant been so advised at the time, and he had been dissatisfied with the arrangement, certainly he could not have complained thereof, as against the Ayr Lawn Company, without first returning the money, nor can he now hold onto the fruits of his agent's transaction while complaining of his departure from instructions.

"The other question raised between the complainant and the Ayr Lawn Company is whether the three notes on a foreclosure sale of the mortgage property shall be paid pro rata out of the proceeds or whether the note of the Ayr Lawn Company shall have priority. Under the rule of this state where the mortgage was given and the property is situated, the note first maturing must be first paid out of the proceeds of the foreclosure sale. New York Security & Trust Co. v. Lombard Inv. Co., 65 Fed. 271, loc. cit.

"The remaining question for decision is whether the respondent Burns estate, under the junior deed of trust, acquired the title to the mortgaged property freed from the asserted lien under the first mortgage. The contention of the Burns estate is that the property in question was an appurtenant so affixed to the freehold that it passed by the deed of trust conveying the latter. This position is not maintainable. In the first place, at the time of executing the mortgages in suit, the mortgagor recognized and treated the property as personalty, and severable from the building. He would therefore be estopped from asserting the contrary. The deed of trust under which the Burns estate claims title recites on its face that 'part of which machinery is subject to a deed of trust or chattel mortgage heretofore made.' The grantee under such a mortgage takes cum onere. This should be so especially in this case, in view of the fact that the second deed described the same property in part as 'fixtures, machinery, and miller's outfit.' Without entering into any discussion of the vexed question of the definitive line where machinery placed in a building becomes a permanent fixture, and where it retains its character as personalty,

or without entering into the distinction between the rights of mortgagor against the mortgagee, and those of lessor against lessee, it is sufficient to say that in a case like the one at bar, where the owner has given a lien upon the specific machinery described as being in a house, and a subsequent mortgagee takes with an affirmation in his grant of the liability of the machinery to a prior mortgage, he ought not to be heard to deny the existence of the burden on the property as against the parties to the first mortgage. And most certainly, where he does undertake to subvert the claim of the senior mortgage on the ground that such machinery is a part of the freehold, the burden should rest upon him to establish clearly the character of the property claimed by him. The only evidence in this case, outside of the description in the deed of trust itself, respecting the manner in which this machinery was placed in the mill, is the mere statement of Burns in his deposition that the 'boilers and machinery were put in like other machinery. The engine was bolted down, and the other machinery attached to the floor. They made an oatmeal mill.' It would not be admissible for the court upon such a statement to determine whether there was permanency in this attachment, or whether it was of such a character as to be separable from the building without injury thereto. This issue is found for the complainant. Decree in accordance with the foregoing opinion."

And upon this opinion the decree below is affirmed, with costs.

FARMERS' LOAN & TRUST CO. v. MEMPHIS & C. R. CO. et al.

(Circuit Court, W. D. Tennessee. February 10, 1897.)

AGENCY—RATIFICATION OF AGENT'S ACTS BY PRINCIPAL—EFFECT.

Under a provision of a railroad mortgage that, on default in payment of any installment of interest, continuing for 60 days, the holders of one-third in amount of the bonds secured might declare the principal of the debt due, by an instrument executed by them "or their attorneys in fact thereto duly authorized," and delivered to the trustee, such a declaration of maturity was signed by a person as attorney in fact for his wife and two brothers, who were bondholders. He had no written authority at the time, but an instrument ratifying his act was executed by the persons for whom he acted after the filing of a bill for foreclosure by the trustee. *Held*, that such ratification rendered valid and effective the act of the attorney as against the mortgagor and a second mortgagee.

Bill for foreclosure by the Farmers' Loan & Trust Company against the Memphis & Charleston Railroad Company and others.

Turner, McClure & Ralston and Estes & Fentress, for complainant. F. P. Poston and Turley & Wright, for defendants.

LURTON, Circuit Judge. This is a bill under which it is sought to foreclose a mortgage styled the "First Consolidated Mortgage" of the Memphis & Charleston Railroad Company. It was intended that two older series of bonds would be retired by bonds secured hereunder. In part this has been done, though not altogether. It is therefore sought to sell subject to the lien of the senior outstanding mortgages. This consolidated mortgage was made August 20, 1877, to secure an issue of bonds aggregating $4,700,000. Of these only $2,264,000 have been actually issued. The remainder are in the hands of the trustee, and held for the purpose of taking up outstanding first and second mortgage bonds. These consolidated bonds mature January 1, 1915, and have annexed coupons for interest, pay-

able each recurring six months. The case comes on now to be heard upon the pleadings and proof, and a final decree of foreclosure is sought, both for principal and interest. The right to such a decree is predicated upon a default in the payment of interest accruing July 1, 1893, January 1, 1894, July 1, 1894, January 1, 1895, and July 1, 1895; this bill having been filed August 2, 1895.

The bill particularly alleges that demand had been made for the payment of the interest accruing July 1, 1893, and that payment was refused; that this default continued for more than 60 days after such demand; that thereupon holders of more than one-third in value of the outstanding bonds had, by an instrument in writing, filed with the trustee, elected that the principal of the said bonds should immediately become payable, and requiring the trustee to foreclose the mortgage. This precipitation of the maturity of the principal of the bonds is claimed or asserted by virtue of the first proviso of the mortgage, which is in these words:

"In case default shall at any time be made by the party of the first part in the due and punctual payment of any installment of semiannual interest at any time becoming due and payable upon any of the said bonds within the aggregate amount of forty-seven hundred thousand dollars, issued under the security of this mortgage, as aforesaid, and if any such interest shall remain in arrear and unpaid for sixty days after demand thereof, then, and in such case, if, and when thereafter, the holders at the time being of one-third in amount of the then outstanding bonds issued under and entitled to the benefit of the security of this mortgage shall, by instrument or instruments executed by them respectively, or their attorneys in fact thereto duly authorized, and delivered to the party of the second part, or its successor or successors, as trustees hereunder, so elect, the principal sum secured by and payable upon all and singular the said bonds, within the aggregate amount of forty-seven hundred thousand dollars, issued under the security of this mortgage as aforesaid, with all arrears of interest thereon, shall become immediately due and payable, although the time for the payment of said principal originally stipulated in said bonds shall not yet have arrived; anything in the said several bonds contained to the contrary notwithstanding."

Every important averment of this bill is put in issue both by the Memphis & Charleston Railroad Company and the Central Trust Company of New York, which is made a defendant to the bill as trustee under a mortgage junior to the consolidated mortgage. The principal objection urged against a decree of foreclosure for the principal of the mortgage debt turns upon the authority of one D. Willis James to sign the declaration of maturity for his wife, who owned four bonds of $1,000 each, and for two brothers, each owning twenty bonds of $1,000 each. Mr. James signed the names of his wife and brothers by himself as attorney. The defendants say that he was not the "attorney in fact thereto duly authorized" of the said signers, and that, if these names be eliminated, a valid election by one-third in value of all outstanding bonds has not been declared. It clearly appears that Mr. James had a general parol authority from his wife and brothers to act for them as he deemed best in respect to the management and disposition of these securities. But it is also admitted that he had no written letter of attorney particularly authorizing him to do this act. That these persons owned the bonds for which their names are signed is sufficiently made out by the general statement to that effect in Mr. James' deposition. Being

wholly undisputed, we see no reason for inquiring into the source of his information. After the filing of this bill, these persons, in writing, formally confirmed and ratified the act of D. Willis James in making the declaration of maturity now in question. If the legal effect of this ratification is to put the agent in same position as if he had had authority to do the act when done, there is no necessity for considering the question at the bar as to the meaning of the provision in the mortgage touching the election of holders of bonds through "attorneys in fact thereto duly authorized." The general doctrine in respect of the ratification of the acts of one assuming without authority to act for another is that a subsequent "ratification operates upon the act ratified precisely as though the authority to do the act had been previously given." Cook v. Tullis, 8 Wall. 338. "In short," says Justice Story, "the act is treated throughout as if it were originally authorized by the principal, for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy, or, as the maxim expresses it, 'Omnis ratihabitio retrotrahitur.'" Story. Ag. § 244. The principle is clearly stated in the well-considered case of Wilson v. Tumman, 6 Man. & G. 236, where it is said:

> "An act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. In such case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or on contract, to the same extent, and with all the same consequences, which follow from the same act done by his previous authority."

Counsel for defendants seek to take this case without the general effect of ratification by an application of the not very clear statement of a limitation found in section 246 of Story on Agency, where it is said that third persons will not be bound by the retrospective consequences of ratification "if the act done by such person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses for the nonperformance of that act or duty, or would defeat a right or an estate already vested in the latter." This limitation is evidently deduced from such cases as Buron v. Denman, 2 Exch. 167, Right v. Cuthell, 5 East, 491, and Mann v. Walters, 10 Barn. & C. 626. These were cases of notices given of the determination of leases by unauthorized persons assuming to be agents of the landlord. That Judge Story bases his text upon that class of cases is not only evident from the cases cited in the notes to the text, but from the stronger fact that he illustrates the meaning of an otherwise cloudy statement by the illustration:

> "Thus, if a lease contains a condition that it may be determined by either party upon six months' notice, such notice, given by an unauthorized person for the landlord, although subsequently ratified and adopted by the latter, will not be a valid notice to determine the lease."

The ground upon which such cases have been put is that stated in the subsequent part of the section from which I have been quoting, namely, that a notice to defeat an estate should be such a one as

that the tenant can safely act upon at the time he receives it, "so that he may deliver up the possession at the end of six months, without being liable to further claims in respect to the remainder of the term." The cases upon this subject have not been uniform. To this Judge Story calls attention in a footnote. In Roe v. Pierce, 2 Camp. 96, a verbal notice to quit, by a steward of a corporation, was held ratified and binding by the corporation bringing a suit founded on the notice; and in Goodtitle v. Woodward, 3 Barn. & Ald. 689, the decision is put upon ground quite antagonistic to the cases first cited. If such cases as Buron v. Denman and others cited above are supportable, it must be upon the ground that the tenant ought not to be subjected to the hazard of going out and remaining liable thereafter because the landlord elected to repudiate the notice given in his name. If not rested wholly upon this narrow ground, they are in seeming conflict with an older line of cases holding that an entry to make a claim, or to avoid a fine, or for a condition broken, if made by a person assuming to be the agent of the principal entitled to such claim or entry, would justify an action upon such acts by the principal upon the ground that his subsequent ratification would supply the want of an original authority. Story, Ag. § 245; Co. Litt. 258; Fitchet v. Adams, 2 Strange, 1128.

The distinction between the class of cases last cited and those of a notice to terminate a lease is very refined, and, as observed by Judge Story in a note to section 246 of his work on Agency, "stands upon reasoning not very satisfactory or clear." Judge Story, in his text, states the supposed distinction to be this: that in the latter case "the third person's act is not to depend upon the validity of the entry at the time when it is made." And so, he adds:

"The rule, 'omnis ratihabitio retrotrahitur et mandato priori æquipareatur,' seems applicable only to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot, in the meantime, depend on the fact whether there be a ratification or not."

Counsel for defendants do not—and I say it with deference—make a proper application of Judge Story's deduction from the leasehold cases. They say, in their printed argument, this:

"The underlying principle is perfectly plain. If A. has acted as the agent of B., and B. has ratified the act done, and taken advantage of it, if C. thereupon sues B. upon such act recognizing the agency, B. and C. have both (the one by the ratification of, and the other by his suit, recognizing the agency) estopped themselves mutually from denying it. But if A., not being the agent of B., undertake to act for him so as to allow B. to acquire a right against C., and B., by ratification, attempt to acquire such right as one arising at the time A. acted, and dating back to such time, such ratification is unavailing over C.'s objection. There is no mutuality in the estoppel. Until B. ratified, he was not bound, and, C. having done no act to consent to the ratification and recognition of the unauthorized agency against C. in invito, the agency cannot exist except from the time the authority was actually given. It is not the case of a party being bound by the ratification of an agency, but of a party seeking by his own act of ratification to bind the other party. A similar case would be where a plaintiff recognized a person who was not defendant's agent as such agent, while defendant refused to recognize and ratify, and who sought to bind defendant by the acts of such unauthorized agent because plaintiff had ratified his acts. This, of course, is absurd, but it is the reductio ad absurdum of complainant's position in this case."

But that the effect of ratification is to bind the other contracting party is the very consequence of the retrospective effect of ratification. The books are full of cases in which the third party was held bound by a subsequent ratification. Were this not so, the act of "ratification would not be dragged back, as it were, and made equipollent to a prior command," as the matter is put by Baron Martin in Brook v. Hook, L. R. 6 Exch. 96. "Thus," Judge Story says, "the effect of ratification is not only to bind the principal as to his agent, but as to the third party, and give the ordinary rights and remedies both for and against him." Story, Ag. § 245.

In Wharton on Agency it is said:

"The third party contracting is bound from the time of the institution of the contract, and not merely from that of the ratification. The principal, by the act of ratification, puts himself in his agent's place. From this it follows that the ratification acts retrospectively, and nowhere is this more unhesitatingly expressed than in the Roman law. But," adds Prof. Wharton, "accepting this principle as unquestioned, we must limit its application to the relations of the principal to the contracting third party. The third party is precluded from contesting the right of the principal to go back to the original inception of the contract." Whart. Ag. §§ 76, 77.

In the Law of Contracts, by Leake, at page 391, it is stated that:

"The principal may also claim the benefit of a contract professedly made on his behalf, and though it was made without his knowledge."

A few illustrations from leading cases may serve to show how the retrospective effect of ratification has found application. Where contracts were made in the name of the state, but without authority, a subsequent ratification was held to bind the third party in suits upon the contract. Ohio v. Buttles' Ex'r, 3 Ohio St. 309; Wisconsin v. Torinus, 26 Minn. 1, 49 N. W. 259; Iowa v. Shaw, 28 Iowa, 67. Where insurance was effected by an unauthorized agent upon the interest of the plaintiff in a ship, it was held that the ratification of this act after the loss of the ship was operative, and made the contract binding upon the insurer. Hagedorn v. Oliverson, 2 Maule & S. 485. Where an offer of sale, made by C., was accepted by B. for A., it was held that by ratifying the act of B., though after the offer had been withdrawn, the contract was validated as of the date of the original acceptance, and that the intermediate withdrawal was ineffective, and C. bound by the contract. Bolton v. Lambert, 41 Ch. Div. 295. This case was followed in Re Portuguese Consolidated Copper Mines, 45 Ch. Div. 16. In the case last cited certain shares in the corporation had been subscribed for, and allotments made, in the name of the corporation, by a board having no authority. Subsequently these allotments were ratified by the corporation acting by a legal board of directors. It was held that the subscribers were bound, although they, before ratification, had withdrawn their subscriptions. That Mr. James' principals did not ratify his act until after this bill was filed seems of no importance if the ratification is to be given a retrospective effect. Where a bill was indorsed to one Ancona, and a suit brought in his name as plaintiff by one assuming to be his agent, it was held that Ancona's ratification, after suit brought, of what had been done before, was equivalent to a prior authority. Ancona v. Marks, 7 Hurl. & N. 686. These cases abun-

dantly illustrate what is meant by the ratification being equivalent to a prior command, and serve to show that the effect is not only to bind the principal ratifying the act, but also the other contracting party. There are exceptions to this rule, such as have been mentioned by both Story and Wharton, namely, it will not be permitted to defeat an estate vested in the third party, as in Lyell v. Kennedy, 18 Q. B. Div. 796, and it will not be suffered to affect innocent strangers who have acquired intervening rights by levy, attachment, or otherwise. Wood v. McCain, 7 Ala. 806; Whart. Ag. §§ 77–79; Taylor v. Robinson, 14 Cal. 396. Certainly neither the railroad company nor the junior mortgagee have acquired any intervening rights to be affected by ratification, and it is not pretended that its effect will be to defeat any vested estate. Neither can it be said that the conduct of the railroad company, on whom ratification is to operate, depended in the meantime on whether there would be ratification or not. The holders of these bonds had an option to mature the principal according as they should deem best. That option arose out of the default of the railroad company in respect of interest. When that default was suffered to continue for 60 days after demand, the option arose, and could only be cut off by payment before a declaration of maturity.

The coupon in respect to which the original bill made a definite statement of demand was paid, but not until after the declaration of maturity, which declaration operated, when filed with the trustee, to mature the principal. It follows, therefore, that payment of that coupon did not defeat the suit, for the whole debt was due and unpaid, except the coupon of July, 1893. Between the filing of the instrument of maturity and the time of ratification the debtor company did nothing, and incurred no loss, risk, or danger. The instrument purported to be signed by one authorized to act for those whose names he signed. It was an act clearly in the interest of those for whom he assumed to act, and its ratification could not possibly work a surprise. It was only a matter of evidence whether James had authority to sign for his wife and brothers, and "proof of subsequent ratification is sufficient, and dispenses with proof of prior authority, though the prior authority is required to be in writing or under seal." Leake, Cont. pp. 388–391; Tupper v. Foulkes, 9 C. B. (N. S.) 797; Bolton v. Lambert, 41 Ch. Div. 295.

Commenting on the conflict we have referred to in an earlier part of this opinion, Prof. Wharton says, at section 80 of his Commentaries on Agency:

> "The true distinction seems to be this: If ratification on part of principal was an act to be anticipated as morally certain by parties having adverse interests, then the ratification is no surprise to them, and cannot mislead them, and they are bound to treat the original unauthorized act as one which is to be authorized."

Applying this to the defendants, they must be regarded as bound by the ratification which, in view of the relationship borne by D. Willis James to those he assumed to represent, and the obvious interest they have in ratifying what he did, can be no surprise to them. In this view of the case, it becomes unnecessary to say whether this bill

might be maintained as a bill to foreclose for interest alone, or how it might be maintained as a bill filed under the discretion of the trustee. Ratification operating as an original command, the bill is well filed, and a decree of foreclosure may be drawn, unless within a short time the defendant company shall discharge both principal and interest of the mortgage debt.

BOYD et al. v. HANKINSON et al.

(Circuit Court, D. South Carolina. December 3, 1897.)

1. CONTRACT—MEETING OF MINDS—UNCOMPLETED NEGOTIATIONS.

On March 8, 1897, one C., the treasurer of a New Jersey corporation, made an offer, conditional on the approval of the stockholders, to sell to defendant, for $5,000, certain lands and buildings owned by the corporation, in Aiken county, S. C. On June 7, 1897, defendant accepted this offer, on condition of the execution of bonds for titles and necessary papers. Before the conditions could be fulfilled the governor of New Jersey declared the corporation's charter forfeited. Some further tentative negotiations followed during August, including suggestions of making title through a sheriff's sale, but defendant still insisted on a bond for titles, which was never given. October 10, 1897, the property in question was sold by the sheriff of Aiken county, under executions dated prior to the governor's proclamation, and was bought for $2,000 by defendant, who paid the money and received the sheriff's deed. He had received no notice from C. of the sale, and was unaware that C. was represented at it. In an action by C. and others, creditors and stockholders of the corporation, to set aside the sale, *held*, that the facts showed no meeting of minds, and no breach of contract or of fiduciary relations by defendant.

2. EXECUTION—TESTE—DISSOLUTION OF DEFENDANT CORPORATION—SHERIFF'S SALE.

If, after judgment against a corporation in South Carolina, execution is issued and levied, and at the date of the teste the defendant is in full enjoyment of its franchises, the subsequent dissolution of the corporation does not defeat the right to sell its property and give a good title under the execution.

Fleming & Alexander, for complainants.
Henderson Bros., for defendants.

SIMONTON, Circuit Judge. This case comes up upon bill and answer, with the testimony, for a hearing on the merits. The facts of the case are these: The Southern Pine-Fiber Company, a corporation created by the laws of the state of New Jersey, owned in North Augusta, a town in Aiken county, S. C., three acres of land. On this land had been erected valuable buildings containing machinery for manufacturing matting and other material from pine fiber. The company had ceased manufacturing operations, and had let their property to the Hankinson Lumber Company. On March 8, 1897, W. H. Castle, treasurer of the Southern Pine-Fiber Company, made an offer to the Hankinson Lumber Company to sell this property to it for $5,000, of which $1,000 was to be paid in cash, and $1,000 each year for four years consecutively, represented by notes, each bearing 6 per cent. per annum, title to remain in the Southern Pine-Fiber Company until full payment, and bond for title to be made to the purchasers. The offer was made subject to the approval

of the stockholders, and was to be accepted or rejected within 10 days from March 2, 1897. On 30th May thereafter J. L. Hankinson, president of the lumber company, wrote to W. H. Castle, treasurer, that he had persuaded his father, Luther H. Hankinson, to buy this property, and in his behalf he offered $4,500,—$1,000 cash, and the remainder in four equal annual installments,—in other respects conforming to the first offer. This was declined. On June 7, 1897, J. L. Hankinson, in behalf of Luther H. Hankinson, accepted in writing the offer made on March 8, 1897, adding: "Have papers prepared in the name of L. H. Hankinson, and send same to Mr. Jackson or any one in Augusta, and the notes will be signed and the check given upon delivery of your bond for titles." It will be observed that the offer of W. H. Castle, treasurer, was contingent upon approval by the stockholders. The record discloses no action on their part. So, also, the acceptance was contingent upon bond for titles. Before such bond could be executed, and before such action of the stockholders could be had, information was received that the governor of New Jersey, under his construction of an act of the legislature of New Jersey in such case made and provided, declared the charter of the Southern Pine-Fiber Company to be forfeited. This put an end, apparently, to any further contract with the corporation as a corporation, for no further steps were taken either as to the bond of indemnity or as to the action of stockholders. On July 15, 1897, James Boyd, a director in the fiber company, and a creditor, consulted Messrs. Fleming & Alexander as to whether the property could not be sold at sheriff's sale under some outstanding judgments, and purchased by "one of us" as trustee, and then convey a satisfactory title to Mr. Hankinson. The testimony at this point is somewhat obscure. Messrs. Fleming & Alexander evidently advised that a good sale and a satisfactory title could be made in this way. On August 2, 1897, L. H. Hankinson wrote to W. H. Castle, stating that he had heard that the charter of the company had been forfeited, and that it was necessary for one of the stockholders of the company to apply to the courts to make the transfer; that this would take time, which was valuable to him, as, on the faith of the promise of the company to make proper papers, improvements were being made on the property, and that the work could not be stopped except at great loss. He states that he is advised that the mode of making title by sale under the judgments is not proper. He asks that an inclosed paper be signed in order that he (Hankinson) should be in position to go ahead with the work on the property. The form of agreement inclosed provided for the execution of a bond for titles by Castle to Hankinson.

It will be noticed that a bond for titles was one of the conditions of the proposed contract with the company. This letter shows that Hankinson was willing to carry out an agreement of the same tenor, provided proper papers be executed and a bond for title given. That letter was received on 10th August. The reply was that, if his lawyer approves, he will gladly sign such a paper. It was never signed. The letter of 2d August was written by Mr. Foster, counsel for L. H. Hankinson, who notified Messrs. Fleming & Alexander of its con-

tents before he sent it, and insisted on the bond for titles as a condition necessary for the protection of Mr. Hankinson. The sheriff of Aiken county had in his possession two executions against the Southern Pine-Fiber Company, one dated October 13, 1893, the other dated October 12, 1893, and levied on the land October 12, 1893, and November 7, 1893, before the proclamation of the governor of New Jersey declaring the charter forfeited. On these executions, no return having been made, the land was ordered to be sold on the sale day in October, 1897. Notice that the sale would take place was given by W. H. Castle to the son and agent of Luther H. Hankinson. He, however, did not communicate this to his father until after the day of sale. Luther H. Hankinson went to the sale. He did not see there either Mr. Castle or any one of the firm of Fleming & Alexander, who were his attorneys. It seems that these gentlemen, being otherwise engaged, had sent Mr. J. R. Randall to represent them, with instructions to bid up to the gross amount of the judgments, some $1,800. Mr. Hankinson did not know by what authority or for what purpose Mr. Randall was bidding. He then bid himself, and finally became the purchaser at and for the sum of $2,000, paid the money, and received a deed from the sheriff conveying the land in fee.

This bill is filed by James Boyd, William H. Castle, and Martin Lane, averring that they are creditors and stockholders in the Southern Pine-Fiber Company, acting in behalf of themselves and others similarly situated, against Luther H. Hankinson, and Owen Alderman, the sheriff of Aiken county. The purpose of the bill is to set aside the sale to Hankinson, and to place the property in the hands of a receiver for the use of the stockholders and creditors of the fiber company, unless Hankinson will pay the estimated value of the property, to wit, $5,000. The bill proceeds with a double aspect. It charges that Hankinson was under contract to purchase this property for $5,000; that under this contract the property was to be sold at sheriff's sale, to be bought in by Castle, and by him to be conveyed to Luther H. Hankinson; that the purchase by the latter at sheriff's sale, for himself, at the reduced price of $2,000, was a violation of his contract and a breach of trust. It also charges that the levy and sale were void, the sale having been made after the dissolution of the defendant corporation.

It will be noticed that in all the correspondence between Luther H. Hankinson and Mr. Castle he always insists on proper titles. If, then, it be true that by this sale no title passed, surely he cannot be bound to take the property as in one prayer of the bill is asked.

The first question is, was there an existing contract between Hankinson and Castle at the time of this sale? If the corporation has been dissolved, all executory contracts with it fell to the ground. Besides this, as Castle's offer was subject to the approval of the stockholders, the dissolution prevents this approval. Was there afterwards any contract between Castle and Hankinson? It was suggested that Castle go on and get title as he proposed under execution. Hankinson consented, provided that he got the obligation of Castle that the property would not cost Hankinson more than $5,000. This

obligation he never received. The minds of the contracting parties never concurred. Was this provision by Hankinson material? Castle proposed as the price of the property $5,000. He declared his plan to be a sale at public auction, at which he would buy the property, and, if it was bid in for that sum or less, he would convey it to Hankinson. If it brought more, he would not be bound to convey. So Hankinson was bound, at all events, to take the property. Castle was only bound to convey if it brought at public auction $5,000 or less. The sale was to be at public auction. The world was invited to bid. What sort of guaranty did Hankinson have that no bid would exceed $5,000? His condition for a bond had not been fulfilled. Any chilling of the sale would vitiate his title. He was wholly without protection. It is true that the result showed that Castle could have gotten the property for less than $5,000. But why should Hankinson assume this risk? He was at the mercy of Castle, whose refusal to give the security required showed either doubt or intention. He was at the mercy of any one who may have wanted the property, which, in the argument, was said to be worth more than the price named. The essential elements of a contract were wanting between these parties.

Was there any fiduciary relation existing between these parties binding the conscience of Hankinson, and preventing him from bidding at the sale? The contract was still open. His condition had not been fulfilled. It could have been fulfilled at any time before the sale. So he attended in order to see if this would be done. He did not see Castle there or either of the firm of Fleming & Alexander. He did not know what the business of Mr. Randall was at the sale, nor was he bound to inquire, nor was Mr. Randall bound to tell him. At a public auction each bidder acts without obstruction or interference with the others. From the absence of Castle and of his attorneys he had every reason to think that the plan had been abandoned, and he had the right to take care of himself.

The next question is as to the title. Was the sale a good one, and did it pass the title to the property? The executions were levied in 1893. In South Carolina the active energy of the execution lasts for 10 years. When a cause has been tried, judgment obtained and entered, and execution issued and levied, the rights of the parties have become fixed. No new proceedings are necessary. If the defendant die after this, his death does not prevent the sale under execution (Taylor v. Doe, 13 How. 287; Fishburne ad Verdier, 1 Speer, 347); nor his bankruptcy (Savage's Assignee v. Best, 3 How. 111). This being so, if an execution gives vested rights, not in any way affected by the life or death of the defendant, the rule must apply as well to corporations which are dissolved as to natural persons. The death, natural or civil, of the latter does not defeat the right to sell. So the civil death of the former cannot defeat this right. Besides this, all proceedings under an execution relate back to its teste (Erwin's Lessee v. Dundas, 4 How. 76), and it is so treated. At the teste of this writ the corporation was in full enjoyment of its franchises, and the sale is good. This matter has been discussed as if the proclamation of the governor of New Jersey dissolved this

corporation. Giving it the full effect it can claim, it did only terminate its right to do new business as a corporation. The laws of New Jersey (Sess. Laws 1896, p. 295) contain this provision:

"Sec. 53. All corporations, whether they expire by their own limitation or be annulled by the legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established."

So this corporation continues as a body corporate for the purpose of prosecuting and defending suits. If it can bring and defend suits, it can issue executions, and have them issued against it, with the legal results of both.

As to the question which has been discussed involving the forfeiture of this charter and the construction of the law of New Jersey no opinion is expressed. The bill is dismissed, with costs.

BLACK v. CALDWELL, Sheriff, et al.

(Circuit Court, D. Montana. November 1, 1897.)

1. FOREIGN CORPORATIONS — AUTHORITY TO DO BUSINESS — FILING PAPERS IN EACH COUNTY.

   Comp. St. Mont. div. 5, c. 24, requiring foreign corporations, before transacting any business in the state, to file a duly-authenticated copy of certain documents in the office of the secretary of state, "and in the office of the recorder of the county where they intend to carry on or transact business," does not require a foreign corporation to file such copy in every county where it transacts business, but only in the county where it has its principal office.

2. FORECLOSURE OF MORTGAGE—MATTERS ADJUDICATED.

   A decree, by a court having jurisdiction, foreclosing a mortgage, in an action by an assignee thereof, is a finality as to the validity of the mortgage and the assignment, concluding parties and all in privity with them.

3. FOREIGN CORPORATION—RIGHT TO PURCHASE AT FORECLOSURE SALE—EQUAL PROTECTION OF LAWS.

   Where a foreign corporation which has not complied with the law, so as to be authorized to do business in the state, holds a mortgage which it has a right to foreclose within the state, a denial of its right to become a purchaser at the foreclosure sale is a denial of the equal protection of the law in violation of the fourteenth amendment.

Luce & Luce, for plaintiff.

I. Parker Veazey, for defendants.

KNOWLES, District Judge. In the bill in this cause it is alleged that the Northwestern Guarantee Loan Company is a foreign corporation, organized under the laws of Minnesota; that on the 25th day of March, 1890, said company entered into a contract with Horace T. Kelly and Martha I. Kelly, his wife, whereby the two last-named persons made and executed a mortgage to said company upon certain lands in Gallatin county, Mont., to secure the sum of $3,550, with interest at the rate of 10 per cent. per annum; and that this contract was entered into in said Gallatin county. It is also set forth in the bill that previous to the time of entering into said con-

tract, and at no time subsequent thereto, had the said company complied with the provisions of chapter 24, div. 5, of the Compiled Statutes of Montana, in that it had made none of the records required by said chapter in Gallatin county. The provisions of said chapter which apply to the points presented in this case are as follows:

"All foreign incorporations or joint-stock companies organized under the laws of any state or territory of the United States or by virtue of any special act or acts of the legislative assembly of any such state or territory, or of any foreign government, shall before doing any business of any kind, nature or description whatever within this territory, file in the office of the secretary of the territory, and in the office of the county recorder of the county wherein they intend to carry on or transact business, a duly authenticated copy of their charter or certificate of incorporation, and also a statement, to be verified by the oath of the president and secretary of such incorporation and attested by a majority of its board of directors, showing: First. The name of such incorporation and the location of its principal office or place of business within this territory, and if it is to have any place of business or principal office within this territory, the location thereof. Second. The amount of its capital stock. Third. The amount of its capital stock actually paid in money. Fourth. The amount of its capital stock paid in any other way, and in what. Fifth. The amount of the assets of the incorporation, and of what the assets consist, with the actual cash value thereof. Sixth. The liabilities of such incorporation, and if any of its indebtedness is secured, how secured, and upon what property. Such incorporation or joint-stock company shall also file at the same time and in the same office, a certificate under the seal of the corporation and the signature of its president, vice-president or other acting head, and its secretary, if there be one, certifying that the said corporation has consented to be sued in the courts of this territory upon all causes of action arising against it in this territory, and that service of process may be made upon some person, a citizen of this territory whose name and place of residence shall be designated in such certificate and that process when so served upon such agent, shall be taken, deemed and held to be as valid to all intents and purposes as if served upon the company in the state or territory under the laws of which it is organized."

"Sec. 443. Written consent of the person so designated to act as such agent, shall also be filed in like manner, and such designation shall remain in force until the filing in the same office of a written revocation thereof, or of the consent executed in like manner."

The word "territory," so far as the same applied to Montana, was changed by the constitution of the state to the word "state."

Section 444 of this chapter provides that any contract entered into by any corporation who has failed to comply with the provisions of the above statute shall be void and invalid as to such corporation.

The claim is that none of the requirements of this statute were complied with in Gallatin county. In the argument of the case it was conceded that said corporation had complied within Lewis and Clarke county, Mont., with said statute. Subsequently the attorneys for the respective parties to this action filed a stipulation which makes the following statement of facts a part of the bill herein:

"Prior to the making of the loan to Horace T. Kelly and wife, or the acceptance of the said Kelly note or mortgage referred to in the plaintiff's complaint, and before doing business of any kind in the territory or state of Montana, the Northwestern Guarantee Loan Company filed in the office of the secretary of state and of the county clerk and recorder of Lewis and Clarke county all of the papers provided for and required to be filed by foreign corporations, under chapter 24 of the Compiled Statutes of Montana; and in the verified statement so filed by said company the principal place of business or principal office of the

company within the territory of Montana is declared to be located at the city of Helena, in the said county of Lewis and Clarke, but the said company has never at any time filed in the office of the county recorder of the county of Gallatin any of the papers specified in said chapter 24 of the Compiled Statutes of Montana, nor has the Industrial Trust Company (one of the defendants in this cause) ever at any time filed any of the papers provided in the said chapter 24, either in the office of the secretary of state of Montana, or in any office of the county clerk and recorder of any county in the territory or state of Montana."

The bill further sets forth that on the 1st day of April, 1892, the said Northwestern Guarantee Loan Company sold and assigned said mortgage, executed as aforesaid to it, to the defendant the Industrial Trust Company; and that said Industrial Trust Company, prior to the 1st day of April, had not complied with the aforesaid provisions of the aforesaid chapter 24; and that prior to said date said trust company was doing business in Montana, and at the said date, and since the same, was so engaged, and is attempting to enforce and collect divers and numerous notes, mortgages, and contracts made to and with said Northwestern Guarantee Loan Company in its business of loaning money. It is then set forth that said Industrial Trust Company commenced suit against the said Kelly and wife, Catherine Callum, and William B. Thompson to foreclose said mortgage, and on the 6th day of July, 1895, obtained a decree of foreclosure of the same for the sum of $4,801.50; that afterwards White Caldwell, under an order of said sale, issued from the court in which said decree was rendered, sold, as sheriff of Gallatin county, said real estate in said mortgage mentioned, to the said Industrial Trust Company, and issued to said company a certificate of sale of said land; that, by virtue of this certificate of sale, said trust company claims some rights or interest in said land. It is further set forth that the court had no jurisdiction to order the aforesaid sale, and that the contract of purchase by said trust company is void. The plaintiff alleges that he is the owner in fee of this land, and prays that he may have a decree declaring the same, and that the said mortgage be declared canceled, and the Industrial Trust Company be enjoined from claiming any right, title, or interest in the said lands, and that the sheriff, Caldwell, be enjoined from making a deed to said trust company for said land. The defendants demurred to said bill, on the ground that it does not state facts sufficient to constitute a cause of action; in other words, that the same does not state any grounds for the equitable relief prayed for.

The legal questions presented in this case are as follows: (1) Was the Northwestern Guarantee Loan Company required, under the statute law of Montana, to file the statement required of foreign corporations by said chapter 24 in Gallatin county, although it had filed such statement in Lewis and Clarke county? (2) What was the effect of the decree of foreclosure entered against Kelly and wife and others as to the validity of the mortgage made to the Northwestern Guarantee Loan Company, and as to the validity of the assignment of the said mortgage to the said Industrial Trust Company? (3) Was the Industrial Trust Company, on account of having failed to file any of the statements required by said chapter 24,

precluded from having said land specified in the mortgage sold, and from bidding in the same at said foreclosure sale?

In looking at the 442d section of chapter 24, Comp. Laws Mont., it will be observed that foreign corporations are to make the statement and record required thereby "in the office of the secretary of the territory, and in the office of the county recorder of the county wherein they intend to carry on or transact business," and the statement shall state the "principal office or place of business." There is no requirement that the record shall be made in every county wherein the said corporation may transact any business.

In the case of Cowell v. Springs Co., 100 U. S. 55, the supreme court said:

"If the policy of the state or territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way."

In the case of Union v. Yount, 101 U. S. 352, the supreme court, after quoting the language above, said:

"In harmony with the general law of comity attaining among the states comprising the Union, the presumption should be indulged that a corporation of one state, not forbidden by the law of its being, may exercise within another state the general powers conferred by its own charter, unless it is prohibited from so doing either in the direct enactments of the latter state or by its public policy, to be deduced from the general course of legislation or from the settled adjudications of its highest courts."

In Mor. Priv. Corp. § 961, this rule is expressed:

"Accordingly, it may be stated as a general rule of the common law, in force in each of the states of the Union, that a corporation formed under the laws of another sovereignty may carry on its business and make contracts within the state, and may protect its rights in the courts of the state either as plaintiff or as defendant."

Again, in section 966, the same author says:

"The law of comity is the law of the land, unless expressly or impliedly repealed."

From these authorities, I think, it may be predicated that the statute of Montana under consideration is in derogation of the common-law rule as to the comity which prevails as to corporations organized under the laws of one state doing business in another, and should be strictly construed. As it does not clearly state or imply that a foreign corporation should make the statement specified in said chapter 24 in each county of the state before doing business therein, it should not be so construed. If the statute is complied with in filing the necessary statement in the office of the secretary of state, and in the county where the corporation has its principal office or place of business, it will be sufficient. Only to this extent has the common-law rule been modified if this statute is construed strictly. If, however, I should be mistaken as to this rule, I am confronted with another fact. The defendant the Industrial Trust Company obtained a decree of foreclosure, in a court of competent jurisdiction, of the mortgage named in the bill.

In considering the effect of a judgment upon the merits of a cause, the supreme court, in Cromwell v. Sac Co., 94 U. S. 351, said:

"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."

In the case at bar, the defense that the said mortgage was void, because the Northwestern Loan Company had not complied with the provisions of said chapter 24 of the Compiled Laws of Montana, could have been made. It could also have been set forth as a defense that the assignment of this mortgage to the Industrial Trust Company was void. This view is sustained in the case of Semple v. Bank, 5 Sawy. 88, Fed. Cas. No. 12,659. The mortgage, then, and the assignment, must be considered as valid contracts, and the decree foreclosing said mortgage must be classed as one within the jurisdiction of the court.

The contention that the sale to the Industrial Trust Company was void is the only point, then, left upon which the plaintiff can support his claim. The mortgage must be considered valid, the assignment valid, and the foreclosure valid, but the claim is that, because the Industrial Trust Company failed to comply with the law, its purchase of the property at the sale ordered by the court is invalid. A foreign corporation, which owns a contract, has, as a matter of comity, a right to sue and collect the same in this state. There is no provision in the law prohibiting a foreign corporation from bringing a suit to enforce a claim against any resident of this state. In the case of American Loan & Trust Co. v. East & W. R. Co., 37 Fed. 242, it was held that in Alabama, under a statute similar to the one in this state, a foreign corporation could maintain a suit against another corporation in that state. In the case of Utley v. Mining Co., 4 Colo. 369, it was held that the failure of a foreign corporation to comply with the statute of the state of Colorado, similar to the Montana statute, did not affect its capacity to sue. This case was referred to approvingly in the case of Fritts v. Palmer, 132 U. S. 282, 290, 10 Sup. Ct. 93. The right to maintain a suit would certainly involve the right to have a judgment or decree entered therein. In the case of Richards v. Holmes, 18 How. 143, the supreme court held that a creditor at a sale of real property made by a trustee to satisfy his claim had a right to become a purchaser. This ruling was approved in the case of Smith v. Black, 115 U. S. 308, 6 Sup. Ct. 50. It is stated in Pom. Eq. Jur. 1190, that a mortgagee may become a purchaser at the sale of the mortgaged premises. If a sale made by a trustee in a mortgage to the mortgagee cannot be impeached, much less can a sale made by order of court be impeached, for the same reason. I think it may be safely affirmed that a mortgagee has the general right to become a purchaser at a judicial sale of the premises named in the mortgage, although no permission for him to make such purchase is given in the decree. I think it may be safely said that any person in Montana who is a mortgagee would have the right to become a purchaser at a sale made by

order of court with a view of liquidating his debt and satisfying his mortgage. The question is then presented as to whether the state can say that a foreign corporation shall not have this right.

In the case of Erie Ry. Co. v. State, 31 N. J. Law, 531, it was said:

"It seems to be utterly inconsistent with legal principles, which have always been decreed axiomatic, to hold that a government can recognize the legal existence of a foreign corporation for the purpose of taxation, and at the same time can deny such legal existence for the purpose of depriving it of those rights which belong to every individual or company known to law."

See, also, Mor. Priv. Corp. § 937.

The same may be said in regard to a rule that would allow a foreign corporation to bring a suit in the courts of a state, and yet would deny it the benefits to be derived from that suit. The right of a creditor to bid in property decreed to be sold in an action brought by him is a valuable one. In many cases it is the only means afforded a creditor of obtaining anything of value from his judgment or decree. That provision of the fourteenth amendment of the constitution of the United States which provides that "no state shall deny to any person within its jurisdiction the equal protection of the law" applies to corporations, whether domestic or foreign, the same as individuals. The only question is as to when is a corporation within the jurisdiction of the state. If such a corporation comes into the courts of a state rightfully to have its rights adjudicated, I apprehend for that purpose it is within the jurisdiction of the state.

In the case of Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, the supreme court said of foreign corporations:

"The equal protection of the law which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state. The plaintiff is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within the jurisdicton, and, on condition that it pays the required license tax, it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the state, and the constitutional amendment requires nothing more."

If no license had been required of the foreign corporation mentioned in the above case, it would, by the rules of comity, have had the right to do business within the state of Pennsylvania, and, so far as it had any rights or property therein, it would have been entitled to the equal protection of the laws of that state. To the extent of its rights and property, it would have been within the jurisdiction of that state. In this case, as I have shown, the defendant corporation had the right to sue in the courts of Montana. Being for that purpose within the jurisdiction of the state, it should have the equal protection of the laws so far as the suit it had instituted to foreclose the mortgage mentioned in this case was concerned; and, as I believe, if the statute under consideration should be interpreted as forbidding the defendant company from purchasing said property named therein at the judicial sale ordered in said foreclosure suit, it would be a violation of said provisions of the fourteenth amendment to the United States constitution, as not affording to said company the equal protection of the laws of the state.

There is another point to be observed in considering the statute under consideration. There is nothing in the same that prohibits a foreign corporation from holding real estate. It is provided that the contracts of a foreign corporation which fails to comply with the statute shall be void and invalid as to such corporation; that is, the corporation cannot enforce any contracts it may make. As far as it is concerned, its contracts are void and invalid. But, as to any person duly qualified to enter into such a contract, it is not void or invalid, and can be enforced by him against the corporation. It would seem, then, that, until the person who entered into a contract with the foreign corporation saw fit to declare the same invalid and void, it must remain in force. The sale under a decree of foreclosure of a mortgage in Montana may not possess all of the characteristics of a judicial sale under the former equity practices, yet I think it must be classed as such a sale. See Pom. Eq. Jur. § 1228. A judicial sale is one made by the court, and one who bids in the property at such a sale becomes subject to the orders of the court. Rorer, Jud. Sales, §§ 1–4, 148. The court can enforce a sale so made. It is not proper, then, for a third party to step in and declare such a sale and purchase void. The court has control of this matter. The court only should have the right to declare such a sale void. A judicial sale is made for money unless otherwise ordered in the decree. I think it would be highly inequitable, after a party had paid his money to an officer or commissioner in pursuance of his bid at a judicial sale, to have some third party step in and say the contract of purchase is void. The defendant in a foreclosure suit is not a party to the contract of sale, if it can be called a contract, but the court is such a party. The purchaser from such a defendant stands in no better position than his grantor. The sale in the case at bar must remain in force unless the contract of sale is annulled by the court.

I am aware that the views here expressed are not fully in accord with those expressed by Judge Deady in the case of Semple v. Bank, 5 Sawy. 88, Fed. Cas. No. 12,659. I am not sure that the statutes of Oregon at the date of this decision were the same as those of Montana in regard to foreign corporations. The same considerations bearing upon this question that have presented themselves to this court were not presented to the learned Judge Deady in that case, and hence I do not feel that the decision in that case should control this court in this case. The demurrer is therefore sustained.

BOWLES v. FIELD et al.

(Circuit Court, D. Indiana. December 31, 1897.)

No. 9,316.

1. CONTRACTS OF MARRIED WOMEN—CONFLICT OF LAW—PUBLIC POLICY.
A promissory note of a married woman, valid under the laws of the state where made, is binding upon her, and the enforcement thereof is not precluded by the public policy of the state of Indiana, although under its laws she was prohibited from making such a contract.

2. SAME—FOR THE BENEFIT OF HUSBAND.
In an action on a note of a married woman, she cannot claim credit thereon for the amount of the proceeds applied to the purchase of property for her husband, or given to him, or paid in discharge of his obligation, when she took and retained such obligation.

This was a suit by Frank Bowles against Elizabeth S. Field and Frank B. Field to foreclose a mortgage on real estate situated in Indiana, and executed by them, as husband and wife, to secure a note of Elizabeth Field executed by her in the state of Ohio.

D. W. McKee and Morrow & Goodhart, for complainant.
Addison C. Harris, for defendants.

BAKER, District Judge. After a careful consideration of the argument and authorities presented on the final hearing, the court still adheres to the views expressed in Bowles v. Field, 78 Fed. 742. If it were conceded that the consideration of the note and mortgage in suit rested upon the notes executed and made payable by the feme defendant and her husband in the state of Ohio, and that she was surety for her husband thereon, I am still of opinion that her liability, so created, constituted a sufficient consideration to uphold the note and mortgage in suit. These notes, executed and made payable in Ohio, were valid and binding obligations there, because by the law of that state the feme defendant had the same ability to bind herself by contract as though she had been unmarried. They were the joint and several obligations of herself and her husband, and as to the payee each stood as a principal. Nor do I think the public policy of this state precludes the enforcement of such obligations. The policy of this state has been to enlarge the rights of married women by removing their common-law disabilities, and, simply because this policy has not been carried so far here as in many of our sister states, it cannot well be maintained that the policy of our state is so repugnant to the more liberal policy of other states that the courts of the United States ought to refuse to enforce contracts valid by their laws. The policy of congress, as disclosed by its legislation touching the rights and liabilities of married women in the District of Columbia, is the same as the policy of the state of Ohio. 16 Stat. 45; Sykes v. Chadwick, 18 Wall. 141. If there was an irreconcilable conflict in the public policy of the two states on this subject I should be of opinion that this court ought to be governed by the more liberal policy indicated by the act of congress rather than by the public policy indicated by the statutes of this state. The note and mortgage in suit were executed to secure a loan made by the feme defendant of $4,000. She alone executed the note, and the mortgage was executed in conformity with the law of this state by husband and wife. She received a check for that amount at the time, drawn by the complainant on the Citizens' Bank of Harrison, Ohio, and the bank paid the check, and gave her credit for that amount upon its books. On the same day that she received the check and the credit, she drew four checks against the money so on deposit in her name. One check was for $391.12, payable to Francis M. Hollowell, to pay off a material man's lien which he had taken upon certain buildings and land belonging

to the feme defendant. This lien, in my opinion, was a valid claim against her. She also drew her check on the Citizens' Bank in favor of Albert Williams to pay off a mechanic's lien held by him against her property for $115.15. This was a valid claim against her, and was rightfully paid off. She also drew her check for $100, payable to the complainant, to take up a note for that amount, executed by her in Ohio, for money which she had borrowed on her personal credit, and for her own use, on February 27, 1891. She also drew a check on the Citizens' Bank for $1,237.47, being the amount of the principal and interest of a note executed March 11, 1892, for $1,169.40. This note was executed at Harrison, Ohio, and was payable to the complainant at the Citizens' Bank, Harrison, Ohio, and was signed by the feme defendant and her husband. There is much conflict in the testimony in regard to the consideration of this note. I am of the opinion that to the extent of $482 the feme defendant received the consideration, and that to the extent of $737.40 it was received by her husband. I do not, however, think she is entitled to a credit for that sum and interest thereon in the present suit, because, in my opinion, the whole amount of that note was a valid obligation against her, and she rightfully appropriated the amount of her check to its payment. On December 5, 1892, she drew a check for $100, payable to herself, which she admits she received and applied upon a personal liability of her own. On December 5, 1892, she drew her check, payable to the complainant, for the sum of $990.45. This check was drawn to take up certain notes held by the complainant which were secured by a chattel mortgage executed by her and her husband. The undisputed evidence shows that the property covered by this chattel mortgage belonged to Frank B. Field, except one horse named "Fan," owned by Mrs. Field, which she valued at $25. If the note secured by this chattel mortgage represented obligations solely binding upon her husband, the evidence shows that they were amply secured and were valid as against him. She paid them off, and took them up. I know of no principle upon which, having taken up the valid obligations of her husband, she can claim credit for the money so paid, and still retain such obligations. A married woman can, if she chooses, make a gift of her money to her husband, and, if so, why may she not apply her money to buy or pay off a valid obligation existing against him? For the money thus applied by her she can claim no credit on the note and mortgage in suit. On December 3, 1892, she gave her check to R. D Templeton for $38.37. This was for a valid claim against her, and she is properly chargeable therefor. On December 6, 1892, she drew her check on the Citizens' Bank for $410, payable to M. O. Butterfield. This check was deposited by the payee in the Miami Valley Bank of Hamilton, Ohio, and was forwarded by it to the Citizens' Bank of Harrison, Ohio, and by the latter bank was duly paid to the former. The check was in payment of a horse named "Galvani," and I think the evidence shows that Frank B. Field bought the horse, and that the debt therefor was his. But, in my opinion, Mrs. Field cannot claim a credit therefor in this case, because the complainant was not chargeable at the time the check was paid with knowledge of the ownership of the horse, or that the check was to

pay a debt of her husband. Aside from this, I am of opinion that it would have been the duty of the Citizens' Bank to honor the check when presented, even if the complainant had known that it was drawn to pay a debt of her husband. On December 5, 1892, she drew her check on the Citizens' Bank, payable to the order of F. B. Field, for $650. This check was presented by, and was paid to, her husband, and he used the money for his own exclusive benefit. In my opinion, she had a right to give the money represented by this check to her husband, if she chose to do so. If she gave the check to him to draw the money and to bring it to her, and he betrayed his trust, I do not think the complainant can be charged therefor. The money drawn out on the above-mentioned checks drawn by her amounts to $4,032.56, being $32.56 in excess of the amount of the loan, as evidenced by the note and mortgage in suit. The exceptions to the master's report will therefore be overruled, and there will be a decree for the principal sum of $4,000, with the interest thereon to this date, to which will be added an allowance of $500 for attorney's fees. The decree will be for $6,124.89.

RYAN v. SEABOARD & R. R. CO. et al.

(Circuit Court, E. D. Virginia. December 4, 1897.)

PROCESS—SUBSTITUTED SERVICE.

A suit brought by an assignee of a specified certificate of stock, which is physically within the district, seeking to establish his ownership thereof, and alleging that its custodian had wrongfully refused to deliver it to him, but fraudulently surrendered it for cancellation, and procured a new certificate in his own name, and which prays for the delivery to complainant of the original, and a cancellation of the spurious reissue, states an equitable cause of action, and falls within the act of March 3, 1875 (18 Stat. 470) § 8, authorizing service of process upon absent defendants by publication or without the district.

This was a bill in equity by Thomas F. Ryan against the Seaboard & Roanoke Railroad Company and others to establish title to, and secure possession of, certain shares of corporate stock.

Henry Crawford, for complainant.

Wm. A. Fisher and Watts & Hatton, for defendants.

SIMONTON, Circuit Judge. The bill in this case, among other things, alleges that, in consequence of a pooling agreement made between certain shareholders in the Seaboard & Roanoke Railroad Company, one Theodore Cooke, a subscriber thereto, forwarded to Louis McLane, chairman of the committee, original certificate No. 754, for 153 shares in this company; that he executed in blank an assignment on the back of the certificate; that subsequently he, for value, sold, and by a proper instrument in writing assigned, the certificate No. 754 to complainant; that after his purchase of the certificate complainant demanded the certificate No. 754 from McLane; that McLane refused to return it to him. It then charges that, after such demand for the return of the certificate, the committee,

who are Louis McLane and Legh Watts, the other member, Moncure Robinson, being now deceased, who were not the owners of the said certificate No. 754, and had no beneficial interest therein whatever, illegally and fraudulently filled up the assignment on the back of the certificate, causing the same falsely to recite that it had been sold, assigned, and transferred, for value received, by said Cooke to the said Louis McLane, chairman, and illegally and fraudulently, and without authority, surrendered said certificate to the officers of the Seaboard Railroad Company, at Portsmouth, Va., for cancellation, and obtained a new certificate in his own name; that the said certificate No. 754, originally issued to said Cooke and by him sold to complainant, is in the custody of the treasurer of the company at Portsmouth, within this district. The prayer of the bill, among other things, is that the complainant be declared the owner of certificate No. 754; that all reissues heretofore made, of certificates for the shares therein named, be declared void. This, then, is for the delivery to complainant of a certain defined, designated, certificate of stock within this district, in which he claims property, and the possession of which is necessary for the assertion of his rights. It is not for a certificate held or owned by Cooke, nor for the new certificate issued to Mr. McLane upon the surrender of certificate No. 754, but for certificate No. 754 itself, and to the complete assertion of his rights the aid of a court of equity is necessary. He finds authority for this in Merritt v. Barge Co., 24 C. C. A. 530, 79 Fed. 228. This certificate No. 754, the possession of which he seeks, is personal property.

The defendants file their pleas to the jurisdiction upon the ground that Richard Curzon Hoffman, Louis McLane, Andrew C. Trippe, J. Livingston Minis, and Charles D. Fisher are citizens of the state of Maryland, nonresident in this district, and that the Raleigh & Gaston Railroad Company is a citizen of the state of North Carolina, and nonresident in this district. A press of engagements prevents an extended discussion of this matter. So far as the claim for the delivery of the certificate No. 754 is concerned, inasmuch as that is within the district, personal property, the title to which is clouded and possession of which is sought, the bill is within the act of 1875. As Mr. Hoffman is president of the company, holding the certificate whose action is necessary to obtain full relief respecting it, and as Mr. McLane has a certificate issued upon surrender of this certificate No. 754, they are parties who can be served notwithstanding their nonresidence. The pleas based upon their presence as parties are overruled, and the defendants have leave to answer over. With regard to the other defendants, the pleas are sustained, and the bill as to them dismissed.

PENN MUT. LIFE INS. CO. v. UNION TRUST CO. OF SAN FRANCISCO. CAL., et al.

(Circuit Court, N. D. California. December 15, 1897.)

No. 12,263.

1. INTERPLEADER—RELATIONS OF CO-DEFENDANTS — EFFECT OF PLEADING AS EVIDENCE.
Two adverse claimants to a fund, who are joined as defendants to a bill of interpleader, occupy, as between themselves, the position of complainant and defendant, and a sworn denial by one of them of the allegations of a cross bill filed by the other has the same effect as evidence as though contained in an answer to an original bill.

2. LIFE INSURANCE—ASSIGNMENT OF POLICY—CONSTRUCTION.
The holder of a life policy assigned the same to a third person, "if she survive him; otherwise to such other beneficiary, having an insurable interest on the life of the insured, as the insured may thereafter in writing nominate, with full power to the insured to change or alter or cancel this assignment at any time." *Held*, that such assignment was not absolute, and the reservation of the right to change or cancel applied to the assignment in which it was contained, and not to the one appointing a successor to the assignee.

3. SAME—REASSIGNMENT—UNDUE INFLUENCE.
Neither advice given by a physician to his patient as to his reassignment of a life insurance policy, nor assistance rendered him in carrying out such advice, constitute undue influence, unless the influence so exerted is sufficiently strong to substitute the will of the physician for that of the patient, and control the latter's action in the matter.

Rothchild & Ach, for complainant.

Platt & Bayne, for respondent Union Trust Co. of San Francisco.

Cannon & Freeman, for respondent Theresa Abell.

MORROW, Circuit Judge. This is a bill in interpleader brought by the Penn Mutual Life Insurance Company against the Union Trust Company of San Francisco and Edwin R. Dimond, executors of the last will and testament of William H. Dimond, deceased, and Theresa Abell. The controversy is with respect to the moneys due on a policy of insurance written by the complainant on the life of W. H. Dimond for the sum of $10,000. The policy is technically known as a "fifteen-year endowment trust certificate." The insured, W. H. Dimond, died in New York City on June 18, 1896, and the moneys due upon the policy in question were claimed both by the executors of the last will of the deceased, on the one hand, and by Mrs. Theresa Abell, on the other. The complainant brought this suit of interpleader against these adverse claimants, and, under the interlocutory decree of this court, made on July 10, 1897, deposited the sum of $6,079.05 in the registry of the court as the amount due on said policy. After the suit had been instituted, Edwin R. Dimond, one of the defendants and one of the executors of the last will of the deceased, resigned his trust as such, and was subsequently dismissed from the case. The present controversy, therefore, lies between the remaining executor, the Union Trust Company of San Francisco, and Mrs. Theresa Abell. The Union Trust Company answered, and, after setting out the policy as it is set forth in the bill of interpleader, averred that on June 8, 1893, the insured, W. H.

Dimond, made an assignment of it in writing to Theresa Abell; that the assignment, among other things, contained the following clause: "With full power to the insured to change or alter or cancel this assignment at any time;" that the assignment was signed by both W. H. Dimond and Theresa Abell, and was subsequently acknowledged by each, but on different days, before a notary public; that on November 19, 1895, said Dimond canceled the assignment to Theresa Abell, and transferred and assigned the policy to himself, his heirs, executors, etc. Mrs. Theresa Abell answered the bill of complaint, and also filed a cross bill, in which it is averred that the policy was, on the 8th day of June, 1893, assigned as stated in the answer of the Union Trust Company. It is alleged, further, that at the time of the execution of the assignment it was the intention of the parties, and their understanding and agreement, that all the right, title, and interest of W. H. Dimond in and to said policy should pass to and absolutely vest in Theresa Abell, should she survive him; that Dimond knew that the contract did not truly express the intention, agreement, or understanding of the parties; that Theresa Abell did believe that it truly expressed the intention, agreement, and understanding of the parties, and, so believing, she signed and executed the contract, acting through and by reason of a mistake as to its true contents; that Dimond knew of this mistake, but did not inform Theresa Abell of her mistake with respect thereto; that the assignment was made in consideration of an engagement of marriage and an indebtedness of Dimond to Abell of $2,100. There is also an averment that, on November 19, 1895, Dimond attempted to cancel the assignment of the policy to Mrs. Abell, and assign and transfer it to himself, his heirs, executors, etc., but it is alleged that this second assignment was null and void, and was made with the intent and for the purpose of defrauding the cross complainant. The prayer of the cross bill is that the court reform and correct the first assignment so that it shall vest in the cross complainant an absolute title to the policy; that, as reformed, it be enforced against the insurance moneys due under the policy in question; and that the second assignment, purporting to cancel the first, be declared null and void. The Union Trust Company, answering the cross bill, denied the allegations of mistake; denied that the assignment was intended to be an absolute assignment; and denied that the assignment was made in consideration of an engagement of marriage and of the sum of $2,100. To this answer a replication was duly filed. During the hearing counsel for the cross complainant applied to the court for leave to amend the cross bill, which was granted, and it was further alleged that the second assignment of November 19, 1895, which purported to cancel the first assignment of June 8, 1893, was obtained by and through undue influence exercised by Dr. Charles H. Rosenthal upon the insured, W. H. Dimond. The Union Trust Company answered this amendment, denying generally and specifically the allegations of undue influence. The policy, with the first and second assignments referred to, were introduced in evidence. There is no dispute that the policy was, by the assignment of June 8, 1893, transferred by the insured, W. H. Dimond, to Mrs. Theresa

Abell, and that the insured, by the subsequent assignment of November 19, 1895, attempted to cancel the assignment of the policy to Mrs. Abell, and revest it in himself, his heirs, executors, etc. The cross complainant, Mrs. Abell, contends that the assignment to her, of June 8, 1893, was intended to be, and was, in legal effect, an absolute conveyance of the policy, made for a valuable consideration, to wit, an engagement of marriage and $2,100 in cash, and that the second assignment, of November 19, 1895, purporting to cancel the first assignment, was, and is, null and void. It is further contended that the second assignment is void for the reason that it was procured from the insured through undue influence exerted by C. H. Rosenthal, the physician of the insured. On the other hand, the executor, the Union Trust Company, contends that the first assignment is not by its terms, and was never intended to be, an absolute one, but that there was a reservation by the insured of the power to change, alter, or cancel the assignment at any time; that this power was duly and legally exercised on November 19, 1895, when the second assignment, canceling the first, was executed by the insured; and that the second assignment is therefore the only valid assignment now existing with reference to the moneys due upon the policy of insurance in question.

From these contentions, as made by the pleadings and proofs, three questions arise: (1) Was it the intention of the parties to make an absolute assignment of the policy of insurance to Mrs. Abell, and did she, at the time of its execution, believe that such were the terms of the assignment, and, so believing, execute it by mistake, with the knowledge of the assignor? (2) Was the revocation clause in the assignment operative? (3) Was the so-called revocation of the first assignment, purporting to have been made by the second assignment, executed through and by reason of undue influence alleged to have been exercised on W. H. Dimond by his physician, C. H. Rosenthal?

As to the first question, the court is without the proof required by law to show mistake on the part of one party, accompanied by inequitable conduct on the part of the other party, to justify it in correcting and reforming the assignment of June 8, 1893, so that it shall be an absolute assignment. The general rule is that when, in a court of equity, it is sought to set aside, annul, or reform a written instrument for fraud or mistake in the execution of the instrument itself, the testimony showing the fraud or mistake must be clear, unequivocal, and convincing. A bare preponderance of evidence which leaves the question in doubt will not suffice. Maxwell Land-Grant Case, 121 U. S. 325, 7 Sup. Ct. 1015; U. S. v. Budd, 144 U. S. 154, 12 Sup. Ct. 575; Cox v. Woods, 67 Cal. 317, 7 Pac. 722; Van Vleet v. Sledge, 45 Fed. 743; Bowers v. Insurance Co., 68 Fed. 785. Mrs. Abell, whose testimony would have been most material on this point, was incompetent to testify as a witness in her own behalf, under section 858, Rev. St., which provides "that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement

by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." This section is simply declaratory of the long and well settled rule on that subject, and, although it may operate harshly in particular cases, still it is necessary to the prevention of fraud upon estates. While Mrs. Abell was sworn as a witness, and permitted to answer certain preliminary questions, she was not allowed to testify "as to any transaction with, or statement by, the testator." Moreover, the answer of the Union Trust Company to the cross bill is sworn to, and is therefore equivalent to the testimony of two witnesses, or one witness and corroborating circumstances equal in weight to one witness. Vigel v. Hope, 104 U. S. 441; Conley v. Nailor, 118 U. S. 127, 6 Sup. Ct. 1001; Morrison v. Durr, 122 U. S. 518, 7 Sup. Ct. 1215. The answer denied that the assignment was ever intended to be an absolute one; that it was executed under mistake on the part of Mrs. Abell, which was known to the insured, W. H. Dimond; and that the assignment was made for a valuable consideration, to wit, an engagement of marriage and the sum of $2,100. These sworn denials, responsive to the allegations of the cross bill, have not been overcome by the testimony of two witnesses, or by the testimony of one witness and corroborating circumstances equal in weight to one witness.

It is strongly urged by counsel for Mrs. Abell that this rule of equity pleading can have no application to a case of the present nature, because both of the claimants for the insurance money were joined as defendants by the complainant, the Penn Mutual Life Insurance Company. But in this suit of interpleader both of the defendants claim the money adversely to each other, and occupy, as between themselves, the position of complainant and defendant. The Union Trust Company answered the bill of interpleader, relying upon the policy and the assignments as executed by the insured, W. H. Dimond. Mrs. Abell both answered and filed a cross bill, attacking both of the assignments,—the first on the ground that it did not express the contract, and asking that it be reformed, and, when reformed, that it be enforced against the insurance money; the second on the ground that, the first being an absolute assignment, the second was null and void, and, further, that it had been procured through undue influence. Obviously, as between herself and the other claimant, the Union Trust Company, she voluntarily took the affirmative of the propositions she contended for, and was bound by the rules of equity pleading and procedure, as much so as if she had brought an independent suit against the Union Trust Company. But, aside from this, it may be observed that Mrs. Abell signed the assignment of June 8, 1893, and there is a presumption that she knew its contents. Therefore, upon the question of mistake, I must hold that the cross complainant has failed in her proofs.

The second question involves the interpretation to be given to the reservation clause in the assignment of June 8, 1893. The assignment reads as follows:

"For value received, I hereby sell, assign, transfer, and set over, all my right, title and interest whatsoever, as a death claim of, in and to 15-year endowment trust certificate policy No. 90,601, on the life of William H. Di-

mond in the Penn Mutual Life Insurance Company of Philadelphia, unto Theresa Abell assignee of William H. Dimond the insured if she survive him, otherwise to such other beneficiary having an insurable interest on the life of the insured, as the insured may thereafter in writing nominate with full power to the insured to change or alter or cancel this assignment at any time.

"Witness my hand and seal this eighth day of June, A. D. 1893.

"William H. Dimond.
"Theresa Abell.

"Signed, sealed, and delivered in the presence of
"E. A. Davis,
"James L. King."

The assignment provides, in effect, for three things: (1) The assignment to Mrs. Abell; (2) the assignment to a nominee to be subsequently named, if Mrs. Abell should not survive the insured; (3) the reservation of the power to change or alter or cancel the assignment at any time. Without taking up in detail the elaborate argument presented by counsel for Mrs. Abell as to the interpretation and validity of this last clause, it is sufficient to say that the principal point made is that the reservation clause applies to the assignment to a nominee to be subsequently named, in case Mrs. Abell did not survive the insured, and that it did not apply to the assignment made to her. But I am unable to give the reservation clause that limited interpretation. In my opinion, it means just what it says, viz. that the insured should have the power "to change or alter or cancel this assignment at any time." It refers to "this" assignment, evidently meaning the assignment to Mrs. Abell. The language used is not necessarily inconsistent with the general intention expressed at the outset to assign the policy to Mrs. Abell. It is an elementary rule of interpretation that the whole of a contract is to be taken together, so as to give effect to every part. Civ. Code, § 1641; Code Civ. Proc. § 1858; Jones, Cont. §§ 210, 214, 217; Faivre v. Daley, 93 Cal. 670, 29 Pac. 256. There is nothing inconsistent or repugnant in construing the reservation clause as applying to any assignment made, or to be made, by the insured. Indeed, that would seem to be its natural and reasonable construction. While it is true that the written part of the assignment was drawn by the insured himself, and is not punctuated, still, in the absence of such a showing of mistake or fraud as would justify the court in reforming the instrument, I am unable to give the clause in question any of the interpretations contended for by counsel for Mrs. Abell. The point is made, further, that the words, "Assignment—Absolute," printed at the head of the assignment, indicate that it was so intended. But these words are part of the printed form used by the parties to this assignment, and it is well settled that, if printed and written parts conflict in an instrument, the written part controls. Civ. Code, § 1651; Harper v. Insurance Co., 22 N. Y. 441. A circumstance, appearing upon the face of the assignment, which is inconsistent with the contention that it was an absolute assignment, is that the policy was assigned to Mrs. Abell in the event that she survived the insured; otherwise to such other person as the insured might name.

The third and last question relates to the charge made by the cross complainant that the revocation, so called,—that is, the second assignment,—was obtained through undue influence exercised by

the insured's physician, C. H. Rosenthal. The latter was called as a witness on behalf of the Union Trust Company, and the cross complainant relies largely upon his testimony, elicited for the most part upon cross examination, to establish this charge. While the testimony of this witness seems to give some color to the allegation of undue influence, yet, considered as a whole, it is not sufficient to establish the fact of undue influence. The witness testified that he had been the physician of W. H. Dimond for several years; that the latter was not in good health, and was suffering from heart disease; that he visited the office of the witness upon one occasion, and appeared to be laboring under some nervous strain, and that he confided to the witness his relations with Mrs. Abell. It appears, from other testimony, that Mr. Dimond and Mrs. Abell had been engaged to be married, but, for some reason that does not clearly appear in evidence, their relations had become somewhat estranged, and the engagement seems to have been broken off. The witness admitted that he advised Mr. Dimond, as his patient, to sever absolutely all relations with Mrs. Abell, and that Mr. Dimond authorized him to act for him in communicating with and effecting a final settlement between himself and Mrs. Abell. He testified that he was empowered to bind Mr. Dimond with reference to any settlement that might be made, and that the latter agreed to be bound by whatever the witness saw fit to do in effecting a final and satisfactory settlement with Mrs. Abell. He, however, subsequently qualified this testimony by stating that he was empowered to bind Mr. Dimond only within the instructions given by the latter to him. While it is palpable from his testimony that he was very anxious that Mr. Dimond should break off all relations with Mrs. Abell, that he advised him to do so, and that he conducted the whole affair with that end in view, yet the court cannot say that his advice or conduct amounted to what the law deems undue influence. He did undoubtedly influence Mr. Dimond, by advice relating to his health and welfare, to sever all relations with Mrs. Abell, but the evidence is not strong enough to justify the court in holding that he unduly influenced him. Undue influence must be of such a nature as to deprive the grantor of his free agency. It must be so strong as to be inconsistent with the idea that the grantor acted freely, and it must result, in effect, that the will of the person exercising the undue influence is substituted for that of the party unduly influenced. Civ. Code, § 1575; In re Kohler, 79 Cal. 313, 21 Pac. 758; In re Calkins' Estate, 112 Cal. 301, 44 Pac. 577; Mackall v. Mackall, 135 U. S. 167, 172, 10 Sup. Ct. 705; Schouler, Wills, 239, 246; 27 Am. & Eng. Enc. Law, 453, and cases there cited. The undue influence must exist at the time of the act, and be a controlling influence in impelling the execution of the act. In re McDevitt, 95 Cal. 26, 33, 30 Pac. 101; Estate of Carriger, 104 Cal. 84, 37 Pac. 785; In re Langford, 108 Cal. 622, 41 Pac. 701; Kelly v. Perrault (Idaho) 48 Pac. 45; In re Kaufman's Estate (Cal.) 49 Pac. 194. The mere fact that the witness did influence Mr. Dimond is not enough. The influence must have been unduly exerted. As was said by Judge Van Brunt in Re Lyddy's Will (Sup.) 5 N. Y. Supp. 639:

"Influence may always be exercised, and it is proper that it should be exercised; 'but it only becomes improper when it becomes undue, and it becomes undue when it substitutes the will of the person exercising the influence for the will of the person who is to do the act.' Arguments, persuasions, and suggestions may be made, so long as the person who is to do the act can weigh the suggestion, and has the ability, if so minded, to resist the influence. Then there is nothing undue in regard to it, though he may yield to it."

An act that is the result of honest argument and persuasion, or of such influence as one may properly exercise over another, does not constitute undue influence. In re McGraw's Will (Sup.) 41 N. Y. Supp. 481. Solicitations, however importunate, do not constitute, of themselves, undue influence. Trost v. Dingler, 118 Pa. St. 259, 12 Atl. 296. The mere fact that the witness, as a physician, occupied a confidential relation with Mr. Dimond, is not, of itself, enough to establish undue influence. Lee v. Lee, 71 N. C. 139; Mackall v. Mackall, supra. Of course, it is a circumstance which, in connection with other evidence, may establish the fact of undue influence. Estate of Brooks, 54 Cal. 474; Dimond v. Sanderson, 103 Cal. 102, 37 Pac. 189; In re Langford, 108 Cal. 622, 41 Pac. 701; Tillaux v. Tillaux, 115 Cal. 675, 47 Pac. 691; Gwin v. Gwin (Idaho) 48 Pac. 301; Lee v. Dill, 11 Abb. Prac. 214. Finally, undue influence must be proven by a preponderance of evidence. It will not be presumed from conjecture or suspicion. In re McDevitt, 95 Cal. 33, 30 Pac. 101; In re Langford, 108 Cal. 623, 41 Pac. 701; In re Calkins' Estate, 112 Cal. 304, 44 Pac. 577; Francis v. Wilkinson, 147 Ill. 370, 35 N. E. 150; Sullivan v. Foley (Mich.) 70 N. W. 322. What is denominated "slight evidence," as defined in section 1835, Code Civ. Proc., is not sufficient to establish undue influence. Estate of Carpenter, 94 Cal. 412, 29 Pac. 1101. The law requires proof of facts when it is attempted to set aside an act apparently done deliberately and executed formally. Small v. Small, 4 Greenl. 220. The testimony of the witness is subject to the criticism that he became, at times, confused in his statements, and did not appear to have a very clear recollection about some of the matters he testified to; but, from all the testimony in the case, I do not think that the evidence is sufficient to justify me in holding that Dr. Rosenthal unduly influenced Mr. Dimond to execute the second assignment, of November 19, 1895, canceling the first assignment, of June 8, 1893. A decree will therefore be entered in favor of the Union Trust Company for the sum of $5,764.95, being the amount remaining in the registry of the court after deducting the sum of $250, allowed to the solicitor of the Penn Mutual Life Insurance Company as his fee, and also the costs upon the suit in interpleader amounting to $64.10. The cross bill will be dismissed, the cross complainant paying costs.

BEHLMER v. LOUISVILLE & N. R. CO. et al.[1]

(Circuit Court of Appeals, Fourth Circuit. November 3, 1897.)

No. 173.

1. INTERSTATE COMMERCE COMMISSION—ORDER BINDING ON SUCCESSOR.
A valid order of the interstate commerce commission, made in a proper proceeding against certain railroad companies, directing each of them to cease to make certain unlawful freight charges under a joint traffic arrangement, is binding on the successor of one of such companies, although the name of such successor does not appear in the order.

2. SAME—LONG AND SHORT HAUL—WATER COMPETITION.
To justify a greater charge for a shorter distance because of water competition, the transportation as to which such competition exists must be concerning freight to the longer-distance point, which, if not carried by the road complained of, could reach that point by water transportation.

3. INTERSTATE COMMERCE—COMPETITION.
The competition of one transportation line cannot be said to meet that of another, for the carriage of traffic from any particular locality, unless one line could perform the service if the other did not.

4. SAME—DISSIMILAR CIRCUMSTANCES AND CONDITIONS—BURDEN OF PROOF.
Where a greater rate is charged for a shorter than for a longer concurrent haul over the same route, it is incumbent on the carrier to show the existence of substantially dissimilar circumstances and conditions to justify such charge.

5. SAME—EFFECT OF COMPETITION — DISSIMILAR CIRCUMSTANCES AND CONDITIONS.
Competition between carriers subject to the interstate commerce act does not produce such dissimilarity of circumstances and conditions as will justify such carriers in making a greater charge for a shorter than for a longer haul, without authority granted by the commission.[2]

6. SAME—IMPORTANCE OF TRAFFIC—JUSTIFIABLE DISCRIMINATION.
That the smaller charge for the longer haul is of great importance to the longer-distance point, in enabling its merchants to build up a great trade that would otherwise be lost, is no justification for such discrimination.
Morris, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of South Carolina.

C. B. Northrop, for appellant.

Ed. Baxter, W. A. Henderson, J. W. Barnwell, J. B. Cumming, and J. E. Burke, for appellees.

Before GOFF, Circuit Judge, and HUGHES and MORRIS, District Judges.

GOFF, Circuit Judge. On the 27th day of June, 1894, the interstate commerce commission entered an order requiring the appellees to cease and desist on or before the 15th day of July, 1894, and thenceforth abstain, from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried, by and under the circumstances and conditions similar to those appearing in this case, from Memphis, in the state of Tennessee, to Summerville, in

[1] Rehearing denied November 24, 1897.

[2] See, however, Interstate Commerce Commission v. Alabama Midland Ry. Co., 18 Sup. Ct. 45.

the state of South Carolina, than that contemporaneously charged and received for the transportation of hay and such other commodities for the longer distance from Memphis aforesaid to Charleston, in the state of South Carolina. Such order was entered as the result of the hearing of the petition that had been theretofore filed before such commission by the appellant, Henry W. Behlmer. In his complaint so filed he alleged, in behalf of himself and other merchants and residents of Summerville: That the defendants were charging an unreasonable and excessive rate, of 28 cents per 100 pounds, on hay in car-load lots, from Memphis to Summerville. That Summerville is an incorporated town, of considerable size and importance, situated on the South Carolina Railway, in the state of South Carolina, and 22 miles inland from the city of Charleston, and that said rate of 28 cents per 100 pounds is 9 cents per 100 pounds greater than the defendants charge and receive for transporting hay in car loads from Memphis, through Summerville, to Charleston, and that such greater charge constituted a violation of the long and short haul clause of the interstate commerce act. That said rate of 28 cents to Summerville was equal to the rate of 19 cents in force on hay in car loads from Memphis, through Summerville, to Charleston, with the local rate of 9 cents per 100 pounds charged over the South Carolina Railway for carrying hay from Charleston back to Summerville, and that the 9-cent local rate which the complainant was forced to pay, in addition to the through Charleston rate, in order to get hay transported from Memphis to Summerville, was unreasonable and excessive. That the petitioner carried on a wholesale hay and grain business in said town of Summerville, and was thus 22 miles nearer than Charleston to the Western points where grain shipments originated. That the petitioner received at Summerville two car loads of hay ordered by him, and shipped to him, from Memphis, Tenn., which hay was so transported to him from Memphis to Chattanooga, 310 miles, by and over the lines of the Memphis & Charleston Railroad; thence to Atlanta, Ga., 152 miles, by the lines of the East Tennessee, Virginia & Georgia Railroad; thence to Augusta, Ga., 171 miles, over the lines of the Georgia Railroad; thence to Summerville, 115 miles, over the lines of the South Carolina Railway Company. That the defendants were common carriers, under a common control and management, for continuous carriage or shipment, and were engaged in the transportation of passengers and property wholly by railroad, between the points mentioned. Also, that the two car loads of hay referred to were hauled from Memphis to Summerville over the same line, in the same direction as Charleston, and under substantially similar circumstances and conditions as was the Charleston traffic; that the haul from Memphis to Summerville was 22 miles shorter than the haul from Memphis to Charleston, and that such shorter distance was included in the longer distance; that the petitioner was forced to pay 28 cents per 100 pounds on said shipment to Summerville, the shorter distance, when the rate to Charleston, the longer distance, was 19 cents per 100 pounds; that the petitioner was thereby obliged to pay $56, in the aggregate, as

freight on the two car loads of hay from Memphis to Summerville, when the same shipment would have been made by the same roads, over the same rails, in the same direction, to Charleston, a greater distance of 22 miles, for a less sum, to wit, $38, in the aggregate. The petitioner further alleged that the local rate of 9 cents per 100 pounds for 22 miles, as also the aggregate charge of 28 cents per 100 pounds from Memphis to Summerville, was excessive and unreasonable, and therefore in violation of the act to regulate commerce. It was further alleged by the petitioner that all of the railway lines mentioned in the petition, and made defendants in said proceedings, were members of the Southern Railway & Steamship Association, and that the discrimination and excessive rates against Summerville existed, not only on hay, but on all other articles of interstate commerce coming to that place, greatly to the detriment and disadvantage of that town, and to the business of its merchants. The petitioner prayed that the notice required in such cases issue to said railroad, and that the interstate commerce commission would order that the defendants cease from violations of the law in the particulars mentioned, and for such other and further relief as the commission might think proper.

The notice issued, and the defendants duly appeared and filed their answers. The joint answer of the receivers of the East Tennessee, Virginia & Georgia Railway Company and of the Memphis & Charleston Railroad Company admits that such companies are subject to the act to regulate commerce, and, in effect, that the shipment of hay took place as set forth in the petition; but it was not admitted therein that the rates specified constituted a violation of the law, and proof of the same was demanded. The answer of the lessees of the Georgia Railroad, as also the answer of the receivers of the South Carolina Railway Company, are, in substance, the same. Concerning the petitioner's allegations of a violation of the fourth section of the interstate commerce act, the answers make the following averments, in substance: That the Georgia Railroad Company and the other carriers complained against have no joint through tariff from Memphis to Summerville, and that, therefore, they have no "line," in the sense of said section, from Memphis to Summerville, on which that section can operate; that the transportation of the two car loads of hay from Memphis to Summerville was not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston, for the reason that Summerville is a local station on the South Carolina Railway, not on any water route, and that enterprise and capital has not constructed more than one railroad to it; that consequently it has not the advantage of competition of carriers, as the said railroad on which it is located is not compelled by competition to choose between a reasonable rate and a rate which is much below what is reasonable; and that at Charleston there exists competition with numerous other all-rail routes between Memphis and that city, eight of which are mentioned by name, and the lines composing the same set forth in detail. The claim was made by the defendants in their answers that

all such lines were actual competitors for business from Memphis to Charleston; that Charleston was a port on the Atlantic Coast, easy of access for vessels from Baltimore, Philadelphia, New York, Boston, and other Eastern ports from which hay is shipped by water; that if the railroads running from Memphis to Charleston charged rates to all places as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be shipped from Memphis to Charleston, but the latter city would be supplied with hay from the North Atlantic ports, and said railroads would not only be deprived of such business, but that Memphis would lose the hay market; that the rates on Western produce to Charleston and other coast cities are made with a view to actual existing water competition; that Western produce, such as grain and hay, can be shipped from Chicago to Charleston, through the ports of New York, Philadelphia, or Baltimore, over continuous water routes, by the lakes and canal, or over combined rail and water routes; that the all-rail lines seeking to do business between Chicago, Charleston, and the coast cities are compelled to make their rates approximate those offered by the continuous water route, or the combined rail and water routes; that the all-rail routes make their rates as much higher as the difference in services will permit, and those rates are correspondingly adjusted from all Western points, such as Evansville, Cairo, St Louis, and Memphis, the present all-rail rates on hay per 100 pounds being as follows: From Chicago, 33 cents; from St Louis, 28 cents; from Louisville, Evansville, and Cairo, 23 cents; from Memphis, 19 cents. The defendants claimed, therefore, that the rate from Memphis to Charleston on hay was forced upon their lines by actual existing water competition, as well as by other additional competition beyond their control; that the controlling element in said competition is the lake, canal, and ocean transportation between Chicago and Charleston, or the lake transportation from Chicago to Buffalo, or other lake ports, thence by rail to New York, and thence by ocean to Charleston, or rail transportation from Chicago to Baltimore, Philadelphia, or New York, and thence by ocean to Charleston.

The case being at issue upon the complaint and answers (the testimony having been duly taken), the same was, after argument by counsel, duly submitted to the commission, which directed the order to the appellees hereinbefore referred to; and, as required by law, it caused a properly authenticated copy of its report, and of its findings of fact and conclusions thereon, together with a copy of said order, to be delivered to each and all of the parties to said cause, their receivers and successors in operation. The defendants to said proceeding before the interstate commerce commission having failed and refused to obey such order, the said Henry W. Behlmer filed his petition, as he was authorized by the interstate commerce law to do, in the circuit court of the United States for the district of South Carolina, in which the action had before the commission was fully set out, and the refusal of the defendants therein to comply with what he charged to be the lawful order of the commission was alleged; and the prayer was made that an or-

der be entered granting to the petitioner a writ of injunction restraining the defendants, their officers, servants, and attorneys, from continuing in their violation and disobedience to said order of the interstate commerce commission, and that finally an order and decree be issued restraining the said defendants, and each of them, and their officers, servants, and attorneys, from further violating or disobeying the requirements of said order of the commission, and decreeing permanent obedience to the same, together with such further and additional orders as are usually entered under such circumstances. The court below on the 2d day of November, 1894, directed that the defendants appear and answer said petition, and show cause, if any they could, why the prayer of the same should not be granted. In the same order it was provided that the defendants be restrained and enjoined, until the further order of the court, from charging, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those in this case, from Memphis, in the state of Tennessee, to Summerville, in the state of South Carolina, than that contemporaneously charged and received for the transportation of hay and such other commodities, respectively, for the longer distance from Memphis to Charleston; and also the South Carolina & Georgia Railroad Company was restrained and enjoined from imposing, charging, and collecting the added local rate of 9 cents in addition to the through rate of 19 cents to Charleston. The case was duly matured, and came on to be finally heard on the 11th day of December, 1895, when, after argument, the court took the same under advisement, and afterwards, on the 22d day of January, 1896, entered a decree dismissing the bill. From this decree the petitioner appealed.

At the time of the institution of the proceedings before the interstate commerce commission, the South Carolina Railway Company was represented by Daniel H. Chamberlain, its receiver, who was made a defendant, and who filed his answer to the petition. The proceedings were instituted in December, 1892, and the order of the commission issued on the 27th day of June, 1894; but prior thereto, on April 12, 1894, the South Carolina Railway Company was sold by virtue of a decree of the circuit court of the United States for the district of South Carolina, entered in the cause of Bound v. South Carolina Railway Co. et al., in which said cause the said Daniel H. Chamberlain had been appointed such receiver. On the 12th day of May, 1894, the purchaser of said property under said foreclosure sale conveyed the same to the South Carolina & Georgia Railroad Company, a defendant herein. That company moved the court below to dismiss these proceedings, so far as it was concerned, for the reason that there was no evidence before the court of any notice to, or service of the same upon, said company, of the institution of this action before the interstate commerce commission, nor any evidence of any refusal or neglect by it to obey the order of the commission. The court below was of opinion that there was no evidence of the service of the commis-

sion's order on the South Carolina & Georgia Railway Company, nor of its refusal or neglect to obey the same; but as there were other defendants, as to whom it was necessary to dispose of the questions raised, the court proceeded to a decree concerning the same.

The petition filed in the court below avers that the findings and conclusions of the commission in the matter of the petition filed before it by the appellant, together with a copy of the order and notice, were delivered to each and all of the parties to the cause, their receivers and successors in operation. We think the evidence sufficiently sustains these allegations. The South Carolina Railway Company had due notice of the proceedings before the commission, and filed its answer, through its receiver; and it plainly appears that a registered letter was sent from the office of the secretary of the commission in July, 1894, and dulv delivered at Charleston to the successor of said South Carolina Railway Company (the South Carolina & Georgia Railroad Company), which contained a copy of the opinion and order of the interstate commerce commission made and filed in the matter of said petition. That such copy was received by the South Carolina & Georgia Railroad Company is not doubted, and the point relied upon by that company in its motion to dismiss made in the court below was that the name of the South Carolina & Georgia Railroad Company is not mentioned in said order and opinion, and the further fact that said company was organized after the date when such order and opinion were made and filed. In our judgment, this position of the South Carolina & Georgia Railroad Company is without merit. So far as the questions involved in this controversy are concerned, we think it had sufficient notice, and in fact that it was bound by the notice served upon, and the answer filed by, the receiver of the South Carolina Railway Company. The petitioner, in his complaint filed with the commission, charged the South Carolina Railway Company and its receiver with unlawfully charging an unreasonable rate of freight on certain articles transported over its line, and other lines with which it had traffic arrangements; and the commission, after full investigation, found that the petitioner's allegation was true, and ordered that said road and the others connected with it cease, on or before July 15, 1894, to make such unlawful charges. We are utterly unable to agree with the contention that such order of the commission was rendered absolutely nugatory, within a few days after it was issued, by the mere fact that the name of one of the railroads mentioned therein had in the meantime been changed, while the traffic arrangements theretofore in existence were still in force. To so hold would render it impossible for any petitioner to obtain relief in cases similar to this, and would in fact prevent the commission from enforcing its lawful orders. The supreme court of the United States, in the case of U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 309, 17 Sup. Ct. 540, in effect decides this point in the manner we have indicated, when it says, in substance, that if, by the mere dissolution of the association originally proceeded against, the suit abates, then de-

fendants have thereby discovered an effectual means to prevent the judgment of the court being given on the question really involved in the case.

We do not think it essential to the decision of this case to further consider the argument of counsel relating to the pecuniary liability of the purchaser of property sold under foreclosure decree, nor of the responsibility of such purchaser for contracts made by the receiver prior to such sale, as in our judgment the propositions of law therein involved are not applicable to the facts and circumstances of this case. We conclude that the court below had jurisdiction of the parties and of the subject-matter involved, and, such being the case, it was its duty, as a court of equity, to make both its jurisdiction and its remedy effectual for perfect relief, if it found the allegations of the petition to be true.

This brings us to the real question in this case, and that is, have these defendants violated the provisions of the fourth section of the act of congress approved February 4, 1887, entitled "An act to regulate commerce"? 24 Stat. 379. That section reads as follows:

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

We find this case, so far as the fourth section is involved, to be quite similar to the case of Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, commonly known as "The Social Circle Case." That the appellees, in transporting the hay and other property mentioned in the petition filed in this cause, and in establishing the rates on the same from Memphis to Charleston and from Memphis to Summerville, were engaged in such transportation under a common management for continuous carriage or shipment, within the meaning of that language as used in the act to regulate commerce, is, we think, without doubt; and therefore it follows that it was within the jurisdiction of the interstate commerce commission to ascertain whether, in charging a higher rate for a shorter than for a longer distance over the same line in the same direction (the shorter being included within the longer distance), the appellees were transporting such property under substantially similar circumstances and conditions. The appellees alleged, both before the commission and the court below, such substantial dissimilarity of circumstances and conditions as justified them in making the greater charge for the shorter haul complained of in the petition, and upon them was the burden of showing affirmatively that such circumstances and

conditions were in fact substantially dissimilar. The commission, in ascertaining the facts, found against this claim of the railroad companies, and entered the order the enforcement of which was the object of the petition filed by the appellant. The circuit court, however, on hearing the matters involved, sustained the claim of the appellees, and refused to enforce the order of the commission. The appellees claim that the substantial dissimilarity in the circumstances and conditions under which they transport property from Memphis to Charleston and from Memphis to Summerville is created by (1) the competition of various markets for the trade of Charleston, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston by all-water lines or by all-rail lines, or part-rail and part-water routes; (2) the competition of all-rail lines between Memphis and Charleston.

The decisions of the interstate commerce commission concerning the proper construction of this fourth section of the commerce act have not been uniformly sustained by the decrees of the courts of the United States in cases instituted for the purpose of enforcing the orders of the commission concerning that section; and therefore, prior to the announcement of the opinion of the supreme court in the Social Circle Case, there was much confusion concerning the true meaning of the same. A careful reading of that opinion impels us to the conclusion that the construction given that section by the interstate commerce commission in a number of cases decided by it prior to such decision is the proper one. In this connection may be cited the following: James & Mayer Buggy Co. v. Cincinnati, N. O. & T. P. R. Co., 3 Interst. Commerce Com. R. 682; Georgia R. Co. v. Clyde S. S. Co., 4 Interst. Commerce Com. R. 120; Chattanooga Board of Trade v. East Tennessee, V. & G. R. Co., Id. 213. Such being our conclusions, we have now to determine whether or not the facts found by the commission are supported by the evidence taken in this case, or, in other words, whether or not the circumstances and conditions attending the transportation of hay from Memphis to Charleston and from Memphis to Summerville are so dissimilar as to justify the rates charged respectively. Does the competition set up by the appellees as existing by water between Chicago and the North Atlantic ports, and the competition by rail between Memphis and Charleston, as also the competition of market with market, constitute substantial dissimilar circumstances and conditions, within the meaning of the said fourth section of the act to regulate commerce? Did such competition in fact affect rates between Chicago, the North Atlantic ports, and Charleston? We are of the opinion that it was not of controlling force; that it was not such effectual competition as would constitute the dissimilar circumstances and conditions which would justify the commission, upon application to it, in authorizing the carrier to charge less for the longer than for the shorter haul. We adopt the conclusion heretofore announced by the interstate commerce commission, which is, in substance, that, in order to justify the greater charge for the shorter distance because of water competition, the transportation as to which such competi-

tion exists must be concerning freight to the longer-distance point, which, if not carried to such point by the road giving the rate complained of, could reach that point by water transportation, and also that the competition of one transportation line cannot be said to meet that of another for the carriage of traffic from any particular locality, unless one line could perform the service if the other did not. Such we believe to be the true meaning of said fourth section, so far as the point we are now considering is involved. We are also of opinion that the competition claimed by the appellees to exist between the different markets—particularly those of Memphis, Chicago, and the North Atlantic ports—to supply the trade of Charleston in the products mentioned is not in reality the competition that affects rates from a particular locality, but is one that is regulated by the commercial circumstances existing at those points, applicable to business of that character, and not connected with the usual conditions under which transportation is conducted; nor does such competition, in our judgment, create the dissimilar circumstances and conditions referred to in the fourth section of the act now under consideration. And we further hold that competition between carriers subject to the requirements of said act does not produce such substantial dissimilarity in the circumstances and conditions under which transportation is performed as will justify such carriers in making a greater charge for the shorter than for the longer haul without an order to that effect from the commission, granted by it as provided for in the proviso to the fourth section. It is fair to presume that, if the facts in any given case justify departure from this rule, the commission will, on a proper showing, grant the relief asked for, and make such exceptions as the circumstances suggest as proper, and justice to the carrier as well as the shipper demands. If the carriers were permitted to determine such questions, the conflicting results produced by opposing interests would not only cause confusion, but work great injury in many cases to the shippers, to localities, and also to certain lines of business that would be affected thereby. If the competition of markets or of carrying lines subject to the provisions of the commerce act justifies carriers in making greater short-haul and lower long-haul charges over the same line, without an order from the commission, issued after due investigation, then the unjust rates for transportation existing when that law was enacted, and which it was intended should be prohibited by it, will continue to be imposed and collected; and schedules will be made, announced, and maintained, to the prejudice of some localities and in favor of others, to the destruction of some shippers and to the profit of others. This statute was intended to prevent any and all kinds of discrimination in favor of localities, individuals, or corporations, and to put all shippers on the same footing,—that of perfect equality.

The rate from Memphis to Charleston on hay and grain and like products is reasonable, and is shown by the evidence to be remunerative. It is fair to presume that it would not have been made by the railroads unless those controlling them were satisfied that it would be so; and consequently, to justify the higher charge for

the shorter haul to Summerville, which we have found was made under substantially similar circumstances and conditions, the commission, after application to it for that purpose, must find certain reasons for the same, after due investigation, that may in fact exist, but which, we are compelled to say, are not now disclosed by the record before us. In the light of the act to regulate commerce, and keeping in view the theory upon which it was constructed, it is not difficult to understand why application was not made to the commission for permission to charge less for the longer haul to Charleston than for the shorter haul to Summerville, when the rate proposed was 19 cents per 100 pounds for the longer and 28 cents per 100 pounds for the shorter. The appellees contend that the smaller charge for the greater distance is in this case of great importance to the city of Charleston, as well as to the section of country adjacent thereto, as by means thereof the merchants of that city are enabled to build up a trade that otherwise would be lost to them. That may be true, but is not the same argument applicable to Summerville and other interior cities along the lines of the roads operated by the appellees between Charleston and Memphis? In order to build up one locality, we should not tear down many others, and justice to one section should not be purchased at the expense of another. It should be kept in mind that the petitioner does not ask that the rate from Memphis to Charleston be changed,—that it shall be made less, and consequently unremunerative, or increased, and thereby cause the loss of the traffic,—but only that the rate from Memphis to Summerville shall not be greater than the rate to Charleston. Finding the facts to be as above indicated,—substantially as found by the interstate commerce commission in the proceedings instituted before it by the appellant,—and construing the law as we do, it follows that the order issued by said commission to the appellees was a lawful order, of which they had due notice, and which it was and is their duty to obey and respect.

We do not find it necessary to consider and dispose of the questions raised in the pleadings, and argued by counsel, concerning the Southern Railway & Steamship Association, nor the matter of the added local charge of nine cents from Charleston to Summerville, otherwise than it may be involved in the through rate to Summerville.

The decree of the court below dismissing the bill is reversed, and this cause is remanded to said court, with instructions to enter a decree herein requiring the appellees, and each of them, to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the state of Tennessee, to Summerville, in the state of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid, to Charleston, in the state of South Carolina. Said court will also see that the requirements of said decree are immediately carried into effect and en-

forced as provided for in said act to regulate commerce, and will further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just. Reversed and remanded.

MORRIS, District Judge (dissenting). I am unable to join in the order reversing the decree of the circuit court, which it is proposed to pass in this case, and will very briefly state my reasons:

Behlmer, in his petition to the commission, complained that he was charged as freight on two car loads of hay from Memphis to Summerville at the rate of 28 cents per 100, while the rate over the same roads, to Charleston, 22 miles further, was only 19 cents. This, he alleged, was a violation of the fourth section of the interstate commerce act. He further complained that the 9 cents additional per 100 charged to Summerville was based on the local rate for 22 miles from Charleston back to Summerville over the South Carolina Railroad, which itself, he alleged, was excessive and unreasonable; and he further alleged that the combined rate of 28 cents from Memphis to Charleston was excessive and unreasonable, and in violation of the first section of the act. The defendants answered, alleging that there were eight all-rail routes which were competitors for the business from Memphis to Charleston; that there was, besides, existing water competition from ports on the Atlantic Coast to Charleston; and that the rate from Memphis to Charleston of 19 cents per 100 was forced upon the defendant lines by this rail and water competition which they had to meet at Charleston, but which the South Carolina Railroad did not have to meet at Summerville; and that rates which were just and reasonable to Summerville would result in the loss of the business, if charged to Charleston. The commission considered only the allegation that the defendants violated the long and short haul clause, and, in view of their decision on that point, deemed it unnecessary to consider whether any other provision of the law had been violated. In the decision of the commission appears the following:

"There is no showing in this proceeding of competition by lines not subject to the act to regulate commerce for the carriage of hay from Memphis to Charleston, and the fact that there may be competition for such traffic by lines which are subject to the act, or that hay may be carried to Charleston by various rail and water, or part-rail and part-water, routes, from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the fourth section upon their own motion. Such considerations may constitute reasons for applying to the commission for relief under the proviso clause of that section, but, for the reasons stated in our decisions of the cases above cited, they do not justify carriers in departing from the rule of the fourth section without such relieving order. Water competition, to justify lower long-haul rates, must exist between the point of shipment and the longer-distance destination. One transportation cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality unless the latter line could and would perform the service alone if the former did not undertake it. The competition of markets or the competition of carrying lines subject to regulation under the act to regulate commerce does not justify carriers in making greater short-haul or lower long-haul charges over the same line without an order issued by the commission on application therefor after investigation."

The decision then quotes the rule of practice of the commission with reference to applications under the proviso of the fourth section, and then proceeds:

"Because Charleston is an important seaport and railroad center, and hay may be and is carried there from various points, is not a sufficient reason for a departure from this rule. The just interests of the carrier are fully protected by the proviso clause of the fourth section. The defendants are under no obligation to compete at low rates for the carriage of hay from Memphis to Charleston. They ought not to engage in such competition if the rates obtainable are not remunerative. If they are remunerative, the defendants cannot, in the face of the prohibition of the fourth section, and the provision in that section for the issuance of relieving orders, assume to say that such rates, though profitable on Charleston traffic, are insufficient for the transportation of car-load quantities to a shorter point on the same line, and in the same direction."

There was no finding of fact by the commission other than is contained in the foregoing extract from its decision, and it is obvious that the commission did not pass upon the question of the dissimilarity of the circumstances and conditions, nor upon the question whether the rate for the shorter haul was of itself reasonable and just. They took the law to be that, by charging a greater rate for the shorter haul over the same line, the carriers were prima facie without justification, and that they could only be permitted lawfully to make the charge after they had been authorized upon application to the commission under the proviso of the fourth section. One of the cases cited by the commission in support of this proposition of law is the decision of the circuit court of appeals in Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 9 C. C. A. 689, now known as the "Social Circle Case." The supreme court, in reviewing that case (162 U. S. 184–194, 16 Sup. Ct. 700), did not approve such a hard and fast rule, but held in that case that as the commission had found as a fact that the circumstances and conditions were not so dissimilar as to justify the rates charged, and as the circuit court of appeals had approved that finding, the supreme court would not disturb it. But in the case known as the "Import Case," 162 U. S. 197, 16 Sup. Ct. 666, the supreme court held, in deciding a similar question, that it was error for the commission not to consider an existing competition which affected rates, and the fact that rates had to be reduced in order to secure freight, which otherwise would go by other routes, was one of the circumstances and conditions which must be considered before substantial similarity could be determined. It may be fairly said, therefore, that the commission failed to consider one of the circumstances without which it could not arrive at a just finding. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197–238, 16 Sup. Ct. 666; Interstate Commerce Commission v. Alabama Midland Ry. Co., 21 C. C. A. 51, 74 Fed. 715; Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409. It was error, I think, for the commission to hold that the carriers could not justify themselves because they had not first made application for relief under the proviso of the fourth section. It has been held that, if the carrier can show that the circumstances and conditions of the two hauls are dissimilar, the statute

has not been violated. Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 50 Fed. 295. And this seems a reasonable construction of the law. The case, therefore, it appears to me, came into the circuit court without any finding of fact upon which an order against the carriers could be predicated. The circuit judge examined the testimony, and considered the evidence tending to prove that the through rate had been forced down by the natural advantages of Charleston as a trade center, having numerous routes by rail, by rail and water, and by water over which merchandise of the kind in question was brought to that city, and to compete with which the defendant carriers were obliged to reduce their railroad rates on through freight to Charleston. Summerville had no similar natural or artificial advantages, and its only carrier, the South Carolina & Georgia Railroad, was not subject to having its local rates forced down by competition below what was reasonable and just. Upon consideration of all the proven facts, the circuit judge found that the circumstances and conditions were not substantially similar, and that the defendant carriers had not violated the act. With this conclusion I agree. There is abundant proof to support it, and also to show the destructive loss which would result to the South Carolina & Georgia Railroad (the successor of the South Carolina Railroad) if it was required to conform its local rates to its share of the through rates.

PEORIA, D. & E. RY. CO. v. CENTRAL TRUST CO. OF NEW YORK et al.

CENTRAL TRUST CO. OF NEW YORK et al. v. PEORIA, D. & E. RY. CO. et al.

(Circuit Court, S. D. Illinois. December 15, 1897.)

RAILROADS—RIGHTS OF SECOND MORTGAGEES.

Where the operation of a railroad by a receiver has demonstrated the capacity of the property to earn more than its operating expenses and the interest on its first mortgage, and the receiver has in his hands sufficient money to pay the delinquent interest on such mortgage, the holders of a second mortgage are entitled to have it so applied, although a suit to foreclose for the default has been instituted; there being no right, under the bill filed, to foreclose for anything except the interest due.

Bill by the Peoria, Decatur & Evansville Railway Company against the Central Trust Company of New York and William A. Heilman, trustees, and cross bill by defendants against the complainant. Heard on motion for an order directing the receiver to pay interest.

Samuel P. Wheeler and Alexander Gilchrist, for William A. Heilman.

Green & Humphrey, for reorganization committee.

ALLEN, District Judge. The Peoria, Decatur & Evansville Railway Company filed a bill in this court, and E. O. Hopkins and E. P. Houston were appointed receivers of the railway. Later on, Receiver Houston resigned, and Hopkins continued as sole receiver. Subsequently the Central Trust Company of New York and William

A. Heilman, trustees, after answering the bill, filed a cross bill praying a foreclosure of a second mortgage upon the whole line, and a decree of foreclosure has been passed. There are two divisions of the Peoria, Decatur & Evansville Railway,—one extending from Peoria to Mattoon, and the other from Mattoon to Evansville; and each division is covered by a divisional mortgage, and each of these mortgages is a first lien upon the respective divisions. The interest upon the bonds secured by the Peoria Division mortgage fell due July 1, 1897; and on the 6th of July, 1897, a bill was filed in this court by the Central Trust Company, sole trustee, praying a foreclosure of the Peoria Division mortgage. A petition has now been filed by William A. Heilman, one of the trustees of the second mortgage, asking that an order be entered authorizing the receiver to pay the interest which fell due July 1, 1897, under the Peoria Division mortgage. The co-trustee does not join in this petition, for the reason that it is also trustee under the divisional mortgage, and by its counsel, in open court, has declined to take a position that may be construed as partial to the one side or the other. In this regard the action of the Central Trust Company is proper and commendable. The only opposition to the order asked for comes from the reorganization committee of the first mortgage bondholders, representing the parties to whom it is proposed to pay the money. Unless, therefore, the first mortgage bondholders will in some way be injured by passing the order asked for, it ought to be made. The subordinate lienholders ought to have a fair opportunity to protect, and ultimately save, whatever equity there may be in the property, and it is set up in the petition that the Peoria Division is worth a considerable sum above the first lien. It is contended, however, that this division is scant security for the first mortgage debt. The facts do not, in my judgment, sustain this view. It appears very clearly that at the institution of the receivership the physical condition of the property was very bad, and there then existed $155,000 of preferential debts; that under the receivership the property has been brought up to a fair standard of excellence; that over 67 miles of ballast has been placed, large renewals of cross-ties made, and the property largely enhanced in value. It also appears that during the past year, alone, upward of $85,000 has been expended, outside of the ordinary operating expenses, in the permanent betterment of the property. Since the institution of the receivership the large preferential debt then existing has been substantially paid off by the receiver. The receiver has also paid the interest on the first mortgage bonds of both divisions for more than three years. And all these things have been accomplished solely through the earnings of the property. I regard it as clearly established that the security of the first mortgage bondholders is far better than when the receiver took charge. Again, it appears that the Peoria Division is now earning, and in fact has earned right along, more than its operating expenses and the interest on the first mortgage bonds. The receiver, according to his reports, has the funds in hand to pay the interest on the Peoria Division first mortgage bonds, and there seems no valid reason why he should not do so. It is urged that the receiver's current bills

may become a lien upon the property superior to the first mortgage. I am unable to see the force of this objection. The holders of the first mortgage bonds, if the order asked for is made, will receive this money. If not made, the same money will be applied to the other purpose, of paying a debt that may become a lien superior to the first mortgage. Suppose this should be the result; their condition will be no worse than it now is. There are considerations of duty to the second lienholders that forbid any speculation of this sort. The property is earning a surplus over its operating expenses and this interest. I feel justified in dealing with this question in the light of past and present experience, and feel justified in assuming that no loss can be sustained by the first mortgage bondholders if the order petitioned for is made. It is the policy of courts of equity to stimulate the best possible returns from property being administered or sold under decree, to the end that all creditors and lienholders may, if possible, be paid. There is another reason why the first mortgage bondholders of the Peoria Division cannot be prejudiced by paying them this interest: Under the bill filed, no decree can be entered, except for the interest due. The principal of the debt cannot be declared due for default in payment of interest. The views I have expressed are largely sustained in Railroad Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10; Lloyd v. Railroad Co., 65 Fed. 351; American Loan & Trust Co. v. Union Depot Co., 80 Fed. 36. An order may be entered directing the receiver to pay the interest which fell due July 1st last on bonds of Peoria Division.

HOPKINS et al. v. OXLEY STAVE CO.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1897.)

No. 789.

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP.
A federal court is not deprived of jurisdiction of a suit for an injunction against numerous individual defendants by the fact that some of those joined as defendants were citizens of the same state as the complainant, when, as to them, the bill was dismissed shortly after it was filed, and before an injunction was awarded.

2. INJUNCTION—CONSPIRACY TO COMMIT TORT—PARTIES.
The rule is as well settled in equity as it is at law that where a right of action arises ex delicto the tort may be treated as joint or several, at the election of the injured party. Where a conspiracy by the members of certain labor organizations had been formed to injure the business of a corporation, it was accordingly held that the corporation might treat the tort as joint or several, and maintain a suit against all or against any number of the conspirators, to enjoin them from carrying the same into effect.

3. SAME—UNLAWFUL CONSPIRACY—BOYCOTT.
The members of two labor organizations entered into a combination to compel a manufacturer of casks and barrels to discontinue the use of a machine for hooping the same. This object was to be accomplished by notifying the plaintiff's customers and other persons not to purchase machine-hooped barrels, and by inducing the members of all labor organizations throughout the country, and persons who were in sympathy with them, not to purchase provisions or other commodities which were

packed in machine-hooped barrels. *Held*: First, that the combination in question was an unlawful conspiracy to deprive the plaintiff of its right to manage its business as it thought best, such as would entitle the manufacturer to recover from the parties concerned in the conspiracy whatever damages it had sustained thereby; second, that in such a case the test of the right to sue in equity was whether the damages occasioned by the conspiracy would be irreparable, or whether a proceeding in equity was necessary to prevent a multitude of suits,—in other words, whether the remedy at law was for any reason inadequate; third, that in the case in hand the plaintiff was entitled to sue in equity, and that an injunction to prevent the execution of the conspiracy was properly awarded. Steamship Co. v. McGregor, 23 Q. B. Div. 598, 616, Continental Ins. Co. v. Board of Fire Underwriters, 67 Fed. 310, and Manufacturing Co. v. Hollis, 55 N. W. 1119, 54 Minn. 223, distinguished.

Caldwell, Circuit Judge, dissenting.

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

This was a bill for an injunction by the Oxley Stave Company against the Coopers' International Union of North America, Lodge No. 18; the Trades Assembly of Kansas City, Kan.; and a number of the individual members of such organizations. As against the organizations, the bill was dismissed, and a temporary injunction was granted against the remaining defendants, from which they appeal.

James F. Getty (F. D. Hutchings, on the brief), for appellants.

David Overmyer (David W. Mulvane, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case comes on appeal from an order made by the circuit court of the United States for the district of Kansas, granting an interlocutory injunction. The motion for the injunction was heard on the bill and supporting affidavits, and on certain opposing affidavits. There is no substantial controversy with reference to the material facts disclosed by the bill and accompanying affidavits, which may be summarized as follows: The appellants, H. C. Hopkins and others, who were the defendants below, are members of two voluntary, unincorporated associations, termed, respectively, the Coopers' International Union of North America, Lodge No. 18, of Kansas City, Kan., and the Trades Assembly of Kansas City. Kan. The first of these associations is a labor organization composed of coopers, which has local lodges in all the important trade centers throughout the United States and Canada. The other association, the Trades Assembly of Kansas City, Kan., is a body composed of representatives of many different labor organizations of Kansas City, Kan., and is a branch of a general organization of the same name which exists and operates, by means of local assemblies, in all the principal commercial centers of the United States and Europe. The Oxley Stave Company, the plaintiff below and appellee here, is a Missouri corporation, which is engaged at Kansas City, Kan., where it has a large cooperage plant, in the manufacture of barrels and casks for packing meats, flour, and other commodities. It sells many barrels and casks annually to several large packing associations located at Kansas City, Mo., and Kansas City, Kan., and also has customers for its product in 16 other states

of the Union, and in Europe. Its annual output for the year 1895 was of the value of $164,173. For some time prior to November 16, 1895, the plaintiff company had used successfully in its cooperage plant at Kansas City, Kan., certain machines for hooping barrels, which materially lessened the cost of making the same. It did not confine itself exclusively to the manufacture of machine-hooped barrels, but manufactured, besides, many hand-hooped barrels, and employed a large number of coopers for that purpose. The wages paid to the coopers in its employ were satisfactory, and no controversy had arisen between the plaintiff and its employés on that score. On or about November 16, 1895, the plaintiff company was informed by a committee of persons representing the local lodge of the Coopers' Union, No. 18, at Kansas City, Kan., that it must discontinue the use of hooping machines in its plant. Said committee further informed the plaintiff that they had already notified one of its largest customers, Swift & Co., that, in making contracts with the plaintiff for barrels, the Coopers' Union would require such customer, in future, to specify that all barrels supplied to it by the plaintiff must be hand-hooped. None of the members of this committee were employés of the plaintiff company, and, with one exception, none of the present appellants were or are in its employ. At a later date the Coopers' Union, No. 18, called to its assistance the Trades Assembly of Kansas City, Kan., for the purpose of enforcing its aforesaid demand; and on or about January 14, 1896, a committee of persons representing both of said organizations waited upon the manager of the plaintiff company, and notified him, in substance, that said organizations had each determined to boycott the product of the plaintiff company unless it discontinued the use of hooping machines in its plant, and that the boycott would be made effective on January 15, 1896. The formal action taken by the Trades Assembly was evidenced by the following resolution:

"To the Officers and Members of the Trades Assembly—Greeting: Whereas, the cooperage firms of J. R. Kelley and the Oxley Cooperage Company have placed in their plants hooping machines operated by child labor; and whereas, said hooping machines is the direct cause of at least one hundred coopers being out of employment, of which a great many are unable to do anything else, on account of age, and at a meeting held by Coopers' Union No. 18 on the 31st of December, 1895, a committee was appointed to notify the above firms that unless they discontinued the use of said machines on and after the 15th of January, 1896, that Coopers' Union No. 18 would cause a boycott to be placed on all packages hooped by said machines the 15th of January, 1896, and at a meeting held by Coopers' Union No. 18 on the 4th of January, 1896, delegates were authorized to bring the matter before the Trades Assembly in proper form, and petition the assembly to indorse our action, and to place the matter in the hands of their grievance committee, to act in conjunction with the committee appointed by Coopers' Union No. 18 to notify the packers before letting their contracts for their cooperage: Therefore, be it resolved, that this Trades Assembly indorse the action of Coopers' Union No. 18, and the matter be left in the hands of the grievance committee for immediate action.

"Yours, respectfully, J. L. Collins,
"Sec'y Coopers' International Union of North America, Lodge 18."

It was also charged, and the charge was not denied, that the members of the voluntary organizations to which the defendants belonged

had conspired and agreed to force the plaintiff, against its will, to abandon the use of hooping machines in its plant, and that this object was to be accomplished by dissuading the plaintiff's customers from buying machine-hooped barrels and casks; such customers to be so dissuaded through fear, inspired by concerted action of the two organizations, that the members of all the labor organizations throughout the country would be induced not to purchase any commodity which might be packed in such machine-hooped barrels or casks. The bill charged, by proper averments (and no attempt was made to prove the contrary), that the defendants were persons of small means, and that the plaintiff would suffer a great and irreparable loss, exceeding $100,000, if the defendants were allowed to carry the threatened boycott into effect in the manner and form proposed. The injunction which the court awarded against the defendants was, in substance, one which prohibited them, until the final hearing of the case, from making effective the threatened boycott, and from in any way menacing, hindering, or obstructing the plaintiff company, by interfering with its business or customers, from the full enjoyment of such patronage and business as it might enjoy or possess independent of such interference.

The first proposition contended for by the appellants is that the trial court acted without jurisdiction in awarding an injunction. The ground for this contention consists in the fact that in the bill, as originally filed, two persons were named as defendants who were citizens and residents of the state of Missouri, under whose laws the Oxley Stave Company was incorporated. But as the case was dismissed as to these defendants, and as to the two voluntary unincorporated associations, and as to all the members thereof who were not specifically named as defendants in the bill of complaint, before an injunction was awarded, and as the bill was retained only as against persons concerned in the alleged conspiracy who were citizens and residents of the state of Kansas, the objection to the jurisdiction of the trial court is, in our opinion, without merit. Oxley Stave Co. v. Coopers' International Union of North America, 72 Fed. 695. It is further urged that the trial court had no right to proceed with the hearing of the case in the absence of any of the persons who were members of the two voluntary organizations, to wit, the Coopers' Union, No. 18, and the Trades Assembly of Kansas City, Kan., because all the members of those organizations were parties to the alleged conspiracy. This contention seems to be based on the assumption that every member of the two organizations had the right to call upon every other member for aid and assistance in carrying out the alleged conspiracy, and that an injunction restraining a part of the members from rendering such aid and assistance would necessarily operate to the prejudice of those members who had not been made parties to the suit. In other words, the argument is that certain indispensable parties to the suit have not been made parties, and that full relief, consistent with equity, cannot be administered without their presence upon the record. We do not dispute the existence of the rule which the defendants invoke, but it is apparent, we think, that it has no application to the case in hand. The present

suit proceeds upon the theory—without which no relief can be afforded—that the agreement entered into between the members of the two voluntary associations aforesaid is an unlawful conspiracy to oppress and injure the plaintiff company; that no right whatsoever can be predicated upon, or have its origin in, such an agreement; and that the members of the two organizations are jointly and severally liable for whatever injury would be done to the plaintiff company by carrying out the object of the alleged agreement. The rule is as well settled in equity as it is at law that, where the right of action arises ex delicto, the tort may be treated as joint or several, at the election of the injured party, and that he may, at his option, sue either one or more of the joint wrongdoers. Cunningham v. Pell, 5 Paige, 607; Wall v. Thomas, 41 Fed. 620, and cases there cited. We perceive no reason, therefore, why the case was not properly proceeded with against the appellants, although numerous other persons were concerned in the alleged combination or conspiracy.

We turn, therefore, to the merits of the controversy. The substantial question is whether the agreement entered into by the members of the two unincorporated associations to boycott the contents of all barrels, casks, and packages made by the Oxley Stave Company which were hooped bv machinery was an agreement against which a court of equity can afford relief, preventive or otherwise. The contention of the appellants is that it was a lawful agreement, such as they had the right to make and carry out, for the purpose of maintaining the rate of wages then paid to journeymen coopers, and that, being lawful, the injury occasioned to the plaintiff company, no matter how great, was an injury against which neither a court of law nor equity can afford any redress. According to our view of the case, the claim made by the defendants below, that one object of the threatened boycott was to prevent the employment of child labor, is in no way material; but, in passing, it will not be out of place to say that this claim seems to have been a mere pretense, since it was shown that the machinery used to hoop barrels cannot be managed by children, but must, of necessity, be operated by persons who have the requisite strength to handle barrels and casks weighing from 75 to 80 pounds with great rapidity. It is manifest that this is a species of labor which could not, in any event, be performed by children. Neither do we deem it necessary on the present occasion to define the term "boycott"; for, whatever may be the meaning of that word, no controversy exists in the present case concerning the means that were to be employed by the members of the two labor organizations for the purpose of compelling the plaintiff company to abandon the use of hooping machines. It is conceded that their purpose was to warn all of the plaintiff's immediate customers not to purchase machine-hooped barrels or casks, and to warn wholesale and retail dealers everywhere not to handle provisions or other commodities which were packed in such barrels or casks. This warning was to be made effectual by notifying the members of all associated labor organizations throughout the United States, Canada, and Europe, not to purchase provisions or other commodities, and, as far as pos-

sible, to dissuade others from purchasing provisions or other commodities which were packed in machine-hooped barrels or casks. The object of the conspiracy, it will be seen, was to interfere with the complainant's business, and to deprive the complainant company, and numerous other persons, of the right to conduct their business as they thought proper. To this end, those who were engaged in the conspiracy intended to excite the fears of all persons who were engaged in making barrels, or who handled commodities packed in barrels, that, if they did not obey the orders of the associated labor organizations, they would incur the active hostility of all the members of those associations, suffer a great financial loss, and possibly run the risk of sustaining some personal injury. It may be conceded that, when the defendants entered into the combination in question, they had no present intention of resorting to actual violence for the purpose of enforcing their demands; but it is manifest that by concerted action, force of numbers, and by exciting the fears of the timid, they did intend to compel many persons to surrender their freedom of action, and submit to the dictation of others in the management of their private business affairs. Another object of the conspiracy, which was no less harmful, was to deprive the public at large of the advantages to be derived from the use of an invention which was not only designed to diminish the cost of making certain necessary articles, but to lessen the labor of human hands.

While the courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes, and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract (Arthur v. Oakes. 11 C. C. A. 209, 63 Fed. 310), yet they have very generally condemned those combinations usually termed "boycotts," which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them, by means of threats and intimidation, of the right to conduct the business in which they happen to be engaged according to the dictates of their own judgments. The right of an individual to carry on his business as he sees fit, and to use such implements or processes of manufacture as he desires to use, provided he follows a lawful avocation, and conducts it in a lawful manner, is entitled to as much consideration as his other personal rights; and the law should afford protection against the efforts of powerful combinations to rob him of that right and coerce his will by intimidating his customers and destroying his patronage. A conspiracy to compel a manufacturer to abandon the use of a valuable invention bears no resemblance to a combination among laborers to withdraw from a given employment as a means of obtaining better pay. Persons engaged in any service have the power, with which a court of equity will not interfere by injunction, to abandon that service, either singly or in a body, if the wages paid or the conditions of employment are not satisfactory; but they have no right to dictate to an employer what kind of implements he shall use, or whom he shall employ. Many courts of the highest character and ability

have held that a combination such as the one in question is admitted to have been is an unlawful conspiracy, at common law, and that an action will lie to recover the damages which one has sustained as the direct result of such a conspiracy; also, that a suit in equity may be maintained to prevent the persons concerned in such a combination from carrying the same into effect, when the damages would be irreparable, or when such a proceeding is necessary to prevent a multiplicity of suits. The test of the right to sue in equity is whether the combination complained of is so far unlawful that an action at law will lie to recover the damages inflicted, and whether the remedy at law is adequate to redress the wrong. If the remedy at law is for anv reason inadequate, resort may be had, as in other cases, to a court of equity. In the case of Spinning Co. v. Riley, L. R. 6 Eq. 551, 558, Vice Chancellor Malins held that an injunction was a proper remedy to prevent the officers of a trades union from using placards and advertisements to dissuade laborers from hiring themselves to the spinning company pending a dispute between the latter company and the trades union as to wages. The court said:

"That every man is at liberty to induce others, in the words of the act of parliament, 'by persuasion or otherwise,' to enter into a combination to keep up the price of wages, or the like: but directly he enters into a combination which has as its object intimidation or violence, or interfering with the perfect freedom of action of another man, it then becomes an offense, not only at common law, but also an offense punishable by the express enactment of the act 6 Geo. IV., c. 129. It is clear, therefore, that the printing and publishing of these placards and advertisements by the defendants, admittedly for the purpose of intimidating workmen from entering into the service of the plaintiffs, are unlawful acts, punishable by imprisonment, under Id., c. 129, and a crime at common law."

In Temperton v. Russell [1893] 1 Q. B. 715, the facts appear to have been that a committee representing certain trades unions, for the purpose of enforcing obedience to certain rules that had been adopted by the unions, notified the plaintiff not to supply building materials to a certain firm. He having declined to comply with such request, the committee thereupon induced certain third parties not to enter into further contracts with the plaintiff; such third parties being so induced by threats or representations that the unions would cause their laborers to be withdrawn from their employ in case such further contracts were made. It was held that the plaintiff had a right of action against the members of the committee for maliciously conspiring to injure him by preventing persons from having dealings with him. In delivering the judgment of the court the master of the rolls (Lord Esher) quoted with approval a statement of the law which is found in Bowen v. Hall, 6 Q. B. Div. 333, to the effect that where it appears that a defendant has, by persuasion, induced a third party to break his contract with the plaintiff, either for the purpose of injuring the plaintiff, or for the purpose of reaping a personal advantage at the expense of the plaintiff, the act is wrongful and malicious, and therefore actionable. In the case of State v. Stewart, 59 Vt. 273, 9 Atl. 559, it was held that a combination entered into for the purpose of preventing or deterring a corporation from taking into its service certain persons

whom it desired to employ was an unlawful combination or conspiracy at common law. The court said:

"The principle upon which the cases, English and American, proceed, is that every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and, if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. The labor and skill of the workmen, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all, in equal sense, property. If men, by overt acts of violence, destroy either, they are guilty of crime. The anathemas of a secret organization of men appointed for the purpose of controlling the industry of others by a species of intimidation that work upon the mind, rather than the body, are quite as dangerous, and generally altogether more effective, than acts of actual violence. And, while such conspiracies may give to the individual directly affected by them a private right of action for damages, they at the same time lay the basis for an indictment, on the ground that the state itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings."

In Barr v. Trades Council (N. J. Ch.) 30 Atl. 881, it appeared that a publisher of a newspaper had determined to use plate matter in making up his paper, whereupon the members of a local typographical union, conceiving their interests to be prejudiced by such action, entered into a combination to compel him to desist from the use of such plate matter. The object of the combination was to be accomplished by the typographical union by a formal call upon all labor organizations with which it was affiliated, and upon all other persons who were in sympathy with it, to boycott the paper, by refusing to buy it or advertise in the same. It was held, in substance, that a person's business is property, which is entitled under the law to protection from unlawful interference, and that the combination in question was illegal, because it contemplated a wrongful interference with the plaintiff's freedom of action in the management of his own affairs. Decisions embodying substantially the same views have been made by many other courts. Hilton v. Eckersley, 6 El. & Bl. 47, 74; Steamship Co. v. McKenna, 30 Fed. 48; Casey v. Typographical Union, 45 Fed. 135; Thomas v. Railway Co., 62 Fed. 803, 818; Arthur v. Oakes, 11 C. C. A. 209; 63 Fed. 310, 321, 322. See, also, Carew v. Rutherford, 106 Mass. 1; Walker v. Cronin, 107 Mass. 555; State v. Glidden, 55 Conn. 46, 8 Atl. 890; Vegelahn v. Gunter (Mass.) 44 N. E. 1077. The cases which seem to be chiefly relied upon as supporting the contention that the combination complained of in the case at bar was lawful, and that the action proposed to be taken in pursuance thereof ought not to be enjoined, are the following: Mogul S. S. Co. v. McGregor, 23 Q. B. Div. 598; Id. [1892] App. Cas. 25; Continental Ins. Co. v. Board of Fire Underwriters of the Pacific, 67 Fed. 310; and Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119. In the first of these cases the facts were that the owners of certain steamships, for the purpose of securing all the freight which was shipped at certain ports, and doing a profitable business, had formed an association, and issued a circular to shippers at said ports, agreeing to allow them a certain rebate on freight bills, provided they gave their patronage exclusively to ships belonging to members of the associa-

tion. The association also prohibited its soliciting agents from acting as agents for other competing lines. A suit having been brought against the members of the association, by a competing shipowner, to recover damages which had been sustained in consequence of the formation and action of the association, it was held that the acts complained of were lawful, the same having been done simply for the purpose of enabling the members of the association to hold and extend their trade; in other words, that the acts complained of amounted to no more than lawful competition in trade. Continental Ins. Co. v. Board of Fire Underwriters of the Pacific, was a case of the same character as the one last considered, and involved an application of the same doctrine. It was held, in substance, that an association of fire underwriters which had been formed under an agreement that provided, among other things, for the regulation of premium rates, the prevention of rebates, compensation of agents, and nonintercourse with companies that were not members of the association, was not an illegal conspiracy, and that the accomplishment of its purpose by lawful means would not be enjoined at the suit of a competing insurance company which was not a member of the association. In the case of Bohn Mfg. Co. v. Hollis, it appeared that a large number of retail lumber dealers had formed a voluntary association, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a wholesale lumber business, and had provided in their by-laws that, whenever any wholesale dealer or manufacturer made any such sale, the secretary of the association should notify all members of the fact. The plaintiff having made such a sale, and the secretary being on the point of sending a notice of the fact to members of the association, as provided by the by-laws, it was held that the sending of such a notice was not actionable, and that an injunction to restrain the sending of such notice ought not to issue. The decision to this effect was based on the ground that the members of the association might lawfully agree with each other to withdraw their patronage, collectively, for the reasons specified in the agreement, because the members, individually, had the right to determine from whom they would make purchases, and to withdraw their patronage at any time, and for any reason which they deemed adequate. We are not able to concede, however, that it is always the case that what one person may do without rendering himself liable to an action many persons may enter into a combination to do. It has been held in several well-considered cases that the law will sometimes take cognizance of acts done by a combination which would not give rise to a cause of action if committed by a single individual, since there is a power in numbers, when acting in concert, to inflict injury, which does not reside in persons acting separately. Steamship Co. v. McGregor [1892] App. Cas. 24, 25; Id., 23 Q. B. Div. 598, 616; Arthur v. Oakes, 11 C. C. A. 209, 63 Fed. 310, 321; State v. Glidden, 55 Conn. 46, 8 Atl. 890. But if we concede that the reasoning employed in Manufacturing Co. v. Hollis was sound, as applied to the facts in that case, yet it by no means follows (and that fact was recognized in the

decision) that the members of the association would have had the power to combine for the purpose of compelling other persons, not members of the association, to withhold their patronage from a wholesale dealer who failed to conduct his business in the mode prescribed by the association.

We think it is entirely clear, upon the authorities, that the conduct of which the defendants below were accused cannot be justified on the ground that the acts contemplated were legitimate and lawful means to prevent a possible future decline in wages, and to secure employment for a greater number of coopers. No decrease in the rate of wages had been threatened by the Oxley Stave Company, and, with one exception, the members of the combination were not in the employ of the plaintiff company. The members of the combination undertook to prescribe the manner in which the plaintiff company should manufacture barrels and casks, and to enforce obedience to its orders by a species of intimidation which is no less harmful than actual violence, and which usually ends in violence. The combination amounted, therefore, to a conspiracy to wrongfully deprive the plaintiff of its right to manage its business according to the dictates of its own judgment. Aside from the foregoing considerations, the fact cannot be overlooked that another object of the conspiracy was to deprive the public at large of the benefits to be derived from a labor-saving machine which seems to have been one of great utility. If a combination to that end is pronounced lawful, it follows, of course, that combinations may be organized for the purpose of preventing the use of harvesters, threshers, steam looms, and printing presses, typesetting machines, sewing machines, and a thousand other inventions which have added immeasurably to the productive power of human labor, and the comfort and welfare of mankind. It results from these views that the injunction was properly awarded, and the order appealed from is accordingly affirmed.

CALDWELL, Circuit Judge (dissenting). To prevent the merits of the case from being misconceived or obscured, it is well to state at the threshold what it does, and what it does not, involve. It involves no question of the obstruction of interstate commerce, or the United States mails, or any other federal right. The bill does not charge that the defendants violated any law of the state of Kansas or of the United States, or that they threaten to do so, or that they are guilty of any breach of the public peace, or that any violence or injury to person, or to public or to private property, was perpetrated, threatened, contemplated, or feared. To show precisely what the suit does involve, that portion of the bill which states the plaintiff's grounds of complaint is here copied:

"And your orator alleges and charges that the said defendants have combined, confederated, and conspired together to require of your orator to discontinue in its plant and plants the use of said hooping machines, and, upon refusal of your orator so to do, to boycott the product of your orator's said plant and plants; that is to say, to persuade and coerce all other persons to abstain from having any business relations with your orator, or to patronize your orator by purchasing from your orator the said product and output of your orator's said plants, or from being customers of your orator, or from buying anything from your orator, or sustaining any business relations to

your orator, and to so induce, persuade, and coerce all persons to discontinue all dealings with your orator, if your orator shall refuse to comply with the said request and demand of the said defendants, and to exclude your orator from business relations with the public, and to practically break up, suspend, and ruin your orator's business, if your orator shall refuse to accede to the said demand of said conspirators; and the said defendants have so conspired as aforesaid, and to accomplish said conspiracy, by serving notice upon all persons engaged in any business, of a kind in which the product and output of your orator's plant are used, not to patronize your orator, upon pain of withdrawal of patronage from such persons of said conspirators, and of various members of their said organizations, and of all affiliated and sympathizing kindred organizations, and that said conspirators, and those associated with, related to, and subject to the control of, said conspirators consist of a vast body of people, the number of which is unknown to your orator, in all of the great commercial and trade centers of this and other countries, and possess great power, and are able to, and if unchecked will, do to your orator great damage and injury."

The ground upon which the jurisdiction in equity is rested is that the defendants are, in the language of the opinion of the court, "persons of small means." It will be observed that the bill alleges specifically how the "boycott" was to be conducted, and also how the "conspiracy" was to be accomplished, and that force, threats, or violence is not an element either of the boycott or the alleged conspiracy. Any contention that the defendants meditated violence is silenced by the statement in the brief of the plaintiff's attorney that "it is fair to presume, from the resolution and other testimony, that the defendants were determined to use all means, short of violence, to make the proscription effective." The material part of the answer of the Coopers' International Union appears in the affidavit of its president, and is as follows:

"That about a year and a half prior to the commencement of this action the complainant company commenced to operate certain hooping machines (i. e. machines for cutting hoop locks in, and putting wooply hoops upon, tierces and barrels); that said machines were attended to, and operated by, child labor in said shop (in many instances by children under the age of fourteen years), and that in the operation of said machines the said children were constantly exposed to serious injury, by reason of tender years, inexperience, and the manner of the operation of said machines; that the tierces or barrels hooped by these machines were of an inferior quality, and the said lock, and the manner of locking the hoops thereon, being of such a construction that the said tierces and barrels were unable and unsuitable for the purpose of handling and holding for transportation the products of the packing houses and various other manufacturers,—a fact that was recognized and well known by many of the packing concerns in and about Wyandotte county, Kansas. Affiant further says that during the time of his employment by the complainant company there has been returned to said company, as defective and unfit for use, as high as forty-seven out of a shipment of fifty machine-made barrels, and that the percentage of machine-hooped barrels returned to the complainant company as defective was, of an average, ten times as many as returned from the hand-hooped shipments, even though the complainant company employed and retained a large number of unskillful and inefficient men, engaged in hooping barrels and tierces, which said men were not members of said Coopers' Union, and, by reason of their inefficiency, could not become members thereof; that, by reason of the unworkmanlike and defective barrels manufactured and turned out by the said machines, the wages and compensation of the aforesaid journeymen coopers employed in the cooperage establishments of Wyandotte county, Kansas, were threatened to be materially lowered and reduced, in this, to wit: that in the use of said machines in connection with child labor the said complainant company were enabled to,

and did, discharge (throw out of employment) a large number of competent and efficient journeymen coopers, citizens of the state of Missouri, and citizens of the state of Kansas, and members of the said Coopers' Union, and that thereafter the said Coopers' Union was informed by some, if not all, of the various cooperage establishments in Wyandotte county, Kansas, that unless the complainant company ceased to operate said machines, and to flood the market with the cheap and inferior tierces and barrels, they would be obliged to reduce the wages and compensation paid by them to journeymen coopers employed in their various plants, and that one cooperage establishment did reduce the price and compensation of said journeymen coopers, and also threatened the said journeymen coopers belonging to said Coopers' Union with discharge unless the said output and competition of the cheap and inferior product be taken out of the market; * * * that at no time during the said controversy between said Coopers' Union and said Trades Assembly and the said complainant company has there been any violence threatened or contemplated, and that at no time during said period has there been any unlawful interference with the business of the said complainant company, or has any unlawful interference been threatened; that it is the intention of the said Coopers' Union and Trades Assembly, in case the said complainant company insists upon the use of said machines, and the consequent deprivation of the workingmen, members of said Coopers' Union, of their means of livelihood, that they will request (without in any manner threatening violence, or without making any demonstration of force, and without the use of violence, force, or any coercion of any kind) the co-operation of their fellow workingmen in refusing to purchase or use commodities packed in said defective tierces and barrels manufactured by machinery and child labor; * * * that the action of the said Coopers' Union and said Trades Assembly are simply acts of business competition, opposing the said complainant company, together with all other persons manufacturing wooden, machine-hooped tierces and barrels, and their attempt to use and foist upon the public, machine and child-labor manufactured barrels and tierces; and assisting the said workingmen in securing and protecting their wages and their source of livelihood."

These excerpts from the pleadings accurately present the issues between the parties. In the plaintiff's bill, and the court's opinion, the words, "conspiracy," "threats," and "coerce," are freely used. Indeed, the plaintiff's case is made to rest upon the use of these terms. It is important, therefore, at the threshold, to inquire what is meant by the use of these legal epithets in this case. Unexplained, they have an evil import. A conspiracy is defined to be:

"A combination of persons for an evil purpose; an agreement between two or more persons to do in concert something reprehensible, and injurious or illegal; particularly, a combination to commit treason or excite sedition or insurrection; a plot; concerted treason." Cent. Dict.

From the earliest times the word has been used to denote a highly criminal or evil purpose. Thus, in Acts xxiii. 12, 13, it is said:

"And, when it was day, certain of the Jews banded together, and bound themselves under a curse, saying that they would neither eat nor drink till they had killed Paul. And they were more than forty which had made this conspiracy."

Plainly, nothing the defendants did, or are charged with intending to do, comes within this definition of a conspiracy. So as to "threats." In the common acceptation, a threat means the declaration of a purpose to commit a crime or some wrongful act. Now, what the defendants did, and all they did, is explicitly testified to by Mr. Cable, the president of the Coopers' International Union. He says that the Coopers' Union gave complainant notice—

"That unless their use of said machines, and competition of the inferior tierces and barrels with the hand-hooped barrels of the journeymen coopers, members of said association, should cease on or before January 15, 1896, that a boycott would be declared by said Coopers' Union upon the contents of the tierces and barrels hooped by the hooping machines in Wyandotte county, Kansas; meaning thereby that the members of said Coopers' Union, and of its parent association, the Trades Assembly, would thereafter cease to purchase or use any commodities that were packed in machine-hooped tierces and barrels."

Many other witnesses testified to the same effect, and there is no testimony to the contrary. The "conspiracy" charged upon the defendants consisted, then, in the Coopers' Union and the Trades Assembly agreeing not "to purchase or use any commodities that were packed in machine-hooped tierces and barrels, which came in competition with the hand-hooped barrels," which were the product of their labor (and the bill charges no more); and the "threats" consisted in giving the complainant and certain packing houses formal notice of this purpose. The alleged "conspiracy," therefore, was the agreement stated, and the alleged "threats" were the notice given by that agreement, and the "coercion" was the effect that this agreement and notice had on the minds of those affected by them. It is not true that there is nothing in a name. When for "conspiracy" we substitute "agreement," and for "threats" a "notice," the whole fabric of the plaintiff's case falls to the ground. "There are," says Dr. Lieber (Civil Liberty and Government), "physchological processes which indicate suspicious intentions"; and among them is the use of high-sounding and portentous terms, from which much may be implied or imagined, instead of using plain and common words, which accurately describe the action, and leave nothing to implication or imagination. If an act done or threatened to be done is lawful, it cannot be made unlawful by giving it a name which imports an illegal act. Names are not things. It is the thing done or threatened to be done that determines the quality of the act, and this quality is not changed by applying to the act an opprobrious name or epithet. Unless the definition of a word fits the act, the definition is false, as applied to that act. "Conspiracy" sounds portentous, but in this instance its sound is more than its meaning. As here used, it describes a perfectly innocent act,—as much so as if the charge was that the defendants "conspired" to feed a starving comrade, or to bury a dead one. But if the bill charged, and the proof showed, that a breach of the peace was imminent, that fact would not confer jurisdiction on a court of chancery. Courts of equity have no jurisdiction to enforce the criminal laws. It is very certain that a federal court of chancery cannot exercise the police powers of the state of Kansas, and take upon itself either to enjoin or to punish the violation of the criminal laws of that state. It is said by those who defend the assumption of this jurisdiction by the federal courts that it is a swifter and speedier mode of dealing with those who violate or threaten to violate the laws than by the prescribed and customary method of proceeding in courts of law; that it is a "shortcut" to the accomplishment of the desired object; that it avoids the delay and uncertainty incident to a jury trial, occasions less expense, and insures a speedier punishment. All this may be conceded to be true. But

the logical difficulty with this reasoning is that it confers jurisdiction on the mob equally with the chancellor. Those who justify or excuse mob law do it upon the ground that the administration of criminal justice in the courts is slow and expensive, and the results sometimes unsatisfactory. It can make little difference to the victims of short-cut and unconstitutional methods, whether it is the mob or the chancellor that deprives them of their constitutional rights. It is vain to disguise the fact that this desire for a short cut originates in the feeling of hostility to trial by jury,—a mode of trial which has never been popular with the aristocracy of wealth, or the corporations and trusts. A distrust of the jury is a distrust of the people, and a distrust of the people means the overthrow of the government our fathers founded. Against the exercise of this jurisdiction the constitution of the United States interposes an insurmountable barrier. In that masterly statement of the grievances of our forefathers against the government of King George, and which they esteemed sufficient to justify armed revolution, are these: "He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws;" and "For depriving us in many cases of the benefit of trial by jury." Smarting under these grievances, the people of the United States, under the lead of Mr. Jefferson, were extremely careful to place it beyond the power of any department of the government to subject any citizen "to a jurisdiction foreign to our constitution and unacknowledged by our laws," or to deprive any citizen "of the benefit of trial by jury." This was accomplished by inserting in the constitution of the United States these plain and unambiguous provisions:

"The trial of all crimes, except in cases of impeachment, shall be by jury." Const. art. 3. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." Const. Amend. art. 5. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. * * *" Id. art. 6. "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Id. art. 7.

These mandatory provisions of the constitution are not obsolete, and are not to be nullified by mustering against them a little horde of equity maxims and obsolete precedents originating in a monarchical government having no written constitution. No reasoning and no precedents can avail to deprive the citizen accused of crime of his right to a jury trial, guarantied to him by the provisions of the constitution, "except in cases arising in the land and naval forces, or in the militia when in actual service in time of war or of public danger." These exceptions serve to emphasize the right, and to show that it is absolute and unqualified, both in criminal and civil suits, save in the excepted cases. These constitutional guaranties are not to be swept aside by an equitable invention which would turn crime into a contempt, and enable a judge to declare innocent acts crimes, and punish them at his discretion. But notwithstanding the constitution expressly enumerates the only exceptions to the right of trial by jury, and positively limits those exceptions to the

cases mentioned, those who favor government by injunction propose to ingraft upon that instrument numerous other exceptions which would deprive the great body of the citizens of the republic of their constitutional right of trial by jury. With the interpolations essential to support government by injunction, the constitution would contain the following further exceptions to the right of trial by jury:

"And except when many persons are associated together for a common purpose, and except in the case of members of trades unions, and other labor organizations, and except in cases of all persons 'of small means.'"

Undoubtedly, it is the right of the people to alter or abolish their existing government, "and," in the language of the Declaration of Independence, "to institute a new government, laying its foundations on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness." It is competent for the people of this country to abolish trial by jury, and confer the entire police powers of the state and nation on federal judges, to be administered through the agency of injunctions and punishment for contempts; but the power to do this resides with the whole people, and it is to be exercised in the mode provided by the constitution. It cannot be done by the insidious encroachments of any department of the government. Our ancestors, admonished by the lessons taught by English history, saw plainly that the right of trial by jury was absolutely essential to preserve the rights and liberties of the people, and it was the knowledge of this fact that caused them to insert in the constitution the peremptory and mandatory provisions on the subject which we have quoted. English history is replete with examples showing that the king and his dependent and servile judges would have subverted the rights and liberties of the English people, but for the good sense and patriotism of English juries. It is to the verdicts of the juries, and not to the opinions of the judges, that the English people are chiefly indebted for some of their most precious rights and liberties. A brief reference to one or two of the many cases will serve to illustrate this truth, and show why a trial by jury is the only sure and safe refuge the citizen has for his rights and liberties:

William Penn and William Mead were Quaker preachers. Their religious faith was offensive to the king, and to his judges and the governing class. The Quaker meeting house having been closed against them, the congregation assembled, in that quiet and orderly manner characteristic of Quakers, in an open place near their meeting house, where Penn was preaching to them, when they were set upon by the police and violently dispersed. For this Penn and Mead, and not the police who created the disturbance, were indicted. The indictment charged:

"That by agreement between him [Penn] and William Mead before made, and by abetment of the aforesaid William Mead, then and there, in the open street, did take upon himself to preach and speak, and then and there did preach and speak unto the aforesaid William Mead and other persons."

The indictment, like the complaint in this case, bristled with charges of conspiracy, unlawful assembly, etc. Penn, being denied counsel, was compelled to defend himself. When arraigned, he

pleaded "Not guilty," and the following, among other, proceedings took place in court during his trial:

"Penn: I affirm I have broken no law, nor am I guilty of the indictment that is laid to my charge; and to the end the bench, the jury, and myself, with these that hear us, may have a more direct understanding of this procedure, I desire you would let me know by what law it is you prosecute me, and upon what law you ground my indictment. Rec.: Upon the common law. Penn: Where is that common law? Rec.: You must not think that I am able to run up so many years, and over so many adjudged cases, which we call 'common law,' to answer your curiosity. Penn: This answer, I am sure, is very short of my question; for, if it be common, it should not be so hard to produce. * * *"

Despite much browbeating from the court, Penn continued to demand of the court to be shown the law that made it a crime for him to preach, and for his congregation to assemble to hear him. Finally the court ordered the bailiff to:

"Take him away. Take him away. Turn him into the bail dock."

Continuing his defense, Penn said:

"Must I therefore be taken away because I plead for the fundamental laws of England? However, this I leave upon your consciences, who are of the jury, and my sole judges,—that if these ancient fundamental laws, which relate to liberty and property, and are not limited to particular persuasions in matters of religion, must not be indispensably maintained and observed, who can say he hath right to the coat upon his back?"

Despite the peremptory charge of the court to find Penn guilty of the alleged "conspiracy" and "unlawful and tumultuous assembly," the jury returned a verdict of "guilty of preaching only." At this the court fell into a passion, browbeat the jury, particularly their foreman, Bushel, and sent them out to return a general verdict of guilty. This the jury refused to do, and, after being sent out three or four times, they returned a general verdict of not guilty, whereupon they were fined for contempt of court in rendering the verdict contrary to its instructions and to its interpretation of the facts. 6 How. State Tr. 951. But the jurors asserted their right to render a verdict in accordance with the dictates of their own consciences and judgments, and the court to which they appealed held that they had that right, and could not be punished for exercising it, and reversed the fine. The Penn Case, and the proceedings that grew out of it, constitute one of the foundation stones in the English bill of rights. With all their astuteness and eager desire to serve the crown, it never occurred to the judges in those days to enjoin the Quakers from meeting, and Penn from preaching to them. This "shortcut" would have gotten rid of the jury, and placed Penn and his followers completely in the power of the judges; and, instead of becoming the founder of a great city and commonwealth in a free republic, he would have languished in an English prison for contempt of court, incurred by preaching to his congregation, for he avowed in court "that all the powers upon earth" could not divert or restrain him from that duty.

A bookseller, whose publications contained criticisms on the administration of public affairs, was indicted for publishing a seditious libel. He was tried before the chief justice. "In vain," says an

authentic history, "did Lord Ellenborough, uniting the authority of the judge with the arts of the counsel, strive for a conviction. Addressing the jury, he said, 'Under the authority of the libel act, and still more in obedience to his conscience and his God, he pronounced this to be a most infamous and profane libel.' But the jury were proof against his authority and his persuasion." 2 May, Const. Hist. Eng. They returned a verdict of not guilty, thus vindicating the freedom of the press, and the right to criticise the administration of public affairs.

Seven bishops presented a respectful petition to the king, praying for the enforcement of the laws of the kingdom, and for a redress of grievances. For this they were indicted for libel. It is worth while to note the charge of the judges to the jury. The chief justice said: "And I must, in short, give you my opinion: I do take it to be a libel." And Justice Allibone said to the jury: "Then I lay this down for my next position: That no private man can take upon him to write concerning the government at all; for what has any private man to do with the government, if his interest be not stirred or shaken?" and much more to the same effect. After receiving this charge, the jury, says Lord Campbell, "were marched off in the custody of a bailiff, who was sworn not to let them have meat or drink, fire or candle, until they were agreed upon their verdict. All night were they shut up; Mr. Arnold, the king's brewer, standing out for a conviction, until six next morning, when, though dreadfully exhausted, he was thus addressed by a brother juryman: 'Look at me. I am the biggest and the strongest of the twelve; but, before I find such a petition as this a libel, why, I will stay until I am no bigger than a tobacco pipe.' The court sat again at ten the next morning, when the verdict of not guilty was pronounced, and a shout of joy was raised, which was soon reverberated from the remotest parts of the kingdom." 2 Camp. Ch. Jus. 111.

Cases similar to these might be multiplied indefinitely, but enough have been cited to show that it was through the good sense, courage, and love of liberty of the sturdy English juries who stood out against the judges that the right of the people to assemble for lawful purposes, and the right to address them when they were assembled, the right of free speech, and the freedom of the press, and the right of petition for the redress of grievances, were secured to the English people. It is profitable to recur occasionally to these historic cases. They shed light on the action of the framers of our constitution, and explain their resolute and determined purpose to secure to the people of this country the right of trial by jury, against encroachments or invasion from any quarter or upon any pretext, or by any device whatsoever. The framers of the constitution knew that it was not enough that "the rights of man be printed, and that every citizen have a copy." The rights and liberties guarantied to the people by the constitution would avail them nothing unless they were constantly and carefully guarded from invasion and encroachment from any quarter. They had formed a "government of the people, by the people, for the people," and they committed the protection and defense of the rights of the people under that government to the only

agency that could be trusted,—to a jury of the people. They put the rights and liberties of the people in the keeping of the people themselves. The king of England, when a petition was presented to him, reciting his encroachments on the rights and liberties of his subjects, and praying for a redress of grievances, returned for answer that "the king's prerogative is to defend the people's liberties." The assurance was not comforting, and brought no relief. Our fathers invested the prerogative of maintaining and defending the people's rights and liberties in the people themselves,—in a jury. English judges of great learning and ability had sided with the crown and the aristocratic classes in oppressing the people, and denying them those rights and liberties to which they had an undoubted right by natural law, as well as under their charters of liberty. This denial had been, in a large measure, rendered nugatory by the firm stand for liberty taken by English juries. "History repeats itself." This maxim was not lost on the framers of our constitution. They intended to, and did, interpose an insuperable barrier to the loss of, or the impingement upon, the rights and liberties of the people, by the same agencies that vexed our English ancestors. That insuperable barrier was trial by jury. In this country the right of wage earners and others to associate together and act collectively is not a boon granted by the government. It is not derived from the constitution, statutes, or judicial decisions. It antedates the constitution. It is a natural and inherent right. It is the natural weapon of weakness. Its only enemies are despots, and those who would oppress the weak in the absence of the protection afforded them by organization and combined action. This right of men to combine together for lawful purposes necessarily carries with it the right of combined action. Of what utility is organization without the right of collective action? Collective action is implied in the very term "organization." Organization has no other object. Man, by nature, is a social being. Association and collective action, by those having common interests, for their protection and material, moral, and mental improvement, is a natural instinct. The British parliament, whose power of legislation is unrestrained, and the English courts, in the beginning of the struggle between capital and labor, supposed that they could successfully and permanently suppress this instinct; but, happily for mankind, the natural rights of man and the laws of nature proved more powerful and enduring than the acts of parliament and the judgments of courts. The association of men for combined action was declared to be a conspiracy. The wages of laborers were fixed by acts of parliament, and it was made a crime for a laborer to refuse to work for the statutory wages, or to demand an increase of wages, or to quit the service of his employer. These acts were rigorously enforced by the courts, and their spirit found expression in the judgments of the courts long after their repeal. The courts did more, however, than simply enforce the acts of parliament. They supplemented them by laws decreed by themselves,—judge-made laws,—among which was the one relied on by the majority of the court to convict the defendants in this case of a conspiracy. This invention of the judges was the most effective rule ever devised by

the enemies of liberty to deprive men of the natural right of association and co-operation, and to place them completely at the mercy of despotic power, and those whose interest it was to oppress them. Referring to the case of Bohn Mfg. Co. v. Hollis (a case which fully supports the contention of the defendants), the majority of the court say:

"The decision to this effect was placed on the ground that members of the association might lawfully agree with each other to withdraw their patronage, collectively, for the reasons specified in the agreement, because the members, individually, had the right to determine from whom they would make purchases, and withdraw their patronage at any time, and for any reason which they deemed adequate. It is not always the case, however, that what one person may do, without rendering himself liable to an action, many persons may enter into a combination to do. There is a power in numbers, when acting in concert, to inflict injury, which does not reside in a single individual; and for that reason the law will sometimes take cognizance of acts done by a combination, when it will not do so when committed by a single individual."

The proposition here approved by the court, and relied on to weaken the authority of the Bohn Mfg. Co. Case, first emanated from an English court. Rex v. Journeymen Tailors, 8 Mod. 11. As laid down in that case, the formula reads:

"A conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it."

This proposition, that it is unlawful for men to do collectively what they may do, without wrong, individually, was enunciated more than a century and a half ago, when all manner of association and co-operation among men, offensive to the king, or not in the interest of despotic power or the ruling classes, or not approved by the judges, were declared by the courts to be criminal conspiracies. It was promulgated at a time "when," in the language of Mr. Justice Harlan in his opinion in Robertson v. Baldwin, 165 U. S. 288, 17 Sup. Ct. 333, "no account was taken of a man as man, when human life and human liberty were regarded as of little value, and when the powers of government were employed to gratify the ambition and pleasure of despotic rulers, rather than promote the welfare of the people," and when laborers had no rights their employers or the courts were bound to respect. The idea of the power of men in association has always been abhorrent to despots, and to those who wish to oppress their fellow men, because its free exercise is fatal to despotism and oppression. The strength it imparts carries its own protection. In all ages those who seek to deprive the people of their rights justify their action by ancient and obsolete precedents, and by coining definitions suited to their ends. In "that codeless myriad of precedent," running back to the Dark Ages called the "Common Law," it is not difficult to find a precedent for inflicting any injustice or oppression on the common people. But these precedents, so shocking to our sense of right, so inimical to our constitution and social and economic conditions, and so subversive of the liberty of men, should be permitted to sleep in profound oblivion. They neither justify nor palliate encroachments on the natural and constitutional rights of the citizens. Under this asserted rule, what a man, when acting

singly, may lawfully do, he may not do in concert with his neighbor. What all men may lawfully do, acting singly, it is unlawful for any two or more of them to do, acting in concert or by agreement. What each individual member of a labor organization may lawfully do, acting singly, becomes an unlawful conspiracy when done by them collectively. Singly, they may boycott; collectively, they cannot. The individual boycott is lawful, because it can accomplish little or nothing. The collective boycott is unlawful, because it might accomplish something. People can only free themselves from oppression by organized force. No people could gain or maintain their rights or liberties, acting singly, and any class of citizens in the state subject to unjust burdens or oppression can only gain relief by combined action. All great things are done, and all great improvement in social conditions achieved, by the organization and collective action of men. It was the recognition of these truths that prompted the promulgation of the proposition we are discussing. The doctrine compels every man to be a stranger in action to every other man. This is contrary to the constitution and genius of our government. It is a doctrine abhorrent to freemen. It is in hostility to a law of man's nature, which prompts him to associate with his fellows for his protection, defense, and improvement. Under its operation every religious, political, or social organization in the country may be enjoined from combined action, if their religious faith or political creed or practice is obnoxious to the judge. It was originally designed for this very purpose. In his opinion in the case of Vegelahn v. Guntner (Mass.) 44 N. E. 1081, Judge Holmes says:

"So far, I suppose, we are agreed. But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But, in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and principle. Com. v. Hunt, 4 Metc. (Mass.) 111; Randall v. Hazelton, 12 Allen, 412, 414. There was a combination of the most flagrant and dominant kind in Bowen v. Matheson [14 Allen, 502], and in the Steamship Co. Case, and combination was essential to the success achieved. But it is not necessary to cite cases. It is plain, from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed. One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of 'capital,' to get his services for the least possible return. Combination on the one side is potent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. I am unable to reconcile Temperton v. Russell [1893] 1 Q. B. 715, and the cases which follow it, with the Steamship Co. Case. But Temperton v. Russell is not a binding authority here, and therefore I do not think it necessary to discuss it. If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty

that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control."

The asserted rule has no boundaries or limitations other than the chancellor's discretion. Whatever combined action he wills to permit is lawful. Whatever combined action he wills to prevent is a conspiracy. In this country the right of associate and combined action hangs on no such slender thread. But it is said that chancellors should exercise great caution and circumspection in the application of this rule. But this still leaves the right of combined action dependent on the discretion of a chancellor. Thus far they have exercised great discretion, and applied it to combined action of labor organizations only. A careful student of social and economical questions of the day, and of the status of the labor movements in England, says:

"A growth in civil rights on the part of the mass of citizens has attended the labor movement in England from the beginning until now. Workmen are no longer compelled or expected to act without counsel and without concert. They hold a yearly congress, whose object it is to consult on current questions, to watch their legislation, and to urge the measures they desire. The statute book has thus been rewritten in England, with a wide and just regard for the interest of the workman. The fundamental principles of commercial law have taken on new renderings, and accepted new assertions of right. The action of trade unions in demanding better terms, or even a boycott to secure these terms, is no longer a conspiracy in restriction of trade. These methods have won civil acceptance, and gotten to themselves social and moral forces in each instance according to their merit. They seem to be great means of social renovation, which anticipate and prevent revolution. That marvelous political history by which England has won her liberty is repeating itself in her social institutions. Combination is freely accepted. The principle is recognized,—a principle fundamental in social renovation,—that men may do collectively, without wrong, what they may do without wrong individually." Bascom on Social Facts and Principles, 237.

While laborers, by the application to them of the doctrine we are considering, are reduced to individual action, it is not so with the forces arrayed against them. A corporation is an association of individuals for combined action; trusts are corporations combined together for the very purpose of collective action and boycotting; and capital, which is the product of labor, is in itself a powerful collective force. Indeed, according to this supposed rule, every corporation and trust in the country is an unlawful combination; for while its business may be of a kind that its individual members, each acting for himself, might lawfully conduct, the moment they enter into a combination to do that same thing by their combined effort the combination becomes an unlawful conspiracy. But the rule is never so applied. Corporations and trusts, and other combinations of individuals and aggregations of capital, extend themselves right and left through the entire community, boycotting and inflicting "irreparable damage" upon, and crushing out, all small dealers and producers, stifling competition, establishing monopolies, reducing the wages of the laborer, raising the price of the food on every man's table, and of the clothes on his back, and of the house that shelters him, and inflicting on the wage earners the pains and penalties of the lockout and the blacklist, and denying to them the right of associa-

tion and combined action, by refusing employment to those who are members of labor organizations; and all these things are justified as a legitimate result of the evolution of industries resulting from new social and economic conditions, and of the right of every man to carry on his business as he sees fit, and of lawful competition. On the other hand, when laborers combine to maintain or raise their wages, or otherwise to better their condition, or to protect themselves from oppression, or to attempt to overcome competition with their labor or the products of their labor, in order that they may continue to have employment and live, their action, however open, peaceful, and orderly, is branded as a "conspiracy." What is "competition" when done by capital is "conspiracy" when done by the laborers. No amount of verbal dexterity can conceal or justify this glaring discrimination. If the vast aggregation and collective action of capital is not accompanied by a corresponding organization and collective action of labor, capital will speedily become proprietor of the wage earners, as well as the recipient of the profits of their labor. This result can only be averted by some sort of organization that will secure the collective action of laborers. This is demanded, not in the interest of wage earners alone, but by the highest considerations of public policy. In the suggestions on the rights of organized labor submitted by Mr. Olney, attorney general of the United States, as amicus curiæ to the court, in the case of Platt v. Railroad Co. (November, 1894) 65 Fed. 660, he said:

"Whatever else may remain for future determination, it must now be regarded as substantially settled that the mass of wage earners can no longer be dealt with by capital as so many isolated units. The time is past when the individual workman is called upon to pit his single, feeble strength against the might of organized capital."

And, speaking of the restrictions imposed upon laborers by the courts, he said:

"They cannot help knowing that organized capital is not so restricted. And, when treatment so apparently unfair and discriminating is administered through the instrumentality of a court, the resulting discontent and resentment of employés are inevitably intensified, because the law itself seems to have got wrong, and in some unaccountable manner to have taken sides against them."

A conspiracy is defined to be "any combination between two or more persons to accomplish an unlawful purpose, or a lawful purpose by unlawful means." Let the defendants' action be tested by this rule. Their purpose was to drive the plaintiff's barrels out of the market, by giving preference to the barrels produced by their labor, and this purpose was to be accomplished by means of the coopers' and trades' unions everywhere refusing to buy the barrels manufactured by the plaintiff, or any of the commodities packed in them by any one. Devested of the legal epithets and verbiage, this is precisely what the defendants propose to do, and all they propose to do. And it is this the court has enjoined them from doing. They are enjoined from refusing to buy the barrels, and the commodities packed in the same. If the defendants are not allowed to determine for themselves what they will not buy, they ought not to be allowed to determine what they will buy; and the court's guardianship should

go a step further, and tell them what to buy. If the court can enjoin the defendants from withdrawing their patronage and support from the plaintiff, and persuading others to do the same, it is not perceived why it cannot, by a mandatory injunction, make it obligatory upon the defendants to purchase the plaintiff's barrels and their contents, and persuade others to do the same. The invasion of the natural rights and personal liberty of the defendants would be no greater in the one case than in the other. The plaintiff has an undoubted right to hoop its barrels in any mode it sees fit, and the defendants have an undoubted right to refuse to purchase them, or the commodities packed in them, no matter how they are hooped. These are the business rights of the parties, and the exercise of its business right by one party is not an interference with the business right of the other. The defendants' declared purpose not to purchase commodities packed in barrels made by the plaintiff is not an illegal interference with its business, because it is not a business right of the plaintiff to require the defendants to purchase such commodities or to refrain from proclaiming their resolution not to purchase them. In a word, it is none of the plaintiff's business out of whose make of barrels the defendants purchase their meats and other supplies. It is said in the opinion of the court that those persons who did not discontinue the use of the complainant's barrels and the commodities packed in them would "possibly run the risk of sustaining some personal injury." The suggestion is not warranted by any averment in the bill, nor is there a scintilla of evidence in the record to justify it. It does the defendants great injustice. No men could go about a business in a more peaceable, orderly, and law-abiding manner than did these defendants. A rigid purpose of order and keeping the peace presided over all their plans. Their sole purpose was a resolute business nonintercourse. It is, of course, possible for every man to inflict some personal injury on another. That can be predicated of all men, and, if this possibility is a ground for injunction, then every man, including the members of this court, should be enjoined from injuring every other man. If this is a sufficient ground for an injunction, a federal judge can, at his pleasure, slip an injunction noose over every neck in the republic. But an injunction is not granted "except with reference to what there is reason to expect in its absence." To enjoin law-abiding men from breaking the law, because it is in their power to break it, is to confound all distinction between the law-abiding man and the lawbreaker. The court say, "No decrease in the rate of wages had been threatened by the Oxley Stave Company." But such reduction of wages was threatened by all the other cooperage establishments. Mr. Cable testifies that the members of the Coopers' Union were notified by "the various cooperage establishments in Wyandotte county, Kansas, that unless the complainant company ceased to operate said machines, and to flood the market with the cheap and inferior tierces and barrels, they would be obliged to reduce the wages and compensation paid by them to journeymen coopers employed in their various plants, and that one cooperage establishment did reduce the price and compensation of said journeymen coopers, and also threatened the said journey

men coopers belonging to said Coopers' Union with discharge unless the said output and competition of the cheap and inferior product be taken out of the market." Mr. Butler testifies "that the effect of the said action of the complainant company has already caused threats to be made of a large reduction of the wages of journeymen coopers employed in the cooperage plants in Wyandotte county, Kansas"; that other cooperage firms have notified their employés "that if the complainant company continued to operate said machines, and continued to place upon the market a cheap and inferior product in competition with the hand-made products of other plants, the said employés must expect a reduction in their wages, or a discharge from their employment." Moreover, independently of this direct testimony, it is obvious that, if the plaintiff's barrels drove out of the market the hand-hooped barrels, all coopers engaged in that branch of the work would lose their employment, and that the plaintiff would eagerly avail itself of any reduction in the wages of coopers by other cooperage establishments. The court further remarks, " * * * With one exception, the members of the combination were not in the employ of the plaintiff company." The very object of labor organizations is to impart to every laborer the strength of all. A great nation will go to war to maintain the rights of its humblest citizen. A nation that would not do this would justly lose the respect of every other nation, and soon no respect would be paid to the rights of its citizens. The cause of one laborer is the cause of all laborers. Organized labor must give to each of its members its collective force and influence, else they will fall, one by one, a sacrifice to the greed of their employers. If labor organizations did not have the right to protect and defend the interests of their members, individually as well as collectively, they would be of no utility, and would soon come under abject submission to capital, which grants nothing of fundamental value to wage earners which it is not coerced to grant by the combined power of the labor organizations, or legislation brought about usually through their influence.

It will appear from a critical examination of the cases cited in support of the court's conclusion that the facts in each one of them entitled to respectful consideration as a precedent are widely different from the facts in this case. In every one of them having any close analogy to the case at bar, there was the element of violence, or threats of violence, or actual trespass upon the person or property, or the threat of it, or some display of physical force, or action which was held to constitute a trespass or implied threat. No one of these elements is found in this case. It is simply and purely a case where the labor organizations resolved that they would not purchase or use the barrels manufactured by the complainant, or any commodities packed therein. This they had an absolute right to do, without regard to the question how the complainant's barrels were manufactured, or whether they were inferior to, or better than, the hand-hooped barrels produced by the labor of the defendants. The grounds of the boycott are wholly immaterial, in determining the

right to boycott. Whether organized labor has just grounds to declare a strike or boycott, is not a judicial question. These are labor's only weapons, and they are lawful and legitimate weapons; and so long as in their use there is no force or threats of violence, or trespass upon person or property, their use cannot be restrained. Laborers are not wards of chancery. A court of chancery has no more authority to interfere with labor organizations, in the conduct of their business, than it has to interfere with the business of corporations and trusts, and other combinations of capital, in the conduct of their business; and in the case of a strike or boycott, as long as each side is orderly and peaceful, they must be permitted to terminate their struggle in their own way, without extending to one party the adventitious aid of an injunction.

Something is said about its being against public policy to boycott articles made by machinery. As before said, it is immaterial whether an article is produced by hand labor or machinery. Products produced by machinery are no more exempt from competition and a boycott than the products of hand labor. The products of machines stand on no higher plane, in law or equity, than the like products produced by the labor of man. They may be put in competition with each other, and that competition may be prosecuted precisely as was done in this case.

There are numerous authorities supporting the views of the minority,—many of them going far beyond the requirements of this case: Reynolds v. Everett, 144 N. Y. 189, 39 N. E. 72; Sinsheimer v. Garment Workers, 77 Hun, 215, 28 N. Y. Supp. 321; Com. v. Hunt, 4 Metc. (Mass.) 111; Randall v. Hazelton, 12 Allen, 412, 414; Publishing Co. v. Howell (Or.) 38 Pac. 547; Bowen v. Matheson, 14 Allen, 502; Continental Ins. Co. v. Board of Fire Underwriters of the Pacific, 67 Fed. 310; Mogul S. S. Co. v. McGregor, 21 Q. B. Div. 544; s. c. 23 Q. B. Div. 598; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119; McHenry v. Jewett, 90 N. Y. 58; Gilbert v. Mickle, 4 Sandf. Ch. 357. The force of the Steamship Mogul Case, and others of the cases cited, is attempted to be broken by the statement that these were cases of "lawful competition in trade," and therefore not applicable to the defendants, who, it is impliedly said, are not entitled to enjoy the right of competition. This is a misconception of what it takes to constitute competition, and of the relation one must sustain to the business to be entitled to the rights of a competitor. The error probably springs from the erroneous assumption that a boycott cannot be used as a weapon of competition, or consist with it. Competition is defined to be an "endeavor to gain what another is endeavoring to gain at the same time." Cent. Dict. In such a struggle the boycott is perfectly legitimate. It is resorted to by great corporations and trusts,—the sugar trust, the meat trust, the oil trust, and scores of others. That one competing for the mastery in any line of business may rightfully resort to the boycott was decided in the Steamship Mogul Case. Mogul S. S. Co. v. McGregor, 15 Q. B. Div. 476. When that case was before Lord Chief Justice Coleridge, he said:

"It was an application of the plaintiffs for an injunction to restrain the defendants from doing that which was called throughout the case—and which I really see no reason for hesitating to call, also—'boycotting the plaintiffs.'"

And he refused the injunction, and on appeal his judgment was affirmed.

It is the right of every man to compete with every other man in all lawful business pursuits. Every wage earner has this right. His own interests, no less than the interests of his employer, are at stake. If his employer cannot successfully compete with his rivals, he must either go out of business, or reduce the wages of his employés, as was threatened to be done in this case. The wage earner may therefore not only give preference to his employer's commodities, and to the product of his own labor, but he may carry competition to the bitter end, including the boycott, in order to gain the supremacy in the market for his employer's wares, upon whose successful sale his wages, and in some cases, probably, his existence, depend. Competition is not confined alone to cases where the competitors represent large moneyed capital, and are the exclusive owners of the commodity or business out of which the competition arises. It is a fundamental error to deny to labor the rights and privileges of competition, upon the ground that labor is not capital, and therefore not entitled to any of the rights of capital. It is capital of the very highest and most valuable type. It is the creator of all other capital. Cardinal Manning (a great authority upon any subject upon which he wrote, and who was a profound student of the social and economic problems of the time, with a view of adjusting the relations of the church to existing social conditions), speaking of the laborer and his rights, says:

"Among the English-speaking peoples of the world (that is, in the new world, which seems to be molding our future), a workingman is a free man, both in his person and in the labor of his hand. The mere muscular labor of his arm is his own, to sell as he wills, to whomsoever he wills, wherever and for whatsoever time he wills, and at whatsoever price he can. If his labor be skilled labor, or even half-skilled labor, it is all the more valuable, and absolutely his own possession. In truth, it is the most precious form of capital, which gold and silver may purchase, but on which gold and silver absolutely depend. Money is but dead capital, after all, but the live capital of human intelligence and the human hand is the primeval and vital capital of the world. Unless these rights of labor can be denied, liberty of organization to protect these rights and the freedom founded on them cannot be denied." Letter to Catholic Tablet, April 28, 1887.

In his first annual message to congress, Mr. Lincoln expresses the same idea in different language. He said:

"Labor is prior to, and independent of, capital. Capital is only the fruit of labor. Capital could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the more consideration."

That the struggle between the plaintiff and defendants is purely competitive is a fact proven in the case. Mr. Day, president and general manager of the Western Cooperage Company (an intelligent and disinterested witness), testifies that:

"The present controversy is simply a competition between the proprietors of wood-hooping machines and the journeymen coopers; the former endeavor-

ing to displace the latter by machine, unskilled labor, and the latter endeavoring to protect and maintain their wages and occupation."

It cannot be the law that the men and women who do the work of the world, and who produce its wealth, have no rights against the wealth they create, and no right to prefer and promote by lawful and peaceful means the sale of the products of their labor, to secure for themselves continued employment. The "irreparable damage" suffered in business by a vanquished competitor at the hands of his successful rival constitutes no cause of action, either at law or in equity. It is the result of the law of competition, to which all men are subject. They take their chances, and must abide the result, whether it bring fortune or failure. In the Steamship Mogul Case, Lord Chief Justice Coleridge said that it was the resolute purpose of the defendants—

"To exclude the plaintiffs, if they could, and to do so without any consideration of the results to the plaintiffs if they were successfully excluded. This, I think, is made out, and I think no more is made out than this. Is this enough? It must be remembered that all trade is, and must be, in a sense, selfish. Trade not being infinite,—nay, the trade of a particular place or district being, possibly, very limited,—what one man gains another loses. In the hand to hand war of commerce, as in the conflicts of public life, whether at the bar, in parliament, in medicine, in engineering (I give examples only), men fight on without much thought of others, except a desire to excel or defeat them."

And the learned judge held that the plaintiffs could have no redress for their losses; they were losses incident to competition in business, and, as we have seen, to a competition carried on by what the learned chief justice said was "boycotting the plaintiffs." If every one likely to be "irreparably damaged" by competition could enjoin his competitors from boycotting his wares (that is, refusing to buy or deal in them), there would soon be an end of all competition. Under the existing social and economic conditions, the natural person, it has been well said, is the merest rudiment of a man. He can only make his power felt, promote his interests, and defend his rights by association and combination with others. Business and commercial pursuits of any magnitude are not carried on by natural persons any more. All capital seeks to increase its power by combination, and to that end assumes the form of corporations and trusts. The plaintiff in this case is a corporation. It represents a number of persons associated together for the very purpose of combined and collective action. Many of these combinations are on a gigantic scale. Their power and influence are wellnigh irresistible. They are the employers of the great mass of the laborers. They are formed solely for pecuniary profit, and know no other law than that which promotes their pecuniary interests. They defy all social restraints that would have a tendency to lessen their dividends. What the stockholders want is more dividends, and the best manager is the man who will make them the largest. The struggle is constant between the laborers, whose labor produces the dividends, and those who enjoy them. The manager is tempted to reduce wages to increase dividends, and the laborers resist the reduction, and demand living wages. Sometimes the struggle reaches the point of open rupture. When it does,

the only weapons of defense the laborers can appeal to is the strike or the boycott, or both. These weapons they have an undoubted right to use, so long as they use them in a peaceable and orderly manner. This is the only lawful limitation upon their use. That limitation is fundamental, and must be observed. It was observed in the case at bar to its fullest extent. If these weapons are withheld from them, then, indeed, are they left naked to their enemies. One class of men cannot rely for protection and the maintenance of their rights upon the justice and benevolence of another class, who would reap profit from their oppression. They must be in a position to compel respect, and make it to the interest of their adversary to grant their reasonable and just demands. Laborers can only do this by making common cause,—by organization and collective action. The right of organization itself may as well be denied to them, if the right of peaceful and orderly collective action is denied them. It is vital to the public interests, as well as to laborers, that this should not be done. A labor organization in itself teaches respect for law and order. The conscious obedience to the rules and regulations of the organization inculcates a spirit of obedience to all law. Orderly collective action can be attained through organization only. In its absence we have the ungoverned and ungovernable mob. A labor organization improves the mental, moral, material, and physical condition of its members. It teaches them how best to perform their duties, and to become expert in their several callings. The great improvement made in the last half century in the condition of the wage earners is due almost exclusively to the power of these organizations. Sir John Lubbock, whose learning and impartiality must be conceded, in a recent volume (Treasures of Life) ventures to predict that "the readers of the next generation will be not our lawyers, doctors, shopkeepers, and manufacturers, but the laborers and mechanics"; and, if this prediction is verified, it will be mainly due to the beneficent influence of these organizations. To strike them down at a time when their adversaries are more powerful than they ever were in the history of the world is to take a long step backward into the Dark Ages. It is, indeed, the revival of despotism for laborers, and means their practical enslavement to great aggregations of capital, whose greed takes no note of human destitution and suffering. Their adversaries combine to act collectively, and it is not a conspiracy. It is the business of the law to see that no man or class of men, under any pretext whatever, is granted rights or privileges denied to other men or classes of men. The public order must be secured, and private rights protected, under the constitution and laws, without denying to labor, or any other class of citizens, their natural and constitutional rights. Let the person and property of every citizen be securely protected by fixed laws, and speedy punishment follow the commission of crime. Let the constitutional mode of trial remain inviolate. The necessity for this is illustrated in this case. No American jury could be found who would say these defendants were guilty of a "conspiracy," or of making "threats" to injure any one. Like the jury in the Penn Case, they would say, "Guilty of refusing to purchase the plaintiff's

barrels and the commodities packed in them, only," and the common sense of all mankind would respond that that creates neither criminal nor civil liability on any one. The decree of the circuit court should be reversed, and the case remanded, with instructions to dismiss the bill.

FLEMMING v. STAHL.

(Circuit Court, W. D. Arkansas. December 24, 1897.)

1. DEPUTY MARSHALS—REMOVAL—INJUNCTION.
   A court of equity is without jurisdiction to restrain a removal from office in this class of cases.
2. SAME—POWER TO REMOVE.
   The power of removal is incident to the power of appointment.
3. SAME—CIVIL SERVICE LAW.
   The civil service law never contemplated any interference with the president's power of removal.
4. SAME—REGULATIONS BY PRESIDENT AND COMMISSION.
   Under the civil service law, neither the civil service commission, nor the president, nor both combined, can make any regulations with the force and effect of law, nor will courts of equity enforce them. The president has power to enforce such regulations by the exercise of the power of removal, and, if he does not do so, courts of equity will not interfere.

The plaintiff alleges:

That on the 1st day of July, 1896, he was appointed United States office deputy marshal by the attorney general of the United States upon the recommendation of George J. Crump, at that time United States marshal for the Western district of Arkansas, and on the 3d day of July, thereafter, duly qualified as such, and has since continuously remained in office and acted as such; that on the —— day of ——, 1897, the office of office deputy United States marshal was, by an order of the president of the United States, acting pursuant to a law of congress approved January 16, 1883, entitled "An act to regulate and improve the civil service of the United States," placed upon the qualified civil service list; that by virtue of said order, and the then existing civil service rules, and pursuant to said statute of the United States, all United States office deputy marshals were exempt from removal for political or religious reasons, and were to hold office during good behavior; that, notwithstanding he has satisfactorily discharged the duties of said office, he is informed and believes the present United States marshal for the Western district of Arkansas, Solomon F. Stahl, who duly qualified as said marshal on the —— day of ——, 1897, and who is of a different political belief from plaintiff, is attempting, for political reasons, and none other, to remove plaintiff from his said office of deputy marshal, and will speedily remove him unless restrained by this court.

He therefore prayed for a restraining order. A temporary restraining order was granted, without notice, with leave to the defendant to appear and move to dissolve at any time upon one day's notice. The defendant has interposed a demurrer to the bill, questioning the jurisdiction of the court, and the sufficiency of the facts stated in the bill to justify a restraining order. He has also filed a motion to dissolve the temporary restraining order for the following reasons:

(1) Because the restraining order was granted without notice, and in violation of equity rule 55; (2) because it does not appear that the amount involved is sufficient to give the court jurisdiction of the subject-matter; (3) because the bill is insufficient on its face to justify a restraining order; (4) because there is no equity in the bill.

William A. Falconer, for plaintiff.
Hill & Brizzolara and Frank A. Youmans, Asst. U. S. Atty., for defendant.

ROGERS, District Judge. As to what is the proper practice with reference to granting temporary restraining orders without notice the court is not inclined to consider in this case, nor is it inclined to consider the question as to whether or not it is necessary, in a case of this character, to give the court jurisdiction, that the bill should allege that the amount involved exceeded the sum of $2,000, for the reason that, without reference to what the proper practice is, if the bill stated facts sufficient upon its face to justify a temporary restraining order, the court would grant or continue it now; and, secondly, if it is necessary that the bill should show affirmatively that the amount in controversy involves more than $2,000, exclusive of interest and costs, upon sustaining the demurrer on that ground the bill might be amended in that respect. The court prefers to decide the case upon its merits, and this involves two questions: (1) Whether the court has jurisdiction to grant a restraining order; (2) if it has jurisdiction, then whether or not the term of office of an office deputy marshal expires with the term of his principal,—or, to state the same proposition in another form, whether the present marshal has the right, under the law, to remove the plaintiff, notwithstanding the civil service rules referred to in the bill.

I do not find it necessary to decide in this case whether or not it is true that a circuit court of the United States is without jurisdiction, under all circumstances, to restrain a removal from office; but upon the authority of In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, I am of the opinion that the court has no jurisdiction to restrain a removal in this case. That decision is followed in the following recent cases,—similar cases to the one at bar: Woods v. Gary, decided by Judge Cox in the supreme court of the District of Columbia, and reported in No. 37 of the Washington Law Reporter, dated September 16, 1897; Dudley v. James, 83 Fed. 345, opinion by District Judge Barr, of Louisville, Ky.; Carr v. Gordon, 82 Fed. 373, opinion by Jenkins, circuit judge; Cooper v. Smyth, 84 Fed. —–, decided by Pardee, circuit judge, and Newman, district judge, N. D. Ga.; Taylor v. Kercheval, 82 Fed. 497, opinion delivered by Baker, district judge.

It is not necessary that I should say more in this case, but, as the question has been presented, it is perhaps well enough for me to express the result of my investigations upon the second question also, namely, whether or not the term of office of a deputy marshal expires with the term of his principal; or, in other words, whether the present marshal has the right, under the law, to remove the plaintiff, notwithstanding the civil service regulations referred to in the bill. Both these questions the court answers in the affirmative, upon the authority of the following cases: Woods v. Gary, supra; Dudley v. James, supra; Carr v. Gordon, supra; Taylor v. Kercheval, supra; 3 Dec. Comp. Treas. 648. Opposed to these decisions are the decisions of District Judge Jackson, found in Priddie v. Thompson, 82 Fed. 187, and in an opinion delivered by the same judge on November 13,

1897, in the cases of Butler v. White, Berry v. Same, and Ruckman v. Same, 83 Fed. 578. I have carefully examined the opinions by Judge Jackson, and am unable to concur in the conclusion reached by him. I think the construction which he places upon section 10 of the act of May 28, 1896 (29 Stat. 182) is erroneous. The purpose of that section of the act, I think, is manifest. It was never intended thereby that the appointment of an office deputy marshal should be made by the attorney general. On the contrary, it was contemplated that the appointment should be made by the marshal. Congress intended that the attorney general should determine whether or not the public interest required the appointment of an office deputy, and to determine that fact that section provided that the marshal should state the facts, as distinguished from conclusions, showing necessity for an office deputy, in which event it was provided the attorney general should "allow the marshal to employ necessary office deputies and clerical assistance, upon salaries to be fixed by the attorney general, from time to time, and paid as hereinafter provided." Such office deputy or employé was, nevertheless, a deputy of the marshal, and not the appointee of the attorney general. The object of the legislation was in the interest of economy in the administration of the marshal's office, and to keep the matter of the necessity for the employment of an office deputy and the salary attached thereto under the control of the attorney general. It nowhere appears in that section, or in any other part of the act, that this office deputy has the authority or power to do any official service whatever in his own name. On the contrary, a fair construction of the statute, and the practice which has universally obtained under it, is for him to do every official act in the name of his principal. I do not think there is anything in the act which justifies the conclusion that the office deputy, so far as the power of his principal to remove him is concerned, stands upon any other footing than that of a field deputy. I think it is clearly within the power of the marshal, whenever there is no necessity for the office deputy, to discharge him, and the attorney general, whenever satisfied there was no necessity for him, could also direct his dismissal; and upon the refusal of the marshal to do so the attorney general could enforce his direction by reporting the matter to the president, who could himself enforce obedience to the order, if necessary, by the removal of the marshal himself. The provision was a wise and a prudent one. It gave the attorney general supervisory control over the office expenses of the marshals, and, at the same time, has secured to them such help as they require, and at such compensation as, in the opinion of the attorney general, the services of office deputies are reasonably worth. It was, in my opinion, however, never intended that the relation of such office deputy to the marshal should be disturbed by that legislation. Whatever the deputy did, he did in the name of his principal, and I think his term of office expired with that of his principal, except for the purposes named in sections 789 and 790 of the Revised Statutes of the United States. In other words, I am of opinion that, so far as the office of office deputy marshal is concerned, the power of removal is an incident to the power of appointment.

The only remaining question is as to whether or not the civil service regulations made by the civil service commission and the president, and promulgated by the latter, can have the effect, in any wise, to modify, alter, or change the statute. On that point I content myself with the discussion of Mr. Justice Cox in Woods v. Gary, supra, and concur in the conclusion reached by him, that no such power exists either in the civil service commission or in the president, or in both combined. I concur with him, also, in the conclusion that the civil service law never contemplated that the president, or the commission, or both, could make any rule or regulation which could have the force and effect of law. True, the president may make rules and regulations administrative in their nature, which would govern the policy of his administration, and he could enforce the same by the removal of any person from office who refused to abide thereby. but they could not have the force and effect of law, nor would the courts enforce them. Such rules and regulations are purely administrative, and may be altered, amended, or repealed by the president at any time, or by his successor in office.

An examination of the debates of congress, which will be found reported in the Congressional Record, vol. 14, pt. 1, 47th Cong., 2d Sess., discloses unmistakably the fact that congress never intended that the civil service law should, in any wise, affect the power of removal vested, under the constitution, in the president. The bill seems to have been framed upon the idea of taking away the temptation to remove persons from office by requiring appointments to be made, to fill vacancies, under civil service examinations. The debates will show that the bill was framed to carefully avoid that mooted constitutional question of the power of congress to establish a tenure of office with which the president could not interfere. To those who may be now interested in the subject, I cite from the volume of the Congressional Record above referred to (pages 207–210, 274). On the last-named page Senator Hoar said as follows:

"The measure commends itself to me, also, because it carefully and wisely avoids all the disputed constitutional questions which have been raised in the discussion of this subject. It nowhere trenches upon the constitutional power of the president, under any definition or limitation found in our constitutional discussion. The president's right to make rules, to apply rules, to change rules; the president's responsibility growing out of his constitutional duty to see that the laws are faithfully executed, are not impaired, and, in my judgment, cannot be impaired, by legislation. I do not understand that it has been the purpose of the honorable senator from Ohio, in reporting this bill, in any degree to infringe upon the constitutional prerogative of the executive. It does not assert any disputed legislative control over the tenure of office. The great debate as to the president's power of removal, the legislative power to establish a tenure of office with which the president could not interfere, which began in the first congress, which continued during the contest of the senate with Andrew Jackson, revived again at the time of the impeachment of Johnson, and again in the more recent discussion over the tenure of office bill in the beginning of the administration of President Grant, does not in the least become important under the skillful and admirable provisions of this bill. It does not even (and that is a criticism made upon it, but in my judgment it is one of its conspicuous merits) deal directly with the question of removals, but it takes away every possible temptation to improper removals. What executive, what head of a department, what influential public man anywhere, can seek in the least to force a worthy and deserving public

officer from his office merely that there may be a competitive examination to fill his place,—to fill a place at the bottom of the list, not to fill his place, as is well suggested."

On page 207 of the same volume, Senator Pendleton, who was the author of the bill, said:

"The bill does not touch the question of tenure of office or of removal from office. I see it stated, by those who did not know, that it provides for a seven-years tenure of office. There is nothing like it in the bill. I see it stated that it provides against removal from office. There is nothing like it in the bill."

On page 210 Senator Sherman insisted that the fact that no provision was contained in the bill prohibiting removal from office was a grave fault in the bill. It seems to have been conceded, therefore, on all sides, that the bill made no provision whatever for interfering with the right of the president to make removals.

The conclusion I have reached is that the court was without jurisdiction to grant the original restraining order, that the same was improvidently made, and must be set aside. The power to amend not existing, the bill should be dismissed, at the cost of the plaintiff.

In re BOONE.

(Circuit Court, N. D. California. December 7, 1897.)

No. 12,455.

1. ATTORNEYS—DISBARMENT—POWERS OF FEDERAL COURTS.
   The power of the United States courts to disbar attorneys for general unprofessional conduct, or for particular acts of misconduct not coming within any of the three classes of contempts specified in Rev. St. § 725, is unabridged by statute.
2. SAME—DISCRETION OF COURT.
   A court has the power to disbar an attorney for any willful breach of his professional obligations, and it is its duty to exercise it in a proper case, though it should be exercised with discretion and care, and only upon clear legal proof.
3. SAME—RELATION OF ATTORNEY AND CLIENT—DUTIES OF ATTORNEY.
   An attorney is not permitted, in serving a new client as against a former one, to do anything which will injuriously affect the former client in any matter in which the attorney formerly represented him, though the relation of attorney and client between them has been terminated, and the new employment is in a different case; nor can he use against him any knowledge or information gained through their former connection.
4. SAME—AGREEMENT TERMINATING EMPLOYMENT—CONSTRUCTION.
   An agreement terminating the relations between a client and his attorney, and by which the client releases the attorney "from all rights, burdens, obligations, and privileges which appertain to his said employment," and consents that he may engage his services "pro and con as he may see fit," where the attorney did not advise the client that such was the purpose and meaning of the instrument, will not be construed to authorize the attorney to engage in suits against the client involving matters about which the attorney was formerly employed, or to use against the client information confidentially acquired through such employment.
5. SAME—RELEASE OF ATTORNEY FROM OBLIGATIONS IMPOSED BY LAW.
   An agreement by a client, which purports to release the attorney from all the duties, burdens, obligations, and privileges incident to the relationship, is too indefinite, and therefore inoperative and void, and cannot jus-

tify a violation of the duties and obligations imposed on the attorney by law.

6. SAME—WAIVER OF PRIVILEGE BY CONTRACT.

A contract entered into between client and attorney, for the purpose of binding the former, that the latter may at any time divulge information or knowledge acquired during the professional relation, is not a good waiver of the privilege of confidence and secrecy, and is void.

7. SAME—GROUNDS FOR DISBARMENT.

An attorney who had assisted in obtaining a decree in favor of his client, establishing the validity of certain patents, after the termination of his employment wrote to the attorney of an adversary of his client in another suit involving the same patents, falsely stating that he possessed information that the decree was obtained by fraud, and could be reversed, his purpose being to obtain employment, and use the knowledge obtained by virtue of his former employment against his former client. *Held*, that such conduct was ground for disbarment.

Application on petition of A. B. Bowers for the disbarment of John L. Boone.

Crittenden Thornton, for petitioner.
Dunne & McPike, for respondent.

MORROW, Circuit Judge. This is an application for the disbarment of John L. Boone, a duly and regularly admitted and practicing attorney and counselor of this court. The petition for disbarment is made by Alphonzo B. Bowers, and is as follows:

"That your petitioner is, and has been, the plaintiff or complainant in certain actions at law and suits in equity now and of late pending in this court, as follows: (1) A. B. Bowers v. A. W. Von Schmidt; (2) A. B. Bowers v. Williams & Bixler and Golden State & Miners' Iron Works; (3) A. B. Bowers v. San Francisco Bridge Co. (at law); (4) Same v. Same (in equity); (5) Same v. McNee Bros.; (6) Same v. Pacific Improvement Co.; (7) Same v. City of Oakland; (8) Same v. Oakland Iron Works; (9) Same v. John Hackett et al. That your petitioner is and now, and for a long time has been, the plaintiff or complainant in certain actions at law and suits in equity in the circuit courts of the United States for the circuits and districts hereinafter named: (10) A. B. Bowers v. Linden W. Bates (circuit court, Northern district of Illinois); (11) A. B. Bowers v. Heldmaier & Neu (same court); (12) A. B. Bowers v. American Hydraulic Dredging Co. (same court); (13) A. B. Bowers v. Northwestern National Bank (same court); (14) A. B. Bowers v. Chicago Drainage Commission (same court), (15) A. B. Bowers v. San Francisco Bridge Co. and New York Dredging Co. (circuit court, district of Washington); (16) A. B. Bowers v. The New York Dredging Co. (circuit court, Southern district of New York); (17) A. B. Bowers v. American Dredging Co. (circuit court, Eastern district of Pennsylvania); (18) A. B. Bowers v. Bucyrus Co. (circuit court, district of Wisconsin). That your petitioner is the patentee of the United States under twelve several patents granted to him directly, and is the assignee of eighteen other patents, all connected with the inventions pertaining to the art of dredging, and all and singular the above mentioned and described actions at law and suits in equity were brought to recover damages for and to restrain the infringement of the said patents. That in the action of A. B. Bowers v. A. W. Von Schmidt, lately pending in this court, such proceedings were had that a final decree was duly given and made in favor of your petitioner, and against the defendant therein, enjoining and restraining the defendant from further using said patents, and awarding damages to your petitioner. That in said cause such proceedings were further had that an appeal was taken by defendant to the United States court of appeals for the Ninth circuit, in which, after full argument and due consideration, said decree was in all things affirmed, and an opinion rendered and filed in said causes. That the decisions are of great value to your petitioner, as an explanation and construc-

tion of the law and the facts in said cause, and the legal validity and construction of the patents therein involved, and are entitled to have, and do have, great weight in other courts of the United States when cited in causes now pending as authority, on account of the thorough and exhaustive examination of the law and the facts in and by the said opinions. That for nearly nine years last past one John L. Boone has been, and now is, an attorney, counselor, and solicitor of this court, and was during said period the attorney, counselor, and solicitor of your petitioner, as plaintiff, in the actions and suits hereinabove mentioned as pending in this court. That as such attorney, counselor, and solicitor said Boone possessed the special and peculiar confidence of your petitioner, and obtained full and complete knowledge of and from your petitioner of all the facts and evidence in said causes. That in the progress of said causes your petitioner paid to said Boone for his services the sum of about four thousand dollars in full of all his just claims and demands against your petitioner, and said Boone in the month of April, 1897, withdrew, by mutual consent, from the employment of your petitioner and the further prosecution of said causes. That thereafter the said Boone, with the full intent and purpose to betray the confidence of your petitioner, and to violate his trust and duty as the attorney, counselor, and solicitor of your petitioner, did offer and seek to be employed and retained by the defendant in the action of A. B. Bowers v. Linden W. Bates, and the other cases hereinbefore mentioned, now pending in the circuit court of the United States in and for the Northern district of Illinois, and, in consideration of such employment and retainer, did assert and suggest to Thomas A. Banning, Esq., of Chicago, Ill., at the said city of Chicago, who was then and there the attorney, solicitor, and counselor of Linden W. Bates, the defendant in said cause, that the decree in the cause of A. B. Bowers against A. W. Von Schmidt, hereinabove mentioned, was procured by fraudulent means, and that he (said Boone) could not remain in the case under the circumstances; thereby meaning and intending to convey to said Banning the idea that he, said Boone, knew that the said decree was procured by false and perjured evidence and testimony, and should not have been rendered or made. That your petitioner is ignorant of the particular or specific evidence to which said Boone intended to refer, and is unable to say more than that the said charge is wholly and entirely false and untrue. That all the evidence and testimony in said cause are and were true and genuine, and no other than just, lawful, and honest means were employed or resorted to by your petitioner in said cause. That said offer and statement by said Boone were made with the full intent and purpose to obtain employment by and from said Linden W. Bates and the other cases, under the pretense that he could and would betray the confidence of your petitioner, and disregard his professional obligations, and thereby assist the said Bates and others to defeat your petitioner's actions against him and them, and to thwart, embarrass, and retard your petitioner's suits and actions now pending. That the said offer and statement were made and intended to defraud the said Bates and others out of any money they might pay to said Boone as the price of his treachery or his testimony or his legal services, under the false pretense that he (said Boone) could or would bring forward any proof of his statement or suggestion made to said Banning. That the said statement and suggestion was a gross breach of duty and lack of respect by the said Boone to this honorable court, and a breach of his professional obligation to maintain the respect due to judicial officers and courts of justice. That many months ensued between the conclusion of taking testimony in said suit and the argument thereof. That many months ensued between the argument and the rendition of the decree. That over a year elapsed between the rendition of the decree and the argument on the appeal. That over eighteen months elapsed between the argument and the affirmance of said decree. That said Boone was present at almost all times at the taking of evidence, and must have known what false and fraudulent evidence was given, and when and by whom it was given, and what alleged fraudulent means were used by petitioner to gain a favorable decree in said cause. And your petitioner further shows that on May 11, 1897, at his office in the city and county of San Francisco, at No. 314 Pine street, the said Boone did say to one Samuel H. Saleno, the agent and attorney in fact of your petitioner, that unless your petitioner would carry out some supposed promise alleged to have been made by your petitioner to said Boone some five

years back, in regard to the payment of money, he (said Boone) would accept the retainer that was awaiting him (meaning the alleged retainer sought by said Boone from Linden W. Bates), and the acceptance would be very disagreeable to Bowers. He, said Boone, further said that statements had been made to him in years gone by that would be proof positive of perjury, and which, if made public by the other side, would result in the complete loss of Bowers' patents, and might involve his liberty,—all of which was said by said Boone with a malicious intent and purpose to intimidate your petitioner, and extort money from him without any just claim or demand therefor."

The respondent filed an answer, to which a demurrer was interposed. The demurrer was sustained, and the respondent thereupon filed an amended answer, in which he denies the charges of unprofessional conduct as charged. Testimony was thereupon taken on both sides, and the question to be determined, broadly stated, is whether or not the charges preferred have been sustained.

There seems to be some discrepancy between the views of counsel as to the number of charges preferred in the petition, counsel for petitioner contending that the allegations of the petition sustain four charges of disbarment, while counsel for respondent claim that they make but two. The respondent, undoubtedly, is entitled to notice of the charges preferred against him, and that these should be set out clearly and unambiguously, so that he may know exactly what he is called upon to meet, and may have ample opportunity of explanation and defense. As was said in Ex parte Robinson, 19 Wall. 505, 512:

"This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession as when they are taken to reach his real or personal property. And such has been the general, if not the uniform, practice of the courts of this country and of England. There may be cases undoubtedly of such gross and outrageous conduct in open court on the part of the attorney as to justify very summary proceedings for his suspension or removal from office, but even then he should be heard before he is condemned. Citing Ex parte Heyfron, 7 How. (Miss.) 127; People v. Turner, 1 Cal. 148; Fletcher v. Daingerfield, 20 Cal. 430; Beene v. State, 22 Ark. 157; Ex parte Bradley, 7 Wall. 364; Bradley v. Fisher, 13 Wall. 354. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged."

See, also, Ex parte Garland, 4 Wall. 378; Randall v. Brigham, 7 Wall. 523, 540; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569; Ex parte Cole, 1 McCrary, 410, 411, Fed. Cas. No. 2,973; In re Orton, 54 Wis. 382, 384, 385, 11 N. W. 584; Thomas v. State, 58 Ala. 368, 369; State v. Finley, 30 Fla. 325, 11 South. 674.

In my opinion, the petition, stripped of its recitals and legal verbiage, contains, in effect, two general charges of unprofessional conduct, to wit: (1) Seeking to be employed and retained by the defendant in the suit of A. B. Bowers against Linden W. Bates, and in other cases wherein A. B. Bowers, his former client, was plaintiff, which cases were pending in the circuit court of the United States for the Northern district of Illinois, with intent to betray the confidence reposed in him by the petitioner as his client, and to violate his trust and duty as the attorney, counselor, and solicitor of the petitioner. (2) Seeking to intimidate, and extort money from, the

petitioner at an interview had with one H. S. Saleno, a representative of the petitioner.

The evidence introduced shows that there were but two transactions out of which these charges arose, viz.: (1) That in which the respondent sought to be employed, which is the basis of the first charge; and (2) that in which it is claimed the respondent attempted to extort money from the petitioner, which is the basis of the second charge. The accusation that the respondent, in seeking to be employed as above stated, made false representations to the effect that the decree in the Von Schmidt Case had been fraudulently obtained, is properly part of the first charge, and the respondent's conduct in that connection will be considered with respect to it, and not as a separate and distinct charge.

In the United States courts the power to disbar is to be distinguished, as the law now stands, from the power to punish for contempts. The power of the federal courts to punish for contempts is limited by section 725 of the Revised Statutes. See, in this connection, section 20 of the act of September 24, 1789, and the act of March 2, 1831; the former to be found in 1 Stat. p. 83, and the latter in 4 Stat. 487, 488. In the first place, this section limits the power of the court over contempts by providing that it shall not extend to any cases except (1) the misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice; (2) the misbehavior of any of the officers of the court in their official transactions; (3) the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the court. In the second place, the power to punish for the contempts specified above is restricted to a fine or imprisonment, to the exclusion of any other mode of punishment, including, of course, disbarment. Ex parte Robinson, 19 Wall. 505, 512. But the power to disbar an attorney is inherent in all courts which have the power to admit attorneys, and is necessary to the due and orderly administration of justice, and the protection of the profession itself, and, in so far as the power is exercised for general unprofessional conduct or for particular acts of misconduct not coming within any of the three general classes of contempts specified in section 725, Rev. St., it remains unabridged. The power is exercised, generally, where the attorney proceeded against is shown to have been guilty of such conduct as stamps him to be unfit to remain a member of the profession. Ex parte Robinson, supra. It is not necessary that the acts or conduct complained of should be such as would subject the attorney to an indictment or to any civil liability. Any conduct on the part of an attorney showing his unfitness for the confidence and trust which attend the relation of attorney and client and practice of law before the courts, or indicating such a lack of personal honesty, or of good moral character (although it is not every moral delinquency that will justify disbarment), as to render him unworthy of public confidence, constitutes a ground for his disbarment. 3 Am. & Eng. Enc. Law (2d Ed.) p. 302, and cases there cited; Weeks, Attys. §§ 80, 81, and cases there collated. In brief, the court has the power to disbar an at-

torney for any willful breach of his professional obligations, and not only has it the power, but, whenever a proper case is made out, it is its duty to exercise this power. People v. Barker, 56 Ill. 299; Amey v. Long, 9 East, 481; Jackson v. French, 3 Wend. 337; Coveney v. Tannahill, 1 Hill, 33; Beene v. State, 22 Ark. 157; State v. Holding, 1 McCord, 380; Ex parte Brounsall, Cowp. 829; Bryant's Case, 24 N. H. 149; Smith v. State, 1 Yerg. 228; Ex parte Burr, 9 Wheat. 529. The power should, however, be used with care and discretion, for the infliction of disbarment is regarded as a very severe punishment, and should be exercised only upon clear legal proof. In Ex parte Burr, supra, Mr. Chief Justice Marshall, in speaking generally of the power to suspend and disbar, said:

"On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment, but it must be exercised."

And in the case of Bradley v. Fisher, 13 Wall. 354, the following apt language was used:

"The power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession. * * * Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should, therefore, never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired. * * * The obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers."

See, also, Ex parte Secombe, 19 How. 9.

Having stated the main considerations which govern the action of the United States courts in the disbarment of an attorney, I will now proceed to state the facts of this application as briefly as possible.

The petitioner, Alphonzo B. Bowers, is the inventor of certain machines for and improvements in the art of hydraulic dredging. He is the patentee of 12 several patents granted to him directly, and is the assignee of 18 other patents, all relating to inventions pertaining to the art of dredging. His rights as inventor and owner of the patents referred to have been established after long, continuous, and arduous litigation. In this court alone he has been complainant in no less than nine suits, both at law and in equity, involving the validity of his patents. An equally large number of suits has been brought by him in other circuit courts, both on the Pacific coast and in the East. A number of these suits are, and at

the time of the acts of unprofessional conduct complained of were, pending. The petitioner has been uniformly successful in this litigation, and in the case of Bowers against Von Schmidt, instituted in this court, the validity of his inventions and patents in the art of dredging were thoroughly and exhaustively considered both in this court and the circuit court of appeals. 63 Fed. 572, affirmed in 25 C. C. A. 323, 80 Fed. 121. The petitioner was declared a pioneer inventor in the art of hydraulic dredging, and fully entitled to his patents Nos. 318,859 and 355,251. In the course of this long litigation, and, in fact, it would seem, at its very inception, the petitioner employed the services of the respondent, John L. Boone, as his attorney, counselor, and solicitor. It is averred in the petition, and admitted by the answer, that the respondent acted as the petitioner's attorney for nearly nine years, and then withdrew, by mutual consent, from the employment of the petitioner in April, 1897. The respondent, however, while admitting in his amended answer that he did not withdraw from the employment of the petitioner until April, 1897, when it was mutually agreed that he should do so, nevertheless denies that for the last two years preceding his withdrawal in April, 1897, he had been actively engaged in the prosecution of the suits of petitioner. This denial may, however, be treated as immaterial, in view of the admission that he still remained as the petitioner's attorney of record. The professional relations existing between the petitioner and the respondent were finally terminated on May 1, 1897, when they entered into a mutual contract of release. For at least seven years, therefore, the respondent was actively engaged in representing the petitioner as one of his attorneys in the litigation affecting the validity of his invention and patents. He appeared in several of the cases brought in this court, among which were those of Bowers against Von Schmidt, already referred to, and Bowers against the San Francisco Bridge Company. In these cases the respondent was associated with Mr. John H. Miller, who has remained as the petitioner's attorney in the patent litigation, but does not appear as his legal representative in this proceeding to disbar. The case of Bowers against the San Francisco Bridge Company is an action at law. It was tried before a jury, and resulted in a disagreement. During the course of the trial the respondent went upon the witness stand and testified as a witness on behalf of the petitioner, the plaintiff in the case. The case of Bowers against Linden W. Bates is a suit brought by the petitioner in the circuit court for the Northern district of Illinois, and was pending at the time the alleged acts of unprofessional conduct took place. It does not appear that the respondent ever represented the petitioner in that case. One Thomas A. Banning of Chicago, Ill., was the attorney for Linden W. Bates, the defendant in the case.

Having made this preliminary statement of such general and uncontested facts as are necessary to a proper understanding of the matter, I now proceed to consider the evidence presented with respect to the first charge, viz.: That the respondent sought the employment of the defendant in the case of Bowers against Bates with

the intent to betray the confidence Bowers had reposed in him while the respondent acted as his attorney.

The evidence shows conclusively that the respondent, on June 11, 1897, wrote the following letter to Thomas A. Banning, the attorney for Mr. Bates in the action of Bowers against Bates:

"Telephone, Main 5,410.

"John L. Boone, Attorney and Counselor at Law.

"Practices in State and Federal Courts. Patent Law a Specialty. Rooms 43, 44, 45, 214 Pine Street.

"San Francisco, June 11th, 1897.

"Mr. Thomas Banning—Dear Sir: Yours of June 4th received. Without in any way reflecting upon your good faith and integrity, it would hardly be advisable for me to put in physical evidence the information I referred to, without knowing what use would be made of it, or what my position in regard thereto would be. Suffice it to say that my relation to this case qualifies me to state that the fact I refer to is not simply an important one, but it is a vital one. In my opinion it will reverse the decree already rendered, and will take the sting out of Bowers' patents. Mind you, Mr. Bowers and I have never quarreled; we never had a word of misunderstanding. Since the incident I refer to occurred I have refrained from taking any active part in his case. My withdrawal from his case was voluntary on my part after he had obtained his final decree in the Von Schmidt Case. I drew the contract of mutual release myself, without any previous conversation with him, and after signing it I sent it to him for his signature. He did not even know that I contemplated withdrawing from his case. He never refused to pay me any money,—in fact, I have never asked him for a cent. My withdrawal was because I knew the decree was fraudulently obtained, and I could not remain in the case under such circumstances. In my release Bowers releases me from all obligations, rights, and privileges, and consents that I may take employment contra, so that I am perfectly free to take employment from Mr. Bates or from any one else without in any way violating my professional honor. If I had remained in the case with Bowers, and he had been finally successful, there is no doubt but what I would have been largely paid, but I sacrificed all that to my sense of right and duty. I hardly know what to suggest under the circumstances, but you can readily see that it would not be wise for me to give my knowledge on paper at this time. If Mr. Bates wants to retain me, then it is another matter, as I am free to accept his employment.

"Very truly yours, Jno. L. Boone."

The respondent himself admitted that he had written and sent the letter, so that there is no question of fact about this matter. The most cursory reading of the letter tends to show that the respondent was offering his services to Mr. Bates, Mr. Banning's client, and, as an inducement for such employment, declared that he possessed important knowledge, which his relation to the case qualified him to state was vital, and would reverse the decree already rendered establishing the validity of Bowers' patents, and that this knowledge consisted in his knowing that the decree in the Von Schmidt Case had been fraudulently obtained. In what respect the decree had been fraudulently obtained does not appear from the letter sent to Mr. Banning. There is simply the bare assertion that the respondent was possessed of knowledge that it had been so obtained. What he meant in this regard was subsequently developed from his own testimony, and will be referred to later on. The letter, from its terms, indicates that it was in reply to a letter the respondent had received

from Mr. Banning, which, in turn, as appears from the testimony of the respondent, was in reply to a letter sent by the respondent to Mr. Bates, and appears to have been the first communication by the respondent to Messrs. Bates and Banning in which he broached the subject of his employment and the knowledge he possessed. It was not, however, introduced in evidence, but the respondent testified to its contents as follows:

"I wrote Mr. Bates a letter about the 1st of June. It was a letter, I think, of about five or six lines only, wherein I stated to him that I had withdrawn from the employment of Mr. Bowers, and had his written consent to take employment on the other side. I further said that I was in possession of knowledge that would be important in the litigation, and ended the letter by simply saying, 'What have you got to say about it?' That is all that was said in that letter."

Any doubt about the purpose of these letters is set at rest by the admission of the respondent, in his testimony, that they were written with the end in view of being employed by Mr. Bates. He denied, however, that he ever intended to disclose any of the secrets or knowledge he had obtained during the course of his professional relations with Mr. Bowers, but that he simply intended, if employed, to use such information and knowledge in the cross-examination of witnesses and in his conduct generally of the case. It will be observed that the respondent had withdrawn from the petitioner's employ on May 1, 1897, on which day the mutual contract of release was executed, and that the offer of his services to Mr. Bates took place some time in the month of June following.

It is the general and well-settled rule that an attorney who has acted as such for one side cannot render services professionally in the same case to the other side, nor, in any event, whether it be in the same case or not, can he assume a position hostile to his client, and one inimical to the very interests he was engaged to protect; and it makes no difference, in this respect, whether the relation itself has been terminated, for the obligation of fidelity and loyalty still continues. Parker v. Parker, 99 Ala. 239, 13 South. 520; Spinks v. Davis, 32 Miss. 154; Cantrell v. Chism, 5 Sneed (Tenn.) 116; Clarke Co. v. Commissioners of Clarke Co., 1 Wash. T. 250; Valentine v. Stewart, 15 Cal. 387; Burridge v. Pearson, 55 Cal. 472; In re Stephens, 77 Cal. 357, 19 Pac. 646; Id., 84 Cal. 77, 24 Pac. 46; In re Cowdery, 69 Cal. 32, 10 Pac. 47; Gibson v. Jeyes, 6 Ves. 278; Earl Cholmondeley v. Lord Clinton, 19 Ves. 260; Herrick v. Catley, 1 Daly, 512; Sherwood v. Railroad Co., 15 Barb. 650; Hatch v. Fogerty, 40 How. Prac. 492; U. S. v. Costen, 38 Fed. 24; Weeks, Attys. § 120; 3 Am. & Eng. Enc. Law (2d Ed.) pp. 295–300. Of course, it is conceded that an attorney may represent his client's adversary with perfect propriety whenever their interests are not hostile to each other. The test of inconsistency is not whether the attorney has ever appeared for the party against whom he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and also whether he will be

called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection. Price v. Railroad Co., 18 Ind. 137; Bent v. Priest, 10 Mo. App. 543. An attorney cannot use the knowledge acquired confidentially from his client in trafficking with his client's interests. Hatch v. Fogerty, 40 How. Prac. 492. This general and well-settled rule is not found in any positive enactment. Indeed, none is necessary; it springs from the very nature and necessities of the relation of attorney and client, and finds its highest sanction in the confidential character of that relation. No rule in the ethics of the legal profession is better established nor more rigorously enforced than this one. The relation of attorney and client is one of mutual trust, confidence, and good will. Arrington v. Sneed, 18 Tex. 135. The attorney must use all the care, skill, and diligence at his command on behalf of his client. The relation being, in the highest degree, a confidential one, he is bound to the strictest secrecy and the most scrupulous good faith. He is not allowed to divulge information and secrets imparted to him by his client or acquired during their professional relation, except, perhaps, in very rare circumstances, or when authorized to do so by the client himself. This is the privilege of the client, and not of the attorney, and, unless the client sees fit to waive his privilege, the obligation solemnly rests upon the attorney to keep his lips forever sealed, and to preserve inviolate the confidence reposed in him. The relation may terminate, but the obligation nevertheless continues. In re Cowdery, 69 Cal. 32, 50, 10 Pac. 47, and cases there cited. The duties and obligations of an attorney are aptly and succinctly summed up by Chief Justice Hobart in Herrick v. Catley, 30 How. Prac. 208, as follows: "An attorney oweth to his client fidelity, secrecy, diligence, and skill, and cannot take a reward on the other side." This brief statement of the duties and obligations which an attorney owes to his client demonstrates of itself, if, indeed, any demonstration is necessary, how utterly inconsistent with the proper and faithful discharge of them, and, in fact, totally subversive of them, would be any rule permitting the attorney to occupy a position hostile to his client, or to use against him the knowledge he has confidentially acquired. The authorities are all of one accord on this proposition, and disbarment has invariably been inflicted on the attorney who has violated, or attempted to violate, this rule of professional conduct. In U. S. v. Costen, supra, the facts of a proceeding to disbar were these: An attorney was counsel for the complainant in certain litigation. After acting as such for some time, he ceased to be thus employed, and subsequently offered his services to the other side, and advised its counsel, it seems, through correspondence, that he was in possession of facts of great importance to that side; that he desired employment, but that he wished the fact of his employment concealed. Mr. Justice Brewer, then circuit judge, upon this showing, granted the application for disbarment.

But the respondent contends that his offer of services to Mr. Bates as against the petitioner, his former client, is to be distinguished from the case of U. S. v. Costen, and other cases of a like tenor, on

the ground that the petitioner, in and by the terms of the contract of release executed May 1, 1897, consented that the respondent might take employment against him. This is the important question in the case, and directly involves, manifestly, the terms, scope, and effect of the contract of release heretofore referred to. This instrument is as follows:

"This is a contract of mutual release by and between A. B. Bowers and John L. Boone, whereby the said Bowers releases said Boone from all claims, obligations, and services as his attorney in the various suits and actions relating to dredging machines now pending, wherein said Bowers is plaintiff and said Boone is attorney or solicitor. Said Bowers releases said Boone from all rights, burdens, obligations, and privileges which appertain to his said employment, and consents that said Boone may engage his services pro or con, as he may see fit. In consideration of said release the said John L. Boone hereby releases the said A. B. Bowers from all claims, demands, and obligations for services now or heretofore existing. And it is understood that this mutual release shall apply to all cases now pending, and that the filing of a copy of this agreement in the court where said suits are pending shall be a sufficient evidence of said withdrawal and release."

Upon this contract of release two questions arise: (1) Its construction, and (2) its validity. The circumstances under which the contract was drawn up and executed are significant. They may best be stated in the language of the respondent himself, as the same appears in his testimony:

"Q. (On cross-examination). Mr. Boone, you drew this contract of release, a copy of which is set forth in your answer, dated May 1, 1897? A. I did. Q. Did you have any previous consultation with Mr. Bowers prior to drawing that release? A. Regarding the release? Q. Yes. A. None whatever. Q. Did you advise him of its legal results or consequences? A. I did not. Q. Did you inform Mr. Bowers specifically that, if he executed that release, it was your intent and purpose to seek employment in the action of Bowers v. Bates and Bowers v. Heldmaier and Neu and the other cases then pending in the circuit court for the district of Illinois? A. I had no talk with Mr. Bowers outside of presenting him with the contract. He read it before he signed it. He knew what he was signing. Q. Did you prepare it in your own office and send it by messenger to him? A. I prepared it in my office, and sent it by messenger to Mr. Bowers. Q. He signed it, and returned one copy of it? A. Yes, sir. The Court: Q. By messenger? A. Yes, sir. Q. He did not come to your office? A. No, sir. Q. You had no conversation with him about it? A. Not a word. Mr. Thornton: Q. Did Mr. Bowers know, immediately before you sent him and he received a copy of the contract, that you contemplated withdrawing from his case? A. Not that I know of. The reason that I sent for him afterwards was because Mr. Delmas and I, talking the matter over, thought it would be well to find out his opinion upon that matter. The Court: Q. How did you happen to send that document to him at that particular time? A. I had made up my mind that as soon as the Von Schmidt Case was finished,—that was the one we were engaged in fighting— I would wait until the case was entirely finished, and he got his final decree, and there was no question as to my properly getting out of the case at that time. Q. You knew you could get out of the case at any time? A. I did not care to desert a man while he was under fire. I wanted him to get out clear first. I did not propose to desert him while his patent was in danger. I made up my mind to wait until after the litigation was through with. Q. You had no talk with him about that? A. No talk with him whatever."

From this testimony one thing is plain, and that is that the respondent was grossly remiss in his duty as an attorney in not advising the petitioner as to the exact terms of the contract of release,

and the consequences that might flow from it. It was his bounden duty to give him "all reasonable advice against himself that he would have given him against a third person." Gibson v. Jeyes, 6 Ves. 278; Valentine v. Stewart, 15 Cal. 387; Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836. He admits that he failed completely to do so. He had no right to assume, as is strenuously contended for by his counsel, that the petitioner's familiarity and long experience with litigation were sufficient to enable the latter to pass an intelligent and discriminating judgment on the precise nature and legal effect of the release, or that the petitioner would procure the advice of some other attorney. It was his duty to see to it that the petitioner actually understood and fully appreciated the precise nature and full scope of the document in question. Not having done so, the petitioner cannot be deemed bound by it. It is incredible that the petitioner, had the full scope and probable consequences of the contract of release been explained to him by the respondent, would have consented to it. According to the terms of the release, as contended for by his counsel, the respondent had the right to take employment against the petitioner in the case of Bowers against Bates, and to use the knowledge he had confidentially acquired from the petitioner, while acting as his attorney, in the cross-examination of witnesses and the conduct generally of the case. But the contract is not expressed in these plain words. The nearest approach to it is the following stipulation:

"Said Bowers releases said Boone from all rights, burdens, obligations, and privileges which appertain to his said employment, and consents that said Boone may engage his services pro and con, as he may see fit."

There is certainly nothing in this stipulation, nor in the release, taken as a whole, which states explicitly that Mr. Bowers consented that Mr. Boone should take employment in the suit of Bowers against Bates, nor, in fact, in any case in which Mr. Bowers had appeared as plaintiff, which involved the validity of the patents for which Mr. Boone, in other cases, while acting as his attorney, had litigated; nor is there anything in the entire release which says, in so many words, that Mr. Bowers consented that Mr. Boone should use the knowledge he had confidentially acquired from Mr. Bowers, while acting as his attorney, in the cross-examination of witnesses, or against him in any way. On the contrary, the stipulation is not wholly inconsistent with the interpretation that Mr. Bowers considered that he was merely releasing Mr. Boone from the relation of attorney and client that had theretofore existed between them, and that this termination of their relation, as such, was simply couched in apt legal verbiage. And that part of the stipulation which "consents that said Boone may engage his services pro or con, as he may see fit," is not inconsistent, in the absence of any more definite stipulation, with the idea that it was intended to apply to employments entirely outside of and foreign to Bowers' patents with reference to which Boone had rendered professional services to Bowers. In a case like this, every presumption is in favor of the petitioner and against the respondent, and every doubt must be resolved in favor

of the petitioner. The circumstances under which the release was executed certainly invite the application of such a rule of interpretation. It is inconceivable that the petitioner, having established the validity of his inventions and patents after so much litigation, in which the respondent, as his attorney, had for at least seven years actively participated, would be willing that the latter should use knowledge of the inventions and patents, derived from their professional relations, in behalf of a party who was directly interested in defeating the petitioner's patents. To the petitioner, the ultimate result and successful issue of the litigation affecting his inventions and patents for dredging, and in which he was then engaged, meant his reputation and fame as an inventor, aside from the large financial profits to accrue. That he would thus willingly and freely consent, apparently without the slightest objection or hesitancy, to furnish his adversaries in this very same litigation with weapons with which to contest, and, possibly, defeat, his valuable rights as an inventor and patentee, is, as before stated, almost unworthy of credence. The court will not assist an interpretation that would lead to that result by any presumptions in its favor. Language in a contract of release, such as that introduced in the matter at hand, to justify any such interpretation, would have to be positive, unequivocal, and inconsistent with any other interpretation. Ordinary experience teaches us that men endowed with the ordinary business sense and experience do not enter into such remarkable and prejudicial engagements. While I am of the opinion that the petitioner is not bound by the contract of release, considering the circumstances under which it was executed, still, as the argument at the bar proceeded into the broader channel as to whether or not the release was valid, I prefer to place my decision upon that ground.

Assuming, therefore, for the purposes of the decision, that the petitioner did fully understand the nature, scope, effect, and probable consequences of the contract of release, does it follow that this court will give effect to and recognize such contract as valid, and as affording a justification to the respondent for the acts of unprofessional conduct complained of? The contract of release purports to contain a complete absolution by Bowers, as client, to Boone, as attorney, from all the rights, burdens, obligations, and privileges incident to his employment by Bowers, and an unqualified consent by Bowers that Boone might take employment against Bowers. In other words, the petitioner consented that the respondent, his former attorney, might be employed against him in the very litigation which affected the validity of his patents; that the respondent, being released from all the duties, burdens, obligations, and privileges that appertained to his employment as attorney, was free to divulge knowledge acquired during his professional relation with the petitioner, or to use it against him, if he saw fit. In brief, it would seem as if the petitioner had consented that the respondent, as attorney, might violate with impunity any of the obligations which the law imposes upon the relation of attorney and client. This interpretation may seem as exaggerated as it is startling, but neverthe-

less it is the inevitable result to which the words employed in the release lead us, if we are to accept any interpretation other than that the contract was intended as a mere release of legal services, and to place on record the fact of the termination of the relation of attorney and client. The gross improbability that the petitioner fully understood and appreciated what he really was consenting to, in view of the admitted fact that not one word of explanation or advice about the terms of the release was given him by the respondent, for whose benefit, obviously, the release was given, has already been commented on. But, aside from that, a client cannot consent that an attorney should be released from obligations which the law imposes upon him. A client may waive a privilege which the relation of attorney and client confers upon him, but he cannot enter into an agreement whereby he consents that the attorney may be released from all the duties, burdens, obligations, and privileges pertaining to the relation of attorney and client. I have been referred to no case, nor have my researches been rewarded with the discovery of any authority dealing with a release or contract between attorney and client by which the latter consents to release the attorney from all the duties, burdens, obligations, and privileges peculiar to the relation. I only refer to this fact, not as indicating that I experience any difficulty in determining the invalidity of the release in question, but as tending to show that no such instrument has probably ever before been submitted for judicial scrutiny. In determining that the present contract of release is void, I am guided by reasons of public policy, and by considerations which relate to the due and orderly administration of justice, to the honor and purity of the profession, to the protection of clients, and to the dignity of the court itself. Keeping these considerations in mind, I am firmly of the opinion that a contract, or waiver, or release, or consent, or by whatever name it may be styled, by which it is sought to release an attorney from all the duties, burdens, obligations, and privileges incident to the relation, is totally inoperative and void, and contrary to public policy. It is violative of every principle of professional honor and integrity. It is absolutely inconsistent with the duties, burdens, and obligations which an attorney assumes when he enters into the relation of attorney and client, and, in fact, is subversive of them. To uphold such a release as valid and effectual would be fraught with the most pernicious consequences both to the public and to the profession. It would give rise to most unscrupulous and unprofessional practices, and the rankest frauds could be perpetrated upon unsuspecting and improvident clients, and, perhaps, on the courts themselves. A client, in poor circumstances, could be imposed upon by a rich adversary. The inevitable result of such a doctrine would be to degrade the profession and bring the courts themselves into disrepute. The fact that a client may be willing to enter into such a contract does not justify the court in upholding it, nor can the client's consent or connivance shelter an attorney from unprofessional conduct. Courts owe a duty to themselves, to the public, and to the profession which the temerity or improvidence of clients cannot supersede.

But it is further contended by counsel for respondent that a client may permit his attorney to divulge information acquired during their professional relation, and that the release was valid and operative for this purpose. Undoubtedly it is the law that, as the observance of confidence and secrecy by an attorney is the privilege of the client, the latter may waive the privilege, and consent that the attorney disclose certain information. But such a waiver must be distinct and unconditional. Tate v. Tate, 75 Va. 522. The release in this case is absolutely devoid of distinctness and certainty on this point. It purports to release the respondent from all of the "rights, burdens, obligations, and privileges" appertaining to his employment as attorney for the petitioner. This is too indefinite; besides, it is entirely prospective. It fails to specify when, or to whom, or where, or what particular information of a privileged nature is to be disclosed. Even if it were more clearly expressed, still a contract, entered into between client and attorney, for the purpose of binding the former, that the latter may at any time divulge information or knowledge acquired during the professional relation, is not a good waiver of the privilege, and is void. The client cannot be held bound by any such compact. The privilege was intended for his benefit, and not for that of his attorney. It was intended to be exercised by him freely and whenever the contingency presented itself with the consequences immediately before him. In the present case, if the contract is binding and he subsequently desired to retract his waiver of the privilege, he could not do so. By its terms he would be foreclosed from ever objecting to any professional disclosure the respondent might see fit to make. A privilege or exemption or immunity would cease to be such, and would be rendered useless, if it could be bartered away in that manner. It would be of no benefit to those improvident and misguided persons for whose benefit it was chiefly intended. Kneettle v. Newcomb, 22 N. Y. 249. In that case the reasons upon which the incapacity of parties to contract away their privileges is based are clearly stated. It appeared that the plaintiff had contracted to waive and relinquish all right of exemption of any property he might have from execution on certain debts incurred. This stipulation was contained on several notes upon which plaintiff, in a previous action, had been sued, and as to which judgment had been rendered against him. Execution was issued on that judgment, and the deputy sheriff seized and sold the plaintiff's household furniture and his tools, which were exempt from execution by law. The plaintiff forbade the taking and selling of the property referred to, claiming that they were exempt, by law, from execution, and thereafter brought the case cited to recover for the taking and conversion. The court below had given judgment in favor of the plaintiff, holding that the defendants were not warranted in seizing and selling the exempt property. The court of appeals affirmed this judgment, and Denio, J., in delivering the opinion, used the following clear language:

"The statutes which allow a debtor, being a householder and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity, to a limited amount, are based upon

views of policy and humanity which would be frustrated if an agreement like that contained in these notes, entered into in connection with the principal contract, could be sustained. * * * The law was designed to protect him against his own improvidence in giving such consent. The statutes contain many examples of legislation based upon the same motives. The laws against usury, those which forbid imprisonment for debt, and those which allow a redemption after the sale of land on execution, are of this class. So of the principle originally introduced in courts of equity, and which has been long established in all courts, to the effect that, if one convey land as security for a debt, and agree that his deed shall become absolute if payment is not made by the day, he shall still be entitled to redeem on paying the debt and interest; and so, also, with executory contracts without consideration to make gifts, and the like. In these cases the law seeks to mitigate the consequence of men's thoughtlessness and improvidence, and it does not, I think, allow its policy to be evaded by any language which may be inserted in the contract It is not always equally careful to shield persons from those acts which, instead of being promissory in their character and prospective in their operation, take effect immediately. One may turn out his last cow on execution, or may release an equity of redemption, and he will be bound by the act. In thus discriminating, the law takes notice of the readiness with which sanguine and incautious men will make improvident contracts which look to the future for their consummation, when, if the results were to be presently realized, they would not enter into them at all. If, with the consequences immediately before them, they will do the act, they will not generally be allowed to retract; it being supposed, in such cases, that valid reasons for the transaction may have existed, and that, at all events, the party was not under the influence of the illusion which distance of time creates. Ordinarily, men are held to their executory as well as their executed contracts; but in a few exceptional cases, where the temptation is great or the consequences peculiarly inconvenient, parties are not allowed to make valid prospective agreements."

This language is peculiarly applicable to the contention that the release was valid as a waiver of the privilege of confidence and secrecy on the part of the respondent. The respondent himself appears to have regarded the contract of release inoperative as a legal waiver, for, during his testimony, he sought to purge himself of any unprofessional conduct, by disclaiming that, had he been employed by Mr. Bates, he intended to disclose any knowledge he had acquired from the petitioner during the course of their professional relation, but that he simply proposed to use this knowledge in the cross-examination of witnesses. But it seems very doubtful whether the respondent could have carried out this plan, and yet expect to be employed. It is difficult to understand how he hoped to obtain employment unless he disclosed to Mr. Bates, or to his attorney, Mr. Banning, the nature and particulars of the information which he claimed would show that the decree in the Von Schmidt Case had been fraudulently obtained. It is very doubtful whether either Mr. Bates or Mr. Banning would have accepted the respondent's mere pretense that he possessed important information of the character indicated, and would have rested content with the general statement that he had the information, without obtaining further particulars, so that they might judge of the value, to them, of the alleged information. But, as the respondent has purged himself on this point, his explanation perhaps concludes the court with respect to that feature of this matter. In so far, however, as he proposed to use the knowledge or information which he had gained

from his professional relations with Mr. Bowers in the examination of witnesses, his conduct was certainly unprofessional, and, viewed under the most extenuating circumstances, cannot be condoned. It was an act of disloyalty and infidelity to his client, and a breach of the obligation he owed. The proposed use of information, which an attorney has gained confidentially from his client, in cross examining witnesses for a party who occupies a position necessarily hostile to the interest which the attorney at one time was employed to protect and champion, is just as serious a violation of the obligation to keep inviolate his client's secrets as if the attorney actually divulged the privileged information to his client's adversary. It is a powerful weapon in the hands of an adversary, and may prove most prejudicial to the interests of his former client. No more convincing reason why an attorney should not be permitted to take a position hostile to his client can be urged than the above. The fact that the case in which the respondent proffered his services was not one of the cases in which he had been employed by, and had rendered services to, the petitioner, can make no material difference in the application of the rule. The case of Bowers against Bates involved the same patents at issue in Bowers against Von Schmidt and Bowers against the San Francisco Bridge Company, in both of which cases the respondent had represented the petitioner. This fact presents an insuperable objection, in law as well as in morals, to the respondent acting as attorney for any party or parties whose interests, as in the case of Bowers against Bates, were bound to be hostile to those of the petitioner. Although the application of the rule generally arises where an attorney offers and renders services to his client's adversary in the same suit, still cases may arise, and the present one is an instructive example, where an attorney would be equally false to the obligations of secrecy and fidelity he owes a former client, and could perpetrate as much mischief in rendering professional services against such former client.

It is contended, finally, that the information or knowledge which the respondent referred to in his letter to Mr. Banning, and which he proposed to use in the examination of witnesses as against Bowers, if employed in the case of Bowers against Bates, was not protected as privileged matter, because it related to a fraud perpetrated upon this court in obtaining the decree in the Von Schmidt Case. Undoubtedly it is the rule that the disclosures made by a client to his attorney involving crimes malum in se, or, as in the matter at hand, the prostitution of justice itself, are not protected by the privilege. Bank v. Mersereau, 3 Barb. Ch. 528; 19 Am. & Eng. Enc. Law, p. 140, and cases there cited. It, therefore, becomes necessary to inquire into this alleged fraudulent transaction. In his testimony before the court the respondent explained what he meant by the statement contained in his letter, as follows:

"In either the year 1891 or 1892—I cannot fix the exact date—Mr. Bowers and myself were one day in the office of the master in chancery of this court, in the small room which I now believe is occupied by Judge Morrow as a part of his office. The models in the Bowers Case were all there. We had been examining the models. At the particular time to which I refer I was

seated at the table in the room, and Mr. Bowers was two or three feet to my left, away from me, sitting with this model in his hand. Q. Please to identify it. A. The exhibit is torn off. Mr. McPike: Q. Let me interpose. Do you say this model, or a fac simile? A. No; I do not think it was this model, because it had a leather suction-pipe connection. Here it is. I cannot say whether it is the identical model. It was either the identical model or a similar one. It represented the same model. He was handling the model. I was paying no attention to what was going on. I heard something fall on the floor. I looked around, and I saw a piece of tin of which this is a sample (producing) lying on the floor, fallen in front. As I looked around, Mr. Bowers looked at me, reached over, and picked it up. He said, 'That is all right; we will say nothing about it;' and put it in his pocket. It was not done hurriedly, but very deliberately, as Mr. Bowers always is. We then together took this model. I took it, turned it over, looked at it, and— Now, I say this is the first time since that incident occurred that I have had this model in my hand, and the first time I have put my eyes on it, to my knowledge. I have never gone to the court room to look at this model in any way, shape, or manner. I looked in the cutter. I looked to see if I could find how the piece which had fallen out had been attached, because I saw at once it was the inner cylinder of that excavator. I thought I perceived a line of rotten solder which had attached that to the head of the cutter. Q. Of the suction pipe, you mean? A. The head of the cutter. It formed an extension of the suction pipe extending into the excavator. Q. Is that the part which is referred to in the brief? Mr. Thornton: Whose brief? Mr. McPike: Q. The brief prepared by Mr. Miller, at page 12. The words in italics at the top of page 12: 'As this inner cylinder does not rotate, it is no part of the rotary excavator.' A. That is the part. The Court: Q. Is it that cylinder there (pointing)? A. It was inside. How it came out, I do not know. I did not see it come out. I know it fell on the floor. Mr. McPike: Q. Take that part, and see if you can adjust it. Mr. Thornton: Can you take this apart, Mr. Bowers? The Court: Let me see about this (addressing the witness). Was this the condition in which the exhibit was? A. So far as I can now judge. Q. Is this piece of metal now absent from that? A. It is now absent. Q. It once was in there? A. Undoubtedly."

The model referred to is known as "Model N," and was offered in evidence in the case of Bowers against Von Schmidt, on behalf of Bowers, the plaintiff, on October 28, 1890. This was prior to the alleged act of mutilation. While the respondent cannot fix exactly the date of the occurrence in the master in chancery's room, his testimony shows that it was after January 7, 1891, and prior to October, 1892, because in the month of October, 1892, he took the stand in the case of Bowers against the San Francisco Bridge Company, and testified as a witness in behalf of his client, Bowers, with reference to the condition of this same model. The petitioner denies absolutely that anything of the kind attributed to him by the respondent ever took place. Mr. John H. Miller, his present attorney, took the stand, and testified that he had had occasion to examine this same model very many times; that he was thoroughly familiar with it; that it never had, nor was it ever intended to have, an inner cylinder; that it was in the same condition, with the exception that the rubber suction pipe had been broken off from constant handling, it was in when he first saw it, some time in 1889, when he came into the case. There is therefore an irreconcilable conflict between these parties on this point. It is a fact of significance that the respondent testified as a witness on behalf of the petitioner in the case of Bowers against the San Francisco Bridge Company that the exhibit, which he now says was mutilated by Bowers, was in the same condition as it had always

been. This testimony was given after the alleged act of mutilation in the master of chancery's room had occurred. He testified as follows:

"Q. Are the various models which you say you saw—these various models—in exactly the same condition now that they were at the time they were shown to you? A. Substantially, I think. I don't recognize any change, particularly."

Under this state of facts, I am led to the inevitable conclusion that the respondent is guilty of one of two things,—either he testified falsely, and misled the court, in his testimony given to the court and jury in the case of Bowers against the San Francisco Bridge Company, or else the statement in his letter to Mr. Banning that the decree in the Von Schmidt Case had been fraudulently obtained was a falsehood and a pure fabrication of his mind, made with the evident purpose of throwing discredit on his former client's decree, to impair its value as a precedent and authority, and also to insure his employment by Mr. Bates. He now explains his testimony, given in the case referred to, by stating that he testified that the model was "substantially" in the same condition; that he did not say it was exactly in the same condition. But the court can hardly accept this technical differentiation in his testimony to shield him from the full purport and meaning of his sworn statements. The impression gained from the use of the word "substantially," to the ordinary mind, is that there is no material change; whereas the respondent, in his letter and from his present testimony, would have the court believe that the change in the condition of the model was so substantial that it was important and material enough to reverse the decree rendered in the Von Schmidt Case. He claims, further, that he felt under no obligation to amplify or enlarge or explain his testimony because he was then the attorney for the petitioner, and that he considered that he had no right to divulge voluntarily his client's alleged perfidy and misfeasance. The obligation of an attorney to remain faithful to his client, and to keep inviolate his client's professional communications or knowledge, gained therefrom, while, undoubtedly, going very far in justifying him from making disclosures, still was never understood or intended to justify an attorney in misleading the court itself. While a lawyer may remain passive as to many things which his client reveals to him professionally, still he cannot actively participate and assist his client in perpetrating a fraud on the court. The profession of an attorney, and the obligations he assumes, are intended for the furtherance of justice, not its perversion. But, aside from the moral persuasion that the respondent was under to testify, not only to the truth, but to the whole truth, and nothing but the truth, he was in duty bound, as a matter of law, to state the whole truth. Where an attorney is offered as a witness by his client, he cannot claim his privilege on cross-examination. Crittenden v. Strother, 2 Cranch, C. C. 464, Fed. Cas. No. 3,394; Vaillant v. Dodemead, 2 Atk. 524. While an attorney may be justified in declining to testify on the ground that he would be disclosing professional secrets, still when he does testify he is not justified in perverting the truth to protect his client. If he testifies at all, he must testify fully

and truly. When the petitioner offered the respondent as his witness, he impliedly waived his privilege, and the respondent was morally and legally bound to speak the truth, just as much so as if the petitioner himself had testified to the facts he sought to prove by the respondent as his attorney. While it is true that the respondent is not on trial, in this proceeding to disbar, for the crime of perjury, still his conduct in testifying as he did is subject to the cognizance of the court, affecting, as it does, the integrity of proceedings that have taken place in this court. If the court is satisfied that the respondent did not testify fully and truly, a conviction for perjury is not a necessary prerequisite to disbarment. Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569. If, however, the court should take the other alternative, viz. that the respondent testified truly, but that he grossly misrepresented matters in his letter to Mr. Banning, the result is equally unfortunate for the respondent. It does not become an attorney to cast false reflections upon proceedings in court to the prejudice of his former client's interests, nor to deprive him of the well-earned fruits of a long, arduous, and difficult litigation. Such conduct is certainly unprofessional, and, in my opinion, reprehensible in the extreme. In my judgment, the respondent's testimony given in court in the case of Bowers against the San Francisco Bridge Company must be accepted as true, and his representations in the letter to Mr. Banning and his testimony in the present proceeding as untrue. His own testimony, given in the case of Bowers against the San Francisco Bridge Company, is self-impeaching, and casts discredit on his present testimony. It is absolutely contradicted by the petitioner and by Mr. Miller. I am compelled to accept their version as against that of the respondent, and to believe that the statement in respondent's letter to Mr. Banning, that the decree in the Von Schmidt Case had been fraudulently obtained, was not true, and was made with the purpose of casting discredit on that decree, thereby impairing its value as a precedent and authority; also that it was made with the end in view of obtaining employment as against his former client, the petitioner, and, if successful, of using the knowledge he had acquired confidentially against him. A lawyer who will resort to such practice cannot be deemed a fit member of the profession.

In extenuation of the conduct of the respondent, it is claimed that he was acting in good faith, and really believed that the terms of the release were sufficient to justify him in offering his services to Mr. Bates, and, if employed, to use the knowledge he had acquired confidentially from the petitioner, while acting as his attorney, against him in cross-examining witnesses and the conduct of the case generally, and that he was re-enforced in this view by eminent professional advice, as to which he testified. This advice appears, from his own testimony, to have been sought for and obtained after the release had been drawn up and executed,—a fact which does not commend itself to the claim of good faith so earnestly pressed by his counsel. The mere fact that he supposed that, from a legal standpoint, he was protected in the course he proposed to pursue, does not supply nor justify the entire absence of good faith and fidelity which his conduct towards the petitioner makes so conspicuous. The claim

that he was acting under professional advice cannot shield him from the consequences of his acts of unprofessional conduct. Considering the testimony as a whole, it is difficult to escape the conclusion that the respondent was seeking to betray the interests of his former client, the petitioner.

With reference to the second charge, that the respondent attempted to extort money from the petitioner through his representative, one H. S. Saleno, the testimony between the respondent and the latter is irreconcilably conflicting, and, in the view I take of the first charge, it is unnecessary to consider it.

I have considered this matter very carefully, and have given it a great deal of reflection. It is an unpleasant duty to perform, particularly of an attorney who has been an experienced and successful member of the bar and of this court; but in the view I take of the testimony, coupled with the respondent's own admissions while on the stand, I can come to no other conclusion but that the respondent has been clearly proven guilty of such unprofessional conduct as calls for disbarment. In concluding this already lengthy opinion, I can do no better than quote the felicitous language of Mr. Justice Brewer, then circuit judge, in U. S. v. Costen, supra, as follows:

"It is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights, or supposed rights, in any litigation, with the absolute assurance that that lawyer's tongue is tied from ever disclosing it; and any lawyer who proves false to such an obligation, and betrays, or seeks to betray, any information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust. I can tolerate a great many things that a lawyer may do,—things that, in and of themselves, may perhaps be criticised or condemned,—when done in obedience to the interest or supposed interest of his own client, and when he is seeking simply to protect and uphold those interests. If he goes beyond, perhaps, the limits of propriety. I can tolerate and pass that by; but I cannot tolerate for a moment, neither can the profession, neither can the community, any disloyalty on the part of a lawyer to his client. In all things he must be true to that trust, or, failing it, he must leave the profession."

The application for disbarment upon the first charge made will be granted, and the respondent will stand disbarred, and his name will be stricken from the roll of attorneys and counselors of this court; and it is so ordered.

ALFERITZ v. INGALLS.

(Circuit Court, D. Nevada. December 4, 1897.)

No. 638.

1. CHATTEL MORTGAGE—SUFFICIENCY OF DESCRIPTION.
A chattel mortgage which states that the mortgagor is a stock raiser of Merced county, Cal., and describes the property mortgaged as "8,000 sheep, and the increase thereof, * * * now in the county of Merced, state of California," in effect states that the sheep were at the time of its execution owned by, and in possession of, the mortgagor, in said county; and such mortgage is not void for uncertainty in description of the property.

2. SAME—MERGER BY TAKING NEW MORTGAGE.
The taking by the holder of a chattel mortgage of a second mortgage on the same property to secure the same debt and further advances does

not extinguish the first mortgage, where it is not released, and no agreement for its merger is made.

3. SAME—ENFORCEMENT IN ANOTHER STATE—NECESSITY OF AFFIDAVIT.
Where a chattel mortgage between residents of California, and on property then in that state, was executed in accordance with the laws of that state, it may be recorded and enforced in Nevada after the removal of the property to that state by the mortgagor, without annexing thereto the affidavit required by the Nevada statute to render valid a mortgage there executed.

4. SAME—MORTGAGE OF INCREASE—WOOL SHEARED FROM SHEEP.
A chattel mortgage on "sheep, and the increase thereof," executed in California, where such mortgage is expressly authorized by statute (Civ. Code, § 2955; St. 1893, p. 84), covers the wool thereafter shorn from the sheep, as a part of the increase.

Action by Peter Alferitz against W. A. Ingalls. Tried by the court without a jury.

M. A. Murphy and Lyman I. Mowry, for plaintiff.

P. M. Bowler, for defendant.

HAWLEY, District Judge (orally). This is an action at law, in the nature of replevin, brought by the plaintiff against defendant for the recovery of 92 sacks of wool, or, in case a delivery thereof cannot be had, for the value thereof, and damages for the alleged wrongful taking and withholding thereof. Plaintiff is a resident of the city and county of San Francisco, state of California, and is a partner in the firm of Dellepiani & Co., engaged in the general merchandise business,—especially in the wool commission business. On February 6, 1894, Nicholas Pierre & Co. made, executed, and delivered to plaintiff, for money by him advanced, a promissory note in the sum of $11,200, payable six months after date, with interest thereon at the rate of 1 per cent. per month from date until paid, and to secure the payment of this note, on the same day, made, executed, and delivered to plaintiff a chattel mortgage upon certain personal property, viz.:

"All that certain personal property situated and described as follows, to wit: 8,000 sheep, and the increase thereof, * * * now in the county of Merced, state of California."

And said mortgage was also to secure such further and future advances, not to exceed $1,500, as said Peter Alferitz might make to said Nicholas Pierre & Co., with interest as specified in the promissory note. This mortgage contained the further covenant:

"That, if the mortgagors shall fail to make any payment as in said promissory note provided, then the mortgagee may take possession of the said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount in said note and mortgage specified, and all costs of sale, including counsel fees, not exceeding 5 per cent. on the amount due, paying the overplus to the said mortgagors."

The mortgage was duly acknowledged before a proper officer, and annexed thereto is an affidavit duly sworn to by Nicholas Pierre & Co. and Peter Alferitz, to the effect that the mortgage is made in good faith, and without any design to hinder, delay, or defraud creditors, and was duly recorded in the recorder's office of the county

of Merced, in the Book of Chattel Mortgages, on the 6th day of February, 1894, and at different times thereafter recorded in various other counties in the state of California, and on the 14th day of November, 1894, was recorded in the county records of Esmeralda county, state of Nevada, in the Book of Chattel Mortgages. On the 24th of December, 1896, Pierre & Co. executed and delivered to plaintiff a second note, in the sum of $20,000, and a chattel mortgage, to secure the payment of the note, upon "8,350 sheep, and the increase thereof, * * * now in the county of Esmeralda, state of Nevada," which mortgage contains the same provisions, terms, and conditions as the first mortgage. At the time of the execution of the second mortgage, Pierre & Co. were indebted to Dellepiani & Co. in a larger amount of money than was mentioned in the first mortgage, and the second note and mortgage were given for the amount due at the time of its execution, including the amount specified in the first note and mortgage; the understanding and agreement between the parties being that the first mortgage was not to be released until the second was paid, and then both were to be released at the same time. The defendant is the sheriff of Esmeralda county, and as such levied upon the wool in controversy, as the property of Pierre & Co., by virtue of a writ of attachment in the suit of Alexander Nicholas against Nicholas Pierre & Co., and seeks to justify his seizure of the wool by virtue of the proceedings in said suit. The evidence shows that defendant had knowledge of the existence of the mortgage prior to the levy, and at the time of the levy of the attachment was notified that the wool belonged to Dellepiani & Co. Thereafter due demand was made by plaintiff for the delivery of the property. The case was, by stipulation of counsel, tried before the court without a jury. Upon these facts, and others that will hereafter be noticed, the question arises whether the plaintiff can maintain this action. Several objections were made to the sufficiency of the evidence offered on behalf of the plaintiff, and all those which reach the merits of the case will be specifically noticed.

1. It is claimed on behalf of the defendant that the description contained in the mortgages is fatally defective. The general rule is that the description in a chattel mortgage need not be so specific and certain that the property might be identified by the description alone. If the description of the personal property contained in a chattel mortgage is such as will enable third persons to identify the property, aided by the inquiry which the mortgage itself indicates and directs, the mortgage, when recorded, is constructive notice to all third parties. 5 Am. & Eng. Enc. Law (2d Ed.) 956, and numerous authorities there cited; Jones, Chat. Mortg. §§ 53, 54; McNichols v. Fry, 62 Mo. App. 13, 16; Rawlins v. Kennard, 26 Neb. 181, 41 N. W. 1004; Duke v. Strickland, 43 Ind. 494, 499; Wells v. Wilcox, 68 Iowa, 708, 28 N. W. 29; Brown v. Holmes, 13 Kan. 482, 492; Comins v. Newton, 10 Allen, 518; Kenyon v. Tramel, 71 Iowa, 693, 28 N. W. 37; Scrafford v. Gibbons (Kan. Sup.) 24 Pac. 968. Applying this rule to the facts in this case, I am of opinion that the description in the mortgages was sufficient to enable third parties to ascertain the identical property mortgaged. The first mortgage declares that

it is made by Nicholas Pierre & Co., of the county of Merced, in the state of California; by occupation, stock raisers. The second mortgage contains the same words, except the substitution of the words "of the county of Esmeralda, state of Nevada." The facts set out in the mortgage, when properly construed, are to the effect that the property specified in the first mortgage was at the time of its execution owned by, and in the possession of, the mortgagors, in Merced county, Cal., and that the second mortgage was upon property then situate in Esmeralda county, Nev., in the possession of, and owned by, the mortgagors. Such descriptions have generally been held sufficient. Corbin v. Kincaid, 33 Kan. 649, 653, 7 Pac. 145; Wells v. Wilcox, supra; Adamson v. Horton, 42 Minn. 161, 43 N. W. 849; Shaffer v. Pickrell, 22 Kan. 619, 623; Crisfield v. Neal, 36 Kan. 278, 281, 13 Pac. 272. In Shaffer v. Pickrell, supra, the description was, "250 stock hogs owned by the said D. B. Mott, in Franklin county, Kansas." The court, after referring to a clause in the mortgage with reference to the default similar to that contained in the present mortgage, said:

"A fair construction of these provisions is that the hogs, at the execution of the chattel mortgage, were owned by D. B. Mott, the mortgagor; that they were then in Franklin county, in this state, and were also in the possession of said Mott, in said county. * * * The suggestion that Mott may have had 500 or 5,000 hogs of the same description in Franklin county, from aught that appears in the mortgage or in the record, is without particular force, as the canon of construction is to solve the doubts, if any exist, in favor, rather than against, the validity of a written instrument; and we have no right to imagine facts to exist in the record to invalidate and destroy the chattel mortgage."

The description directed parties to the situs of the property in Merced and Esmeralda counties at the time of the execution of the mortgages. This directed third parties to the starting point of inquiry. But the large bands of sheep on this coast are not usually kept on any particular farm or range. They are generally driven, as in the present case, from one county to another in the same state, or across the line into another state. In the summer time they are driven into the mountains, grazing upon the public lands, and there herded and kept, and upon the approach of winter are driven back to the valleys. The most the mortgage can do is to direct the attention of the parties to the time and place where the property was at the time of the execution of the mortgage, and it would be their duty, under such circumstances, to ascertain whether the property in the possession of the mortgagor at another place was the same band of sheep that was mortgaged. Any person who read the mortgages in question would naturally have concluded that the property would be, as it was, found in the possession of the mortgagors, and could readily have ascertained, upon inquiry suggested by the records, whether the sheep were of the same band described in the mortgages. As was said in Shellhammer v. Jones, 87 Iowa, 520, 523, 54 N. W. 363, 364, "A reasonably prudent man, who desired to protect himself, would have done so." See, also, Harris v. Kennedy, 48 Wis. 500, 505, 4 N. W. 651. The statute of this state to regulate "marks and brands of stock" (Gen. St. Nev. § 757 et seq.), relied upon by defendant, only applies to "stock

running at large," and provides the means by which the owner can identify his property, as the marks and brands, as recorded. are made prima facie evidence of ownership, and of the right of possession to the animals. Undoubtedly, it would in all cases be safer, better, and clearer if such marks and brands were mentioned in the description given in a chattel mortgage, as it would obviate objections that might otherwise be urged to the validity of the description. But the decisions are universal to the effect that it is not necessary that the description in the mortgage should be such as would enable a stranger to identify the property. In Eddy v. Caldwell, 7 Minn. 225, 231 (Gil. 166), the court, in answering an objection that the description in a mortgage did not describe the property mentioned in the pleadings, said:

"The mortgage purports to convey ten horses in the possession of the party of the first part. It would be impossible to determine, from an inspection of the mortgage itself, whether the property mentioned in the pleadings was the same as that included in the mortgage or not, however minute the description of the property in the mortgage might be, since there might be many other horses of the same description. In probably the great majority of cases of mortgages of personal property, the description cannot be so exact and certain that a person could infallibly determine therefrom that the article in question was covered by the mortgage. Had the mortgage in this case described the property in the same language employed in the complaint, to wit, two long-tailed gray horses, it would still have been necessary to introduce the mortgage in evidence, and prove dehors the instrument that the horses taken by defendant were the same as those mentioned in the mortgage."

In Willey v. Snyder, 34 Mich. 60, Chief Justice Cooley said:

"If a stranger is to be sent out to select property mortgaged, with no other means of identification than such as are afforded by the written description, and without being at liberty to supplement that information by such as can be gained in the mortgagor's neighborhood by inquiry of those who know what property the mortgagor was possessed of which would answer the description in the instrument when it was given, and by possessing himself of such other circumstances as persons usually avail themselves of in applying written descriptions to the things intended, it is much to be feared that the stranger would be so often at fault that chattel mortgages, if their validity depended upon his success in identifying the property, would seldom be of much value as securities. Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect,—the parties and their privies. A subsequent purchaser or mortgagor is supposed to acquire a knowledge of all the facts. so far as may be needful to his protection, and he purchases in view of that knowledge."

In addition to the authorities heretofore cited, see Elder v. Miller, 60 Me. 118; Johnson v. Grissard, 51 Ark. 410, 415, 11 S. W. 585.

Descriptions of personal property in a chattel mortgage are not required, of themselves, to fully identify the property. They are required to furnish the means and information by which, upon inquiry, the property can be identified. That is certain which can be made certain by making the inquiry indicated and directed by the mortgage. As was said by the court in Coughran v. Sundback (S. D.) 70 N. W. 644:

"The maxims of jurisprudence that 'All is certain which can be made certain,' and that 'An interpretation which gives effect is preferred to one which makes void,' have been made statutory canons of construction by which to determine the validity of the instrument."

It follows from the views herein expressed that the description given in the mortgages is not void for uncertainty.

2. It is next claimed that the mortgages are invalid because no affidavit is attached thereto as required by the statute of Nevada which reads as follows:

"No such mortgage shall be valid for any purpose as against other than the parties thereto, unless there be appended or annexed thereto the affidavits of the mortgagor and mortgagee, or some person in their behalf, setting forth that the mortgage is made in good faith, and given for a debt actually owing from the mortgagor, stating the amount and character of such debt, and that the same is not made to hinder, delay or defraud any creditor of the mortgagor." St. 1887, p. 66.

The words, "and given for a debt actually owing from the mortgagor, stating the amount and character of such debt," are not included in the California statute. The first mortgage was made, executed, and delivered while the sheep were in the state of California, and the affidavit annexed thereto complied with the laws of that state. Meherin v. Oaks, 67 Cal. 57, 7 Pac. 47. The affidavit in the second mortgage is the same as in the first, but the mortgage states that Pierre & Co. were of the countv of Esmeralda, in this state, instead of the "county of Merced, in the state of California," as mentioned in the first mortgage. There are authorities which hold that the recitals in the mortgage may be regarded as evidence of the existence of the debts against subsequent creditors; and it may be that, if such a rule was to be followed, the affidavit in the second mortgage might be held to constitute a substantial compliance with the Nevada statute. Fletcher v. Bonnet, 51 N. J. Eq. 615, 28 Atl. 601; Camden Safe-Deposit & Trust Co. v. Burlington Carpet Co. (N. J. Ch.) 33 Atl. 479, 481. See, also, Petrovitzky v. Brigham (Utah) 47 Pac. 666. But it will be unnecessary to determine whether the affidavit in the second mortgage, if considered as made in this state, complies with the Nevada statute or not, unless the first mortgage was, as is claimed by defendant, merged in the second mortgage, or that it was necessary, upon the recording of the first mortgage in this state, to have annexed to it an affidavit in strict conformity with the laws of this state; for, if the first mortgage is in all respects valid and can be enforced in this state, it is sufficient to entitle plaintiff to recover.

3. Upon the proofs in this case, it clearly appears that the first note and mortgage were not merged in the second. The indebtedness evidenced by the first note, and secured by the first mortgage, was not extinguished. The first note was not paid, nor was the mortgage released, at the time of the giving of the second note and mortgage. On the contrary, the agreement between the parties was that the first note and mortgage should be retained by the mortgagee until the indebtedness from the mortgagor to the plaintiff was fully paid. The law is well settled that a mortgage is not merged by taking a new mortgage upon the same property for the old debt and further advances, or for the old debt and interest accrued upon it, if the old mortgage has not been released, or an agreement made that it should be released. In Gregory v. Thomas, 20 Wend. 17, the court said, in reply to the argument of defendant's counsel that the second mortgage extinguished the first:

"The argument is against all the books, ancient and modern. Adjudications of several centuries upon such cases, of every variety of form, in England, in this state, and in neighboring states, settle the proposition that a subsequent security for a debt, of equal degree with a former, for the same debt, will not, by operation of law, extinguish it."

In Hill v. Beebe, 13 N. Y. 556, 564, the court said, speaking of the rule announced in Gregory v. Thomas:

"That case contains so thorough an exposition of the doctrine, both upon principle and authority, that it would be useless now to enlarge upon it. The proposition is, indeed, quite elementary, that the mere act of taking a new security from the same party, and upon the same property, does not merge or extinguish a prior one, where both are of the same quality and degree."

To the same effect, see Shuler v. Boutwell, 18 Hun, 171; Griffith v. Grogan, 12 Cal. 317, 323; Crary v. Bowers, 20 Cal. 85, 88; Welch v. Allington, 23 Cal. 322; Jones, Mortg. § 862.

4. The first note and mortgage being properly executed in accordance with the statute of California, where they were made, was it necessary, when the property was brought into Esmeralda county, in this state, to annex to the mortgage an affidavit as required by the laws of this state? This question should, in my opinion, be answered in the negative. In proceedings appertaining to chattel mortgages, the lex fori, or the law of the place where the relief is sought or the action brought, will control as to all questions of form, process, and practice. 4 Enc. Pl. & Prac. 508. But, if the situs of the property at the time the mortgage was given be different from the place of contract, then the lex situs will control upon questions of record and local requisites of a valid mortgage. The mortgagors and mortgagee in the present case were, at the time of the execution of the first note and mortgage, residents of the state of California; and the sheep specified in the mortgage were situate in Merced county, where the mortgage was first recorded. The aid of the court may be invoked, and this law applied, wherever the property may be traced. The fact that the mortgagors were allowed to remain in possession of the sheep, and to bring them into this state, where the mortgage was again recorded, should not affect the mortgagees' rights. Whatever rights the parties had in California were fully perfected, and binding upon third parties as well as between themselves. Rights thus perfected in one state ought to be, and generally are, respected in other states into which the property may thereafter be brought. It cannot consistently be claimed in this case that by the law of this state the retention of the possession of the property by the mortgagors is conclusive evidence that the mortgage is fraudulent, unless a new affidavit in strict compliance with the laws of this state was annexed to the mortgage at the time of its being recorded in Esmeralda county. The law in respect to personal property is, as before stated, that the validity of transfers depends, in general, upon the place where the contract was made. The contract, so far as the evidence in this case goes, appears to have been made in the utmost good faith in California, between citizens of that state, and in relation to property there situate, with no purpose of evading any law of this state. Its validity under the laws of California should be here respected and upheld. It would be a harsh and severe rule to hold that such a mortgage,

valid in California, where executed, should be held invalid in Nevada, in respect to personal property of a migratory character, passing over the line of one state into another. Such contracts, if valid where made, should be held valid here. In Iron Works v. Warren, 76 Ind. 513, it was held that a chattel mortgage executed and recorded in another state, where the parties resided, upon property situate in the state of Indiana, but not there recorded, was invalid, as against attaching creditors; but the court expressly recognized the rule to be that a chattel mortgage executed and recorded in the state where the property is situate will, if valid under the laws of the place of execution, be enforced by the courts of the state into which the property is afterwards brought by the mortgagor, unless there is some statute to the contrary, and numerous authorities are there cited in support of this rule. See, also, 5 Am. & Eng. Enc. Law (2d Ed.) 1011, and authorities there cited; Jones, Chat. Mortg. § 299; Hubbard v. Andrews, 76 Ga. 177; Ferguson v. Clifford, 37 N. H. 86; Ballard v. Winter, 39 Conn. 179; Craig v. Williams, 90 Va. 500, 505, 18 S. E. 899; Bank v. Morris, 114 Mo. 255, 263, 21 S. W. 511; Handley v. Harris, 48 Kan. 606, 29 Pac. 1145; Bank v. Massey, 48 Kan. 762, 30 Pac. 124; Herm. Chat. Mortg. § 79; Riddle v. Hudgins, 7 C. C. A. 335, 58 Fed. 490, 494.

5. Before reaching the main question involved in this case, it is deemed proper briefly to refer to different rules of decisions as to the character of the title acquired by the mortgagee of personal property, as found in California and in other states. In the earlier decisions, as well as in the later ones, which follow the principles of the common law, the rule is that a chattel mortgage is something more than a mere security; that it is a conditional sale of personal property, and operates to transfer the legal title to the mortgagee, which can only be defeated by a full performance of the conditions mentioned in the mortgage. 5 Am. & Eng. Enc. Law (2d Ed.) 947, and numerous authorities there cited; Jones, Chat. Mortg. 1; 1 Jones, Mortg. (4th Ed.) 1, 11; Heyland v. Badger, 35 Cal. 404; Berson v. Nunan, 63 Cal. 550; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626; Murray v. Loushman, 47 Neb. 256, 66 N. W. 413; Cahoon v. Miers, 67 Md. 573, 11 Atl. 278; Pyeatt v. Powell, 2 C. C. A. 367, 51 Fed. 551. The decisions rendered under the statutes and registry laws of various states declare the rule to be that the title to personal property in a chattel mortgage remains in the mortgagor until devested by foreclosure and sale; that the mortgage is merely security for the debt, and only creates a lien upon the property. 5 Am. & Eng. Enc. Law, 988; Shoobert v. De Motta, 112 Cal. 215, 44 Pac. 487; Bank v. Erreca, 116 Cal. 81, 47 Pac. 926; Hixon v. Hubbell (Okl.) 44 Pac. 222; Campbell v. Iron Co., 83 Ala. 351, 357, 3 South. 369. If the first rule above stated should be applied, it would end this case in favor of the plaintiff; for, if he is invested with the legal title to the sheep mentioned in the mortgage, he would undoubtedly be entitled to the produce thereof,—to the wool on their backs, and to the wool shorn therefrom. It is earnestly argued by plaintiff that this case should be decided upon the rule announced in Berson v. Nunan, supra, because the mortgage in this case was

executed and delivered when the rule laid down in that case was the law of California, and became a part of the contract in the mortgage; that the rule announced in Berson v. Nunan was approved in Beamer v. Freeman, 84 Cal. 554, 24 Pac. 169; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626; Cardenas v. Miller, 108 Cal. 250, 39 Pac. 783, and 41 Pac. 472,—and remained the rule of property in this class of cases up to the time of the decision in Shoobert v. De Motta, supra; that to apply the rule in the latter case would impair the obligation of the contract, under the doctrines announced in the supreme court in several cases, and expressed in Douglas v. County of Pike, 101 U. S. 677, 686, where the court said:

"As a rule, we treat the construction which the highest court of a state has given a statute of the state as part of the statute, and govern ourselves accordingly; but, where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected. * * * The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same, in its effect on contracts, as an amendment of the law by means of a legislative enactment."

From the views which will be expressed hereafter, it may be conceded, for the purposes of this opinion, that the case of Berson v. Nunan, and the other cases cited, as claimed by defendant's counsel, did not lay down any rule of property, because the question as to the title of property was not necessarily involved therein, and that the rule announced in Shoobert v. De Motta should be followed by this court.

6. This brings us to the vital question involved in this case: Does a chattel mortgage of "sheep, and the increase thereof," cover the wool which is thereafter shorn from the sheep? It was admitted upon the oral argument by the respective counsel that after diligent search they had not been able to find any authorities directly in point upon this subject. The question must therefore be solved by analogy of the principles found in the adjudicated cases, and by the reasons advanced in favor of or against the proposition. With reference to the authorities, it may be stated in the outset that there is nothing in the principles announced in Shoobert v. De Motta and Bank v. Erreca adverse to the proposition that wool would be included in the general term, "sheep, and the increase thereof." In neither of those cases was this question in any manner involved. In the Shoobert Case the controversy was over the lambs. The mortgage was only for "sheep." Now, under the law, the parties might have included "the increase thereof," but they did not do so; and the court, discarding the rule that the title passed to the mortgagee, held that, "in the absence of any express agreement upon the subject, the lien created by a mortgage is limited to the property which is described in the mortgage"; that, inasmuch as the mortgagor retained the possession of the property, he was at liberty to

deal with and use it as its owner; and that whatever income or profit might be derived from such use belongs to him, and not to the mortgagee. Why? Because he had not specified the income or increase of the property in the mortgage. This is made clear by the illustration given in the opinion:

"If, in the case of sheep, the use to which he puts the ewes is for breeding lambs, there can be no sufficient reason given why the lambs that are dropped by the ewes should belong to the mortgagee, any more than the wool which is sheared from their backs."

The lambs and the wool are thus treated as being subject to the same rule. The mortgagor, having limited the lien of the mortgage to sheep, necessarily excluded the "increase thereof"; and hence neither the lambs, nor the wool sheared from the sheep, could be included in the mortgage. But in a case like the present, where the mortgage includes the "sheep, and the increase thereof," is there any sound or sufficient reason why the wool that is sheared from the sheep should not be included in the mortgage, as well as the lambs that are dropped by the ewes? Reference is made in the Shoobert Case to Simpson v. Ferguson, 112 Cal. 180, 40 Pac. 104, and 44 Pac. 484, where the mortgagee, having a real-estate mortgage upon land, with the "rents, issues, and profits thereof," attempted to hold the personal property against a subsequent, properly executed, chattel mortgage of the growing crop of a subsequent year. It was held that this could not be done; the reason given being that a mortgage upon a growing crop must, in order to create a lien thereon, be executed with the formalities prescribed in section 2956 of the Civil Code,—otherwise it is void, as against a subsequent mortgage of the crop in good faith. If the mortgagee in the prior mortgage of the land desired to have a lien on the growing crops, against third parties, he should have included the personal property in a chattel mortgage. In Bank v. Erreca the mortgage, as in the Shoobert Case, was upon sheep only. It involved questions as to the lambs that had been born from the mortgaged sheep subsequent to its execution, and to the wool that had grown upon the sheep described in the mortgage after its execution, and sheared therefrom by the mortgagors. The court held that the lien of the mortgage extended only to the sheep expressly describd in the mortgage, and that, the lambs and wool being excluded from the mortgage, the mortgagor might sell and dispose of the same. Let us examine still more closely the reasoning in that case. The court said:

"In Shoobert v. De Motta, 112 Cal. 215, 44 Pac. 487, it was held that in this state the lien of a chattel mortgage upon domestic animals does not cover the increase of the animals, unless expressly mentioned therein. The provision in section 2955 of the Civil Code authorizing the execution of a chattel mortgage upon 'sheep, and the increase thereof' (St. 1893, p. 84), does not extend the lien of a mortgage upon 'sheep' to the 'increase' of the sheep, but implies that, unless the increase is covered by the terms of the mortgage, it is not included therein."

In other words, if the language of the mortgage had been "sheep, and the increase thereof," it would have included the lambs and the wool,—the progeny and product of the sheep. Can any other rational conclusion be drawn from the language used? This conclusion must,

in natural reason, be true, whether any authorities directly in point can be found or not. No authorities to the contrary have been cited. This case does not involve any question as to the lambs, the natural progeny of the sheep, but does directly present the question whether wool is included under the term "sheep, and the increase thereof." The owner of sheep owns all of their products and accessions, as well as all the progeny born from the parent stock. The sheep is the mother of both. Being so the owner, he can create a lien upon the products and progeny as well as the sheep. Was it necessary, in order so to do, to mention the wool grown and growing upon the backs of the sheep, or to be sheared therefrom? Was it not sufficient to use the words of the statute of California, as shown in the decisions, "sheep, and the increase thereof"? Now, if it be true that all things have a potential existence which will come into existence after the contract by mortgage is made, by means of the ordinary and natural operations of nature, does it not follow that the mortgagor can create a lien thereon, when the same is brought forth, by the use of apt words, which in their ordinary and legal significance are sufficient to include the same? What is meant by the words "and the increase thereof"? It is an elementary principle of construction that words used in a statute are to be given their ordinary, general, and unrestricted meaning, unless the context thereof, or the scope and purpose of the statute, clearly indicate that the words are to have a restricted or limited meaning. What is the meaning of the word "increase," as used in the term "sheep, and the increase thereof"? What do the lexicographers say? "Increase." Webster: "That which is added to the original stock by augmentation or growth; produce; profit; interest; progeny; issue; offspring." Century: "The amount or number added to the original stock, or by which the original stock is augmented; increment; profit; interest; produce; issue; offspring." Standard: "(1) Produce, as of crops; (2) increment by generation; progeny; (3) commercial or financial increment; profit; interest." Accepting these definitions of the word "increase" as correct, it necessarily follows that the wool in controversy in this suit, being the natural increase of the sheep, is included in the term "sheep, and the increase thereof."

7. The only other question to be determined is as to the value of the wool at the time and place where it was wrongfully taken by the defendant. From the evidence, I find this value to be $3,542. The damage for the wrongful withholding thereof, there being no evidence as to any special damages, is the legal rate of interest in this state from the date when the property was taken up to the present time. Judgment will be entered in favor of the plaintiff in accordance with the views herein expressed, with costs.

CRAWFORD v. FOSTER.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1897.)

No. 428.

1. ERROR—QUESTIONS FOR REVIEW.
On error from proceedings upon a motion to revive a judgment in which the court made no special findings, the only questions for review are rulings of the court made at the trial.

2. NOTICE—SERVICE—APPEARANCE.
Insufficiency of notice of a motion to revive a judgment and irregularity in its service are cured by appearance at the trial.

3. ERROR—EVIDENCE—BILL OF EXCEPTIONS.
Assignments of error involving questions of fact will not be considered on error in law actions, and particularly where the bill of exceptions does not purport to contain all of the evidence.

4. REVERSAL—HARMLESS ERROR.
A cause will not be reversed for purely formal errors in awarding an execution when no prejudice results.

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

This was a motion by William Foster under the Indiana statute to revive a judgment at law against Henry Crawford. A judgment of revivor was entered in the court below (80 Fed. 991), and the defendant sued out this writ of error.

A. W. Hatch, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This was a proceeding below on motion under section 675 of the Indiana Revised Statutes of 1881 (section 687 Rev. St. Ind. 1894) to revive a judgment at law. The case is brought here upon a writ of error, and, if governed by the rules applicable to that class of cases, the record presents no question for consideration. There was no right of trial by jury (Plough v. Reeves, 33 Ind. 181; Plough v. Williams, Id. 182; Evansville Gas-Light Co. v. State, 73 Ind. 219), and, consequently, a waiver of the jury was not necessary; but there seems to be no reason why in other respects the mode of preserving questions for the decision of this court should not be the same as in an ordinary action at law where the right of trial by jury has been waived by stipulation in writing. The proceedings upon the motion were had in, and are to be regarded as a part of, the original action at law in which the judgment to be revived was rendered. It follows that, the court having made no special finding of the facts, the only possible questions for consideration must have arisen upon "the rulings of the court in the progress of the trial of the cause." Rev. St. U. S. § 700. The first three specifications of error have reference to supposed irregularity in the order made by the court for the service upon the appellant of notice of the motion to revive, and to alleged insufficiency of the notice; but the subsequent full appearance of the appellant by counsel at the hearing cured whatever faults of that character there may have been. The fourth, sixth, seventh, eighth, and ninth specifications all involve questions of fact which

cannot be considered, not only because in a law case this court does not review the evidence, but in this instance could not, because the bill of exceptions does not purport to contain all the evidence. The fifth specification is that the court erred in awarding the issuance of an ordinary execution upon the judgment. If there was error in this respect, it was purely formal; and if, in any possible way, harmful, the way has not been suggested, and is not perceived. Besides, the objection was not made in the court below, and therefore is not available here. Questions outside of the assignment of errors, of course will not be considered. The judgment below is affirmed.

RUSSELL v. BOHN MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1898.)

No. 408.

1. ASSIGNMENT OF ERROR—DIRECTING VERDICT.
   On error to a circuit court from a ruling directing a verdict for the defendant, the assignment of errors should contain a separate specification for each count of the declaration upon which the right to go to the jury is asserted.
2. SAME—REVERSAL—NEW TRIAL.
   A specification that "the court erred in taking the case from the jury, and directing a verdict for the defendant," is sufficient, under rule 11, providing that the court may, at its option, notice a plain error not assigned, and the proceedings will be reversed when, from the record, there appears nothing to bar a recovery on one cause of action set forth in the declaration, but the new trial in such case will involve only questions affecting such cause.

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

This was an action by Albert Russell against Bohn Manufacturing Company to recover in assumpsit for money had and received. The circuit court directed a verdict for the defendant, and the plaintiff brings error.

Julius H. Johnson and A. B. Melville, for plaintiff in error.

George A. Carpenter, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. In this case the court directed a verdict for the defendant, and the plaintiff prosecutes the writ of error. Besides a number of special counts, based on alleged breaches of contracts for the sale of lumber, the declaration contains the common counts in assumpsit. The ruling of the court in taking the case from the jury involves, therefore, as many separate questions as there are distinct counts, and by a strict construction of rule 11 of this court (21 C. C. A. cxii.) the assignment of errors should have contained a separate specification for each count on which the right to go to the jury is asserted, but, instead, it is alleged in a single specification that the court erred in taking the case from the jury and in directing a verdict for the defendant, and on that we are asked to determine

whether, upon the entire declaration, and especially whether, upon the common count for money had and received, the case should have been submitted to the jury. Under the last clause of the rule "the court, at its option, may notice a plain error not assigned," or, of course, one of that character which is imperfectly assigned. We are of opinion that such an error is apparent in the record. The plaintiff testified distinctly that at the contract prices the lumber received by him amounted to a sum named, and that the payments made exceeded that amount by $1,207.70, and, if that be true, there is nothing in the record to bar a recovery of the excess. Settlements of differences growing out of their contracts were made by the parties on August 23 and December 12, 1893, but payments were made by the plaintiff after the latter date, and the question of overpayment therefore could not have been included in either settlement. In other respects no error is perceived in anv of the rulings of the court, and the new trial which is ordered will be only upon the question whether the plaintiff in error is entitled to recover for an excess of payments over the aggregate prices of the lumber received of the defendant. The judgment below is reversed, at the cost of the defendant in error, with direction to grant a new trial.

THE TRAVELLERS INS. CO. v. THE WILD RIVER LUMBER CO.

(Circuit Court of Appeals, First Circuit. November 5, 1897.)

No. 218.

INDEMNITY INSURANCE—CONSTRUCTION OF POLICY.

A lumber company procured a policy insuring it against loss from liability to any persons who should "sustain accidental bodily injuries under circumstances which shall impose upon the insured a common-law or statutory liability therefor." The application contained the following: "It is understood that, in the conduct of a portion of their business, the assured employ a railroad owned by themselves, and used only for their own lumbering purposes." The company's lumbering operations were carried on on its own land, remote from other settlements; and it had mills, dwellings, and a store for supplying its workmen and agents. It owned a railroad, some 3½ miles long, for the transportation of its lumber supplies, workmen, and such persons as had business at its mills or store. Two commercial travelers, who had come to its premises to take orders for supplying its store, were, by a special arrangement with its superintendent, to be taken back over its road on a locomotive, paying fare therefor. On the way, the locomotive was overturned, and they were injured, under circumstances subjecting the lumber company to a liability, which it paid. *Held*, that the injuries occurred within the scope of the company's "own lumbering purposes," within the meaning of the application, so as to make the insurer liable, and that, under the peculiar circumstances, the undertaking to carry the travelers on a locomotive was not a fraud on the insurer, so as to preclude a recovery.

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

This was an action at law by the Wild River Lumber Company against the Travellers Insurance Company to recover upon a policy of indemnity insurance. The action was brought in the supreme judicial court of the state of Maine, and thence removed into the circuit court by the defendant. The case was tried

to the court without a jury, and judgment given for the plaintiff, to review which defendant sued out this writ of error. The policy sued on insured the plaintiff company "against loss from liability to every person who may during the term sustain accidental bodily injuries under circumstances which shall impose upon the insured a common-law or statutory liability therefor." The plaintiff company was incorporated under the general law of Maine to do a general lumber business, including the cutting, manufacturing, and selling of lumber, with the necessary incidents of this business. It was not expressly authorized to construct and maintain a railroad, but it did construct and maintain on its own land a railroad from a junction with the Grand Trunk Railroad to its mills and store, some 3½ miles distant. The company owned mills and dwellings for its men, in a region not otherwise inhabited, and also a store, wherein it kept, and sold to its workmen and agents, their groceries and other supplies. The railroad was used in connection with the lumber business, primarily for the transportation of lumber, supplies, etc., and also for the conveyance of its agents and servants, and persons having business at the mills and store. In some instances, fare was charged for the transportation of persons. In November, 1894, during the term of the policy, two commercial travelers were carried over the railroad to the store, paying fare, for the purpose of making sales and procuring orders. Desiring to return before the regular train down from the store, they made special arrangements with the plaintiff's superintendent for transportation to the junction for one dollar each, and they were taken in the locomotive. On the way down, the locomotive was thrown from the track and overturned, and both travelers severely injured. They made claims against the plaintiff for damages, which were adjusted and paid, and the plaintiff then brought this action on the policy. The application for the policy sued on contained the following clause: "It is understood that, in the conduct of a portion of their business, the assured employed a railroad, owned by themselves, and used only for their own lumbering purposes; the pay roll being in common with all their methods of business, and included therein."

Josiah H. Drummond (Josiah H. Drummond, Jr., on brief), for plaintiff in error.

Joseph W. Symonds and Addison E. Herrick (Symonds, Snow & Cook and Herrick & Park, on brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. Whether the contract of insurance was contained solely in the policy, or in the policy and application together, does not appear to us a vital question. By the policy the lumber company was insured against loss from liability to every person who should, during a stated period, "sustain accidental bodily injuries under circumstances which shall impose upon the insured a common-law or statutory liability therefor." Conceding, for the purposes of the case, that there should be taken from the application, and incorporated into the contract, the following language: "It is understood that in the conduct of a portion of their business the assured employ a railroad, owned by themselves, and used only for their own lumbering purposes," and that the contract insures for accidents upon the railroad only when it is used for lumbering purposes, this limitation or exception does not avail the plaintiff in error. The company's lumbering operations were carried on upon lands owned by it, and it had mills and dwellings for workmen, in a region not otherwise inhabited. It also had, in connection with its mills and the dwellings mentioned, a shop or store, where it kept, and sold to its agents and workmen, such groceries and other sup-

plies as were required for such a population as was there found. These mills and other buildings were remote from any other settlement, and could not be reached by any public road or highway. The company constructed and operated upon its own land, and primarily for use in its business, a railway, by the use of which logs were transported to the mills, and manufactured lumber from the mills to the Grand Trunk Railway, at a point some 3½ miles distant. Over the same railroad, needed supplies for operations, and stock or merchandise for the shop above mentioned, were transported, as there was occasion for so doing. The company's agents and workmen, and persons having business at the mills, or with the shop, including insurance agents and commercial runners and others, also were carried, from time to time, over said railroad, both ways. From some of the persons so carried over its railroad, the company demanded and collected pay for the transportation. We are of the opinion that the transportation upon the company's private railroad of two commercial travelers, who had come to the premises of the lumber company to transact business with the company, and to make sales, and to take orders for supplying the shop of the lumber company, was a use of the railroad within the scope of the company's "own lumbering purposes." The fact that the travelers paid a sum of money for a special conveyance is immaterial, since the railroad was used by them and by the lumber company in direct connection with the business of the company. Nor can we say that the undertaking of the company or its servants to carry the two travelers upon a locomotive was such a fraud upon the insurer as to preclude the insured from recovering. The defendant in error is a lumbering company, with a railroad for lumbering purposes, and its equipment and mode of running its road naturally differ from those of a common carrier. As the circumstances are peculiar, this court cannot apply to this case common knowledge as to ordinary train service on ordinary railroads; and the record discloses no such finding of facts, bearing upon this question, as to justify us in finding error in the rulings thereon by the circuit court. Upon the record before us, it appears that the method of conveyance was assented to by the passengers and by the company. There is no evidence of bad faith, or of wanton and willful disregard of the safety of the travelers. The lumber company, for the improper performance of its undertaking, became subject to a common-law liability to the injured men, and is entitled to indemnity from its insurer by the contract of insurance, even if this contract contains the limitation for which the plaintiff in error contends. These conclusions render it unnecessary to consider other errors assigned, since it necessarily follows that they could not have prejudiced the plaintiff in error. Judgment of the circuit court affirmed, with interest, and the costs of this court for the defendant in error.

ALTENBERG et al. v. GRANT et al.

(Circuit Court of Appeals, Sixth Circuit. May 24, 1897.)

No. 466.

1. ERROR TO CIRCUIT COURT—TIME FOR ALLOWANCE OF WRIT—MOTION FOR NEW TRIAL.
   Where, in accordance with the local practice, a motion for new trial is made after judgment, the judgment does not become effective, for the purposes of a writ of error, until such motion is disposed of, and the time limited by statute for the allowance of a writ to review the judgment runs from that date.

2. SAME—DELAY IN RETURNING WRIT—DISMISSAL.
   A writ of error will not be dismissed by the circuit court of appeals because return thereof was not made until one day after it was returnable by its terms.

3. SAME—CITATION.
   Where a writ of error is seasonably returned and docketed in the circuit court of appeals in vacation, before the term next ensuing after its allowance, the court may at such term order an alias citation to bring in parties not served with a former citation, though the time for taking the writ has then expired.

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

This was an action at law by G. P. Altenberg and Rudolph Kleybolte against W. T. Grant and others. There were a verdict and a judgment for defendants, and plaintiffs bring error. Heard on motion by defendants in error to quash and dismiss the writ of error.

W. O. Harris and Humphrey & Davie, for defendants in error.

Before TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. The defendants in error, appearing for the purpose of the motion only, have made a motion to dismiss the writ of error in this case on the ground that the proceeding in error has not been perfected by the plaintiffs in error within the time required by law. The facts, as shown by the record, are as follows: The action below was at law. The trial before the court and a jury resulted in a verdict for defendants on the 12th of November, 1895. Judgment was at once entered upon the verdict, and costs were awarded to defendants against plaintiffs. On November 15th following, plaintiffs filed a motion for a new trial. This motion was denied on December 17, 1895. On June 15, 1896, a writ of error was allowed, and a bond was filed and approved. The writ of error was made returnable July 15, 1896, but was not in fact returned until July 16, 1896. A citation against all the defendants in error was signed by the judge at the circuit. It was returned June 30th, executed on only one of the defendants in error. The marshal gave as a reason for not serving the other defendant that the plaintiffs in error had made no deposit for costs. So the matter stood until February 27, 1897, when a new citation was issued, signed by a judge of this court, and was executed and returned March 27, 1897. Three grounds are urged for a dismissal of the writ of error. The first is that more than six months elapsed after the rendition of the judgment sought to be reviewed

before the allowance of the writ of error. If the time for the writ of error began to run from the date of the judgment, the contention is good. If, however, the period of limitation dates from the order denying the motion for a new trial, the writ of error was seasonably allowed. We have no doubt that the motion for a new trial suspends the running of the statute. In some states, judgment is withheld until the defeated party shall have had time to file a motion for a new trial, and, pending the hearing of the motion, judgment is never entered. In other states,—and this is true in Kentucky,—judgment is entered upon the verdict at once, and motions for new trials are made always after judgment. It is certainly the understanding of the bar that, until the motion for a new trial has been disposed of, the judgment is not ripe for review; and it is the duty of this court. so far as the authorities will permit, to avoid a construction of the rules and statutes governing writs of error and appeals which would be a surprise to practitioners and effect undeserved hardships. We think the decisions of the supreme court justify us in holding that a motion for a new trial like a petition for rehearing filed during the term in which the judgment is rendered postpones the running of the period of limitation until the motion is disposed of. Memphis v. Brown, 94 U. S. 715, 717; Railway Co. v. Murphy, 111 U. S. 488, 4 Sup. Ct. 497; Brockett v. Brockett, 2 How. 238; Slaughter-House Cases, 10 Wall. 289. The question whether an execution would run on the judgment pending the motion is not necessarily, we think, the test of when the time within which a writ of error must be allowed begins to run. It is sufficient to say as was said in Memphis v. Brown, ubi supra, that, pending a motion to set aside a judgment, it does not "take final effect, for the purposes of a writ of error," until the motion is disposed of. 2 Fost. Fed. Prac. § 483; Desty, Fed. Prac. (6th Ed.) § 1008.

Nor do we regard the objection that the writ was returned and the record filed here one day after it was made returnable of serious moment. Bingham v. Morris, 7 Cranch, 99, shows that, if the transcript of the record is filed before the motion for dismissal, the motion will not be granted.

The last objection is that the alias citation was not returned served until March, 1897. The citation was returnable in vacation after the adjournment of the October term, 1895. The term next ensuing began in October, 1896. The citation here in question was issued, and returned served in the October term, 1896. This is, according to the precedents, in sufficient time, if the court, in its discretion, permits it to be done. In Jacobs v. George, 150 U. S. 415, 14 Sup. Ct. 159, it was held that when an appeal is allowed at the term of a judgment, but is not perfected until after the term, a citation is necessary to bring in the parties, but that, if the writ of error be docketed in the court of review at its next ensuing term, a citation may be issued by leave of that court, although the time for taking the writ of error has elapsed. This writ of error was seasonably docketed here, and this court, upon motion, directed the citation to issue at this, the term next ensuing after the term at which the writ was allowed. The citation was therefore issued, served, and returned before the writ of

error became inoperative. Green v. Elbert, 137 U. S. 615, 11 Sup. Ct. 188; Richardson v. Green, 130 U. S. 104, 9 Sup. Ct. 443; Hewitt v. Filbert, 116 U. S. 142, 6 Sup. Ct. 319; Evans v. Bank, 134 U. S. 330, 10 Sup. Ct. 493. The motion to dismiss is denied.

DAVIS v. MILLS et al.

(Circuit Court, D. Connecticut. December 13, 1897.)

No. 457.

CODE PLEADING—JOINDER OF CAUSES OF ACTION—SAME TRANSACTION.

By the Montana statute, the president and a majority of the trustees of a Montana corporation are required to file annual reports in a certain office, stating certain facts, and on failure to do so all the trustees are made jointly and severally liable for the then existing debts of the corporation. *Held*, that in an action in Connecticut, to charge a trustee individually under this statute, several different debts due the plaintiff may be joined, under the provision of the practice act permitting joinder of causes of action arising out of the same transaction, since the failure to file the report was the "transaction" from which the defendants' liability arose.

This was an action by Andrew J. Davis against Hiram R. Mills and others to charge them personally with liability for the debts of a Montana corporation, of which they were trustees. The case was heard on a motion by the plaintiff to add a third count to his complaint.

Hungerford, Hyde, Joslyn & Gilman, for plaintiff.
Gross, Hyde & Shipman, for defendants.

SHIPMAN, Circuit Judge. The defendants were trustees of a Montana corporation. By a statute of Montana, the president and a majority of the trustees of a Montana corporation are required to file annually, in a specified office, at a specified time, a report containing the facts, which the statute also specifies, and upon failure to do so all the trustees are jointly and severally liable for the then existing debts of the corporation. The complaint alleges that the trustees did not file such a report in 1893; that the corporation then owed two debts which, together, amounted to over $2,000, of which the plaintiff became owner by assignment; that it is insolvent; and that the defendants are liable to pay these two debts by virtue of said statute. The plaintiff now moves to add a third count, alleging like facts in regard to a third debt of $1,000 or more. The complaint was served June 30, 1897. The defendants oppose the motion.

Divers defenses will be presented against the existence of the alleged liability of the defendants, but the validity of those defenses cannot be considered upon a mere motion to amend the complaint by the addition of a new count containing an additional cause of action of the same character with those stated in the previous counts. All that can now be considered is whether the proposed count is permissible by the practice act of Connecticut, which declares that several causes of action can be united in the same complaint if they

are brought to recover. Subdivision 7 of section 7 provides: "Upon claims, whether in contract, or tort, or both, arising out of the same transaction or transactions connected with the same subject of action." The purpose of the Montana statute was to afford a remedy to a person who was deemed to have been injured by the wrongful conduct of the trustees in omitting to make a report. Huntington v. Attrill 146 U. S. 657, 13 Sup. Ct. 224. The statutory remedy of each existing creditor was an action ex delicto (Stokes v. Stickney, 96 N. Y 323), and I assume that the assignee of these three claims acquired by the assignment the right to use the remedies of the respective assignors. The tort which is the foundation of the defendants' alleged liability was one and the same, and from that tort there is claimed to have resulted a liability to pay three debts, which the plaintiff now owns. While I cannot define exactly the scope of the word "transaction," as used in the seventh section of the practice act, I think that these three statutory claims arose out of the same transaction,—that is, the same neglect,—and that, being owned by one person, they can be grouped in one complaint. The definition of "transaction" in Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co., 63 Conn. 551, 29 Atl. 76, while it took its shape from a set of facts different from those in this complaint, is broad enough, when applied to the alleged facts in this case, to permit the union of these three causes of action in one complaint. The motion to amend is granted.

SMITH v. RACKLIFFE, State Treasurer.

(Circuit Court, N. D. California. December 17, 1897.)

No. 11,915.

TAXATION OF RAILROAD — ROLLING STOCK OF LESSEE — POWERS OF BOARD OF EQUALIZATION.

Under Const. Cal. art. 13, § 10, providing that "the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization," such board has power to assess to a lessee rolling stock owned by it, and used in operating a leased line of road in more than one county of the state.

This is an action by C. W. Smith, as receiver of the Atlantic & Pacific Railroad Company against Levi Rackliffe, state treasurer of California, to recover taxes paid by the company. Heard on demurrer to the amended bill. For former decision, see Reinhart v. McDonald, 76 Fed. 403.

C. N. Sterry (E. S. Pillsbury, of counsel), for plaintiff.

W. F. Fitzgerald, Cal. Atty. Gen., for defendant.

MORROW, Circuit Judge. This action was brought by the receiver of the Atlantic & Pacific Railroad Company, under the provisions of section 3669 of the Political Code of this state, to recover of the state treasurer certain moneys paid by that company into the state treasury for taxes upon rolling stock operated by it within this state. A demurrer to the original complaint having been sustained

by Judge McKenna (Reinhart v. McDonald, 76 Fed. 403), the complainant has filed an amended complaint, containing a formal substitution of parties, and some changes in the verbiage of the complaint, but no substantial change in the material allegations of the original complaint. It appears that the Atlantic & Pacific Railroad Company is a corporation organized and incorporated under the act of congress approved July 27, 1866 (14 Stat. 292). It had in operation, in 1893, a line of railroad from the city of Albuquerque, in the county of Bernalillo, in the territory of New Mexico, through the territory of Arizona, to The Needles, in the county of San Bernardino, state of California; thence to Mojave, in the county of Kern, in the same state. The home and situs of the rolling stock of the road was located at Albuquerque, N. M. The line of this road in the state of California from Mojave to The Needles, a distance of about 243 miles, was built and is owned by the Southern Pacific Railroad Company. In August, 1894, the Southern Pacific Railroad Company agreed to sell this road from Mojave to The Needles to the Atlantic & Pacific Railroad Company. The sale was to be consummated whenever the Southern Pacific Railroad Company was able to make clear title to the line of railway discharged from certain liens. In the meantime, and until the consummation of the sale, and payment of the purchase price, the Southern Pacific Railroad Company leased this line of railway to the Atlantic & Pacific Railroad Company for a period of 30 years at an annual rental. The lease provided that the Atlantic & Pacific Railroad Company should promptly pay and discharge all taxes and assessments which should thereafter become due upon said property, or any part thereof, or might become in any wise due or owing in respect to the same. In the year 1893 the state board of equalization of this state assessed the franchise, roadway, roadbeds, rails, and rolling stock of the Southern Pacific Railroad Company in the state of California, including the line of railroad from Mojave to The Needles, so leased to the Atlantic & Pacific Railroad Company, and which was, at that time, being operated by the last-named company, and did also demand and require of the Atlantic & Pacific Railroad Company that it should make a return of all its personal property in the shape of rolling stock, etc., used in the operation of the line of road from Mojave to The Needles, leased from the Southern Pacific Railroad Company, and thereupon, and under protest, the Atlantic & Pacific Railroad Company returned to the board of equalization that it had in operation 89 cars and locomotive engines, of the value of $56,810, which it had in use and operated at times along the line of said road, and thereupon the board of equalization assessed said rolling stock at a total valuation of $125,000, and imposed a tax of $2,272.80, which the railroad company paid to the state treasurer. To recover this sum of $2,272.80, the present suit was brought against the state treasurer by the receiver of the railroad company.

The first demurrer interposed by the attorney general of the state raised the question of jurisdiction of the court to entertain the action, because it was, in effect, a suit against the state of California. The demurrer also placed in issue the sufficiency of the complaint in

stating a cause of action. The court held that it had jurisdiction of the action, but sustained the demurrer on the other ground. The sufficiency of the complaint involved the question whether, under section 3665 of the Political Code of California, the state board of equalization had the power to assess the rolling stock of a railroad corporation, where the corporation is not located in the state, and does not own the line of road upon which the rolling stock is used, but holds the road under a lease. The section provides, among other things, as follows:

"The board must assess the franchise, road-way, road-bed, rails and rolling-stock of all railroads operated in more than one county. * * * Assessment must be made to the corporation, person, or association of persons owning the same. The depots, stations, shops, and buildings erected upon the space covered by the right of way and all other property owned by such person, corporation or association of persons are assessed by the assessor of the county where they are situate."

It was contended that, as the Atlantic & Pacific Railroad Company was not the owner of the line of railroad from Mojave to The Needles, the rolling stock on that road could not be assessed to that corporation. In other words, there must be a union in the ownership of the line of road and the rolling stock as a condition of assessment. The court held that the tax was legal under the constitution of the state, which provides, in section 1, art. 13, that "all property of the state, not exempt under the laws of the United States, shall be taxed in proportion to its value to be ascertained as provided by law." In support of the present demurrer, it is contended that the state board of equalization had no jurisdiction, under the constitution of the state, to assess rolling stock belonging to a railroad which is not operated in more than one county of the state; that, if such rolling stock happens to be in the state under such circumstances as to require that it should be taxed under the constitution and the laws of the state, the taxes required to be paid by it must be levied upon an assessment made by the local assessor, and not by the state board of equalization. It is contended, further, that this proposition was not presented by counsel or considered by the court upon the first demurrer. The sufficiency of the complaint certainly involved this question, and, in my opinion, it was presented by counsel in their briefs. But, assuming that the question was not considered or determined by the court, I am of the opinion that the assessment is in accordance with the constitution and law of the state. Section 10 of article 13 of the constitution of the state provides:

"All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, road-way, road-bed, rails and rolling stock of all railroads operated in more than one county in this state, shall be assessed by the state board of equalization. at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

Section 3665 of the Political Code, as we have seen, requires the board of equalization to assess rolling stock of railroads operated in more than one county, and the assessment must be made to the

corporation, person, or association of persons owning the same. This is an assessment against a railroad corporation on rolling stock operated by such corporation over a line of railroad in more than one county in the state, and, in my opinion, comes within the jurisdiction conferred upon the board of equalization by the constitution. The demurrer will be sustained.

BACHELDOR v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1897.)

No. 940.

PUBLIC LANDS — RAILROAD RIGHT OF WAY — TAKING TIMBER FROM ADJACENT LANDS.

Under the act of June 8, 1872 (17 Stat. 339), which authorizes the Denver & Rio Grande Railway Company to take timber and materials for construction purposes from the public lands "adjacent" to its line, the company is not confined to the townships through which the road runs, or those adjoining them; nor is the cutting of timber 25 miles from the road, in itself, as a matter of law, unlawful. The meaning of "adjacent" is a mixed question of law and fact for the jury, under proper instructions, and a proper test is whether the timber is within reasonable hauling distance by wagons. 48 Pac. 310, reversed.

In Error to the Supreme Court of the Territory of New Mexico.

Samuel L. Bacheldor, the plaintiff in error, was indicted in the territorial court for the First judicial district of the territory of New Mexico, for unlawfully cutting certain timber on public lands in said territory. He justified the cutting and removal of the timber in question on the ground that he was an agent of the Denver & Rio Grande Railroad Company, and that the timber had been cut for the benefit of the railroad company, in pursuance of the provisions of an act of congress approved June 8, 1872 (17 Stat. 339, c. 354), which granted to the Denver & Rio Grande Railway Company, now the Denver & Rio Grande Railroad Company, a right of way over the public domain 100 feet in width on each side of the track, together with such public lands "adjacent" thereto as might be needed for depots, shops, and other buildings for railroad purposes, and authorized it "to take from the public lands adjacent thereto, stone, timber, earth, water and other material required for the construction and repair of its railway and telegraph line." The evidence showed that the timber in question was cut from land 21½ miles distant from the line of the Denver & Rio Grande Railroad, or about 25 miles distant therefrom by wagon road, and that there was no timber, nearer than that which had been taken, on either side of that part of the road. On the trial of the case the lower court instructed the jury, in substance, that the word or term, "adjacent," as used and applied in the act of congress aforesaid, meant the tier of townships lying adjoining on either side of the townships upon or through which the line and right of way of the Denver & Rio Grande Railroad runs; that, when the public lands are unsurveyed, the word "adjacent" meant relatively the same thing, as to limit of distance from the line or right of way; and that the word "township," as used in the court's instruction, meant an area of land six miles in extent north, south, east, and west, and was a legal subdivision, according to the official surveys, under the laws of the United States. As the timber which had been cut by the defendant below was cut outside of the limit of distance from the right of way that was defined by the foregoing instruction, the defendant was convicted, and, on an appeal taken to the supreme court of New Mexico, the conviction was affirmed by a divided court. 48 Pac. 310. The case has been brought to this court by a writ of error issued to the supreme court of the territory.

Joel F. Vaile (Edward O. Wolcott and Henry F. May, on the brief), for plaintiff in error.

Edward C. Stringer, U. S. Atty.

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

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

The sole question to be considered upon this record is the meaning of the word "adjacent," as used in the act of congress of June 8, 1872, the substance of which is quoted above in the statement. This question has given rise to some difference of opinion among the various courts who have had occasion to consider it. In one case it was held that lands lying at a considerable distance from the line of the defendant's road were adjacent thereto, within the fair intent and meaning of the statute, if they were within reasonable hauling distance by wagon. U. S. v. Denver & R. G. Ry. Co., 31 Fed. 886, 889. In another case, which arose under the act of March 3, 1875 (18 Stat. 482, c. 152), it was thought that lands were adjacent to a railroad track, within the purview of the act, if they were near enough to be directly and materially benefited by the construction of the road. U. S. v. Chaplin, 31 Fed. 890. In another case it was held, under the act of March 3, 1875, above cited, that timber standing on land 50 miles distant from the right of way was not on land adjacent thereto. Stone v. U. S., 29 U. S. App. 32, 12 C. C. A. 451, and 64 Fed. 667. The case at bar is the first, we believe, in which it has been ruled that, under the act of June 8, 1872, timber cannot be taken from the public domain by the defendant company, for the purposes named in the act, unless it is taken from lands lying in the townships through which its road is located, or from lands lying in the tier of townships next adjoining said townships on either side. If congress had intended to limit the defendant's right to take timber and other materials, for the construction of its road, to the townships last aforesaid, it would most likely have so declared in plain language, and thus have freed the act from all doubt and uncertainty as to its meaning. The fact that congress did not do so when conferring the right in question, but used the word "adjacent," which is purely a relative term, and may be understood differently when applied to different objects or under different circumstances, is very persuasive evidence that congress did not intend to fix an arbitrary line on each side of the defendant's right of way, beyond which the right to take timber and other materials should not extend. The use of the phrase "lands adjacent" to the right of way, instead of fixing a more precise limit, as might well have been done by reference to the public surveys, indicates, we think, that it was not the intention of congress to confine the privilege in question to particular townships or sections lying along the right of way, but that its purpose was to leave the right to take timber and other materials to be governed by circumstances. Congress intended to offer substantial inducements for the construction of railroads in certain sections of the country where timber suitable for railroad construction was

known to be scarce, and in many places distant from the lines of road to be benefited, as they would be projected and built. For that reason it did not establish a fixed line on either side of the right of way, which, if established, would at times render the privilege of taking material valueless; but it chose to confer the privilege in such terms as would allow the land department, and courts and juries as well, some discretion in determining, under different conditions, what was a proper limit within which it might be exercised. It accordingly authorized timber and other materials to be taken from adjacent lands, leaving those whose duty it would be to see that the right was not abused, but was exercised in a reasonable manner, to decide in any given case whether the land from which material had been obtained was adjacent to the right of way, within the spirit and intent of the act. For these reasons we cannot approve of the instruction which was given by the trial court, because it contains a definition of the term "adjacent" which, in our judgment, was not contemplated by the lawmaker.

Assuming, then, as above indicated, that in cases arising under the acts of June 8, 1872, and March 3, 1875, above cited, the question whether timber or other materials have been taken from lands adjacent to the right of way of a railroad, is usually a mixed question of law and fact, and that it cannot always be decided as a pure matter of law, it becomes necessary to determine what is the proper test by which the question should be determined. It is obvious, we think, that congress did not intend to grant a general right to take timber from any part of the public domain wherever it was most convenient to take it. The use of the word "adjacent" is of much significance, and renders it necessary in all cases to consider, in the first instance, whether the land from which timber has been obtained for the construction of a railroad is near to or remote from the right of way. The inquiry whether it has been transported a considerable distance, or only a few miles, is always an important consideration. Probably no better or more reasonable test can be applied than that which was first suggested by Judge Hallett in U. S. v. Denver & R. G. Ry. Co., 31 Fed. 886, 889, namely, that timber should be regarded as adjacent to the right of way of a railroad, without reference to township or section lines, if it is within reasonable hauling distance by wagon. It is generally the case that timber suitable for railroad construction will not bear transportation by wagon from points remote from the established line of road, by reason of the expense incident to transporting it. If railroads, therefore, are limited in their right to take timber from the public domain to such timber standing on either side of their rights of way as they can reasonably afford to haul by wagon from the place where it is cut, it is probable that they will realize the full benefit of the privilege which congress intended to confer, and that the privilege will not be abused. In a case which presents conditions like the one at bar, and in others which may arise, no court can say, as a matter of law, that a trespass was committed because the timber was taken from a place 25 miles distant by wagon road from the defendant's right of way; but it should be left to a jury of the vicinage to determine,

under instructions from the court such as we have substantially outlined, whether the right accorded by the statute was fairly exercised as congress intended it should be, or whether, by reason of the distance from which the timber in question was drawn, the defendant should be regarded as a trespasser. The judgment of the territorial court for the First judicial district of the territory of New Mexico, and the judgment of the supreme court of the territory of New Mexico as well, are both reversed, and the case is remanded to the territorial court for the First judicial district of said territory for a new trial.

CROSS LAKE LOGGING CO. v. JOYCE.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1897.)

No. 944.

1. EVIDENCE—RES GESTÆ—PERSONAL INJURIES.
   Where, prior to an accident, an injured person complained to the master of the incompetency of a fellow servant, and was assured that such servant would be discharged, and until he was he would be watched to see that he hurt nobody, statements of the injured person, made to the master immediately after the accident, that the injury would not have been received had the incompetent servant been discharged, are admissible as part of the res gestæ.
2. SAME—ADMISSIONS—STATEMENTS NOT DEVISED.
   Declarations of fault on the part of the master, made by an injured servant, immediately after an accident, to one in charge of the work and competent to deny them, are admissions of the truth of such declarations, when no denial was made.
3. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
   Whether or not one, who complained of the incompetency of a fellow servant prior to an accident in which he was injured, was guilty of contributory negligence by returning to work with such servant upon assurances that the servant would be replaced by a competent person, and, until he was, would be watched to see that he hurt no one, is a question for the jury.
4. SAME—INSTRUCTIONS—EVIDENCE.
   It is not error to refuse to instruct the jury that there is no evidence from which they could infer that the servant remained in the master's employ in reliance upon any promise other than that the servant would be watched, and warning given of any danger, when there is evidence of a promise, upon which the servant might have relied, to the effect that a competent man would be substituted.

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

Emanuel Cohen (Stanley R. Kitchel and Frank W. Shaw, on the brief), for plaintiff in error.

T. F. Frawley (F. C. Brooks and F. N. Hendrix, on the brief), for defendant in error.

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

THAYER, Circuit Judge. This is a suit for personal injuries, in which John Joyce, the defendant in error, sued the Cross Lake Log-

ging Company, the plaintiff in error, hereafter termed the "Logging Company," in the circuit court of the United States for the district of Minnesota, for injuries sustained while he was in its employ as a common laborer, and was assisting some other employés of the Logging Company in loading saw logs upon cars at a place called Woman's Lake, in the state of Minnesota. On the bank of said lake the Logging Company had constructed certain hoisting works, by means of which logs were first drawn from the lake by an endless chain, to a deck or platform elevated some distance above the lake, and were thence rolled down an incline or steps, onto cars standing at the foot of the incline. The plaintiff was working on this incline, his duty being to direct the movement of logs on one of the steps as they were rolled down the incline from the platform, when, by the carelessness of a fellow workman named Peter Plein, a log was allowed to roll down the incline in such a manner as to break and crush the plaintiff's right leg, and necessitate amputation. As a ground for recovery, the plaintiff alleged, in substance, that the work in which he was engaged when he was hurt was dangerous work, requiring skill and activity on the part of those who were engaged in its performance, and that the man named Peter Plein, by whose negligence the injuries complained of were sustained, was a careless and incompetent fellow servant and unfitted for the employment in which he was engaged, and that the Logging Company was well aware of his incompetency, and by reason thereof had promised to substitute some other person in his place a short time before the accident occurred. There was considerable evidence tending to establish all of these allegations, and the jury found in accordance with such testimony. It is assigned for error, however, that the trial court erroneously permitted the plaintiff to give in evidence his own declarations as to the cause of the accident which were made after he was hurt, to one Frank C. Bolin, who was the superintendent of the Logging Company, and who was present at the time of the accident. In the course of the trial there was testimony offered to the effect that on the day of the accident, and prior thereto, the plaintiff informed Frank C. Bolin, the defendant's superintendent in charge of the hoisting works, that Plein was careless and reckless, and did not know anything about the work in which he was engaged, and that he, the plaintiff, would quit work if Plein was further employed in the position where he was then assigned. There was further testimony to the effect that Bolin, in response to this complaint, told the plaintiff to go back to work; that he would put a good man in Plein's place; and that until he did so he would "see to him" himself, and see that he did not hurt anybody. Shortly thereafter the accident occurred, and Bolin was the first man to come to the plaintiff's assistance when his leg was crushed by the log. The plaintiff was allowed to testify, notwithstanding an objection on the part of the defendant company, that when Bolin came to his assistance, as aforesaid, and within a moment after the accident occurred, he exclaimed: "Frank, I wouldn't have lost my leg if you had done as you agreed to and put another man in his place;" and that Bolin said nothing in reply to this remark.

It is manifest, we think, that the statement made by the plaintiff to Bolin, to which the objection related, was properly admitted in evidence as a part of the res gestæ, because it was so nearly coincident with the occurrence to which it referred that the statement may be regarded as having been made almost involuntarily, without time for reflection, when the plaintiff's mind was vividly impressed with the true cause of his injury. Statements thus made, which are not a narrative of a past transaction, but spring naturally and without premeditation from the lips of an injured person in the very presence of the circumstances which have produced it, and while the victim is perhaps writhing in pain, are of the highest value as evidence. Railroad Co. v. Lyons, 129 Pa. St. 114, 18 Atl. 759; Railway Co. v. Buck, 116 Ind. 575, 19 N. E. 453; State v. Murphy, 16 R. I. 529, 17 Atl. 998; Com. v. Hackett, 2 Allen, 136, 139; Greenl. Ev. § 108. Moreover, the fact that Bolin, though charged by the plaintiff with being at fault, did not deny the accusation, may be regarded as in the nature of an admission on the part of Bolin that the charge was true.

It is further claimed by the defendant company that if Plein was unskilled in the performance of the duties to which he had been assigned, and that fact was known to the plaintiff, then the fact that he continued to work amounted to contributory negligence on his part, because the incompetency of Plein rendered the work to be done so imminently and immediately dangerous that no prudent person would have continued to work at the labor in which the plaintiff was engaged until some other person had been put in Plein's place. It is doubtless true that when a master promises to remedy a defect in a machine, or to replace an incompetent fellow servant, such promise will not justify the promisee in continuing to work, if, in view of the defect or the incompetency of the fellow servant, the work to be done is rendered imminently and immediately dangerous. Haas v. Balch, 12 U. S. App. 534, 540, 6 C. C. A. 201, and 56 Fed. 984; Gowen v. Harley, 12 U. S. App. 574, 586, 6 C. C. A. 190, and 56 Fed. 973; Mining Co. v. Fullerton, 36 U. S. App. 32, 41, 16 C. C. A. 545, and 69 Fed. 923; Hough v. Railway Co., 100 U. S. 213. But it is usually a question for the jury to determine whether the work was rendered imminently dangerous by reason of the defect, and whether the employé was guilty of contributory negligence, because he continued to work in reliance on the promise of his master to remedy a given defect or discharge an incompetent fellow servant. It was treated as a question of fact in the present case, and the jury were instructed in accordance with the law as above stated. The jury found in favor of the plaintiff upon that issue, and we cannot say that the work was so extremely dangerous, in view of Plein's incompetency, that the trial court ought to have charged, as a matter of law, that he was guilty of culpable negligence in remaining at work, notwithstanding Bolin's promise to put a competent man in Plein's place.

It is finally claimed that the trial court should have instructed the jury that there was no evidence in the case from which they could infer that the plaintiff remained in the defendant's employ in reliance upon any promise other than a promise made by Bolin that

he would watch Plein, and warn the plaintiff of any danger that he might be subjected to by Plein's negligence or incompetency. This instruction was asked, it seems, for the purpose of enabling the defendant company to contend before the jury that Bolin discharged the duty of watching Plein to the best of his ability, and for that reason the defendant was not liable. We are not able, however, to adopt that view of the case. The plaintiff complained primarily of the employment by the defendant of a negligent and incompetent fellow servant, and he alleged, as an excuse for remaining at work with knowledge of that fact, that he was induced to remain by Bolin's promise that he would put a competent man in Plein's place, and that in the meantime he would watch him, and see that no one was hurt by his neglect. There was sufficient evidence to support these allegations, and from which the jury were at liberty to infer that the plaintiff was influenced to continue at work as much by the promise that the incompetent fellow servant would be shortly removed as by the promise that his actions would in the meantime be watched. There was no occasion, therefore, for giving the instruction in question, and the trial court properly refused it. Upon the whole, the record discloses no error which would warrant a reversal of the judgment below, and it is accordingly affirmed.

WESTERN UNION TEL. CO. v. MORRIS.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1897.)

No. 921.

1. NEGLIGENCE OF TELEGRAPH COMPANY — PROXIMATE CAUSE—QUESTION FOR JURY.
   Where the testimony of a physician tends to show that a surgical operation might have been avoided, had he reached the patient earlier, it is not error to submit to the jury the question as to whether or not the failure of a telegraph company to properly transmit a message, whereby the physician was prevented from earlier attendance, was the proximate cause of the injuries resulting from such operation.

2. DAMAGES—EVIDENCE—INSTRUCTIONS.
   It is error to instruct a jury, in determining the damage to a person resulting from a surgical operation, to consider the probability of permanent impairment of health, and the lessening of ability to perform physical labor, when there is no evidence that the operation tended to produce such results, and the injuries are not, of themselves, of such a nature as to warrant such an inference.

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

This suit was brought by Daisy E. Morris, the defendant in error, against the Western Union Telegraph Company, the plaintiff in error, to recover damages for an error committed, through the alleged negligence of the defendant company, in transmitting a telegram which was intrusted to it for transmission. The facts, as developed by the evidence, were, in substance, as follows: On December 4, 1895, the plaintiff resided with her husband on a farm about two miles from the village of Hoyt, Jackson county, Kan., where the defendant company maintained a telegraph station communicating with its station in the city of Topeka, Kan. On that day she was afflicted with severe pains, which were subsequently attributed by the physician who attended

her to an inflammation of the peritoneum, called "peritonitis"; and about 5 or 6 o'clock p. m. she caused a telegram to be delivered to the defendant company, at its station in the town of Hoyt, to be transmitted to a doctor who resided in Topeka, by the name of Dr. Dawson. The telegram, as delivered to the defendant's operator, read as follows: "Hoyt, Ks., Dec. 4. Dr. Dosen: Come on the morning train, and not fail. Ans. I will meet you. Frank Morris, Hoyt, Kas." By an error committed in transmitting the message, when it was delivered to the doctor, at about half past 8 or 9 o'clock p. m., it read as follows: "Come on the morning train, and not answer. Fronk." A man by the name of Fronk, who was known to Dr. Dawson, for whom the telegram was intended, lived near Hoyt; but as the doctor was not well acquainted with him, and as there were two or three persons by the name of Fronk who lived in the vicinity of Hoyt, he decided not to answer the call. If he had known that the message came from Mrs. Morris or her husband, he would have gone to Hoyt by the first train which left Topeka on the morning of December 5, 1895, at 6:30 a. m., and would have reached his patient about 8 a. m. of that day; but, by reason of the mistake aforesaid, he did not leave Topeka until he had received a second message, which was sent by the plaintiff on the morning of December 5, 1895, and did not reach her bedside until about 5 p. m. of that day. He remained with her on that occasion a few hours, and succeeded in relieving her of acute pain, and reducing her fever to some extent. He did not visit her again until December 7, 1895, at which time she had so far recovered that further visits were deemed unnecessary. On December 29, 1895, in consequence of her health not having been fully restored, the plaintiff went to a hospital at Topeka, Kan., and had a surgical operation performed, which consisted in removing her ovaries and Fallopian tubes, by which means her health was eventually restored. The jury rendered a verdict against the defendant company in the sum of $4,500, and a judgment was entered thereon, to reverse which the case has been brought to this court by writ of error.

W. H. Rossington (Charles Blood Smith, Clifford Histed, and George H. Fearons, on the brief), for plaintiff in error.

S. B. Isenhart, for defendant in error.

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

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

It is first assigned for error that there was no evidence tending to show that the surgical operation which the plaintiff underwent on December 29, 1895, was the proximate result of the mistake made by the defendant company in transmitting the telegram to Dr. Dawson on December 4, 1895, and that the trial court should have instructed the jury to that effect, as it was requested to do. With reference to this contention, it is sufficient to say that while the relation of cause and effect between the two acts last aforesaid seems remote, and while the evidence to establish that the one act was the efficient cause of the other is far from being clear and satisfactory, yet we are not able to say that there was no evidence warranting the submission of that issue to the jury. A careful examination of the testimony of Dr. Dawson, one of the medical experts, shows, we think, that in the course of his examination he did express the opinion, in substance, that if he had not been misled by the telegram of December 4, 1895, and had arrived and prescribed for the plaintiff on the morning of December 5, 1895, instead of the evening of that day, he could have administered remedies which, in

his judgment, would have prevented any suppuration from the affected parts or membranes, and thereby have rendered the subsequent surgical operation unnecessary. This testimony was admitted without objection,—in fact, the opinion of the witness to the effect last stated was elicited on cross-examination; and the jury, rather than the court, were entitled to say what weight should be accorded to it. We think, therefore, that the trial court did not commit a reversible error in leaving the jury to determine whether the defendant's failure to transmit the message properly was the proximate cause of the plaintiff's being subsequently compelled to undergo the surgical operation in question.

It is further assigned for error, however, that the trial court erroneously instructed the jury that, in case they found for the plaintiff below, then it would be their duty, in assessing her damages, to consider the probability of a permanent impairment of the plaintiff's health as a result of the surgical operation, and her ability to perform physical labor thereafter; also, the expense which she had incurred, if any, as the result of the delay in transmitting the message. It is claimed on the part of the defendant that there was no evidence tending to show that the surgical operation permanently impaired the plaintiff's health, or lessened her ability to perform physical labor, or that the mistake made in transmitting the message of December 4th occasioned the plaintiff any expense. The record supports the contention that the jury were instructed to the effect above stated, but there seems to be no testimony in the record which has a tendency to show that the surgical operation did permanently impair the plaintiff's health, or that it affected her capacity to work in the usual way. On the contrary, the evidence has a strong tendency to prove that the removal, by the operation, of certain sexual organs, which had become permanently diseased, had the effect of restoring the plaintiff's health, which could have been restored in no other way. It cannot be said in justification of this part of the charge that the reference made to an impairment of the plaintiff's health, and to a loss of her ability to work, meant no more than that an allowance ought to be made for the loss of the organs which had been removed, because in the same connection the court also instructed the jury that they should assess damages for the loss of said organs, and also for the pain and suffering which the plaintiff had endured as a result of the removal thereof. It is obvious, therefore, that the charge authorized the jury, in addition to the damages last aforesaid, to assess other and additional damages for impaired health, and for a supposed loss of ability to labor. We find no evidence on which to base that part of the charge, and it may have influenced the jury in making up their verdict. It is a well-established rule, in cases of this character, that where damages are claimed for loss of time incident to an injury, or for expenses incurred for medicine and medical treatment, or for a permanent impairment of health, or loss of capacity to labor, there must be some evidence before the jury tending to show damages of such a character; otherwise an instruction which authorizes a jury to assess such damages is misleading and erroneous, and sufficient cause for

a reversal of the judgment, unless it clearly appears that such instruction has in fact done no harm. Railroad Co. v. Patillo (Ga.) 24 S. E. 958; Mammerberg v. Railway Co., 62 Mo. App. 563; Railway Co. v. Artusey (Tex. Civ. App.) 31 S. W. 319; Telegraph Co. v. Drake (Tex. Civ. App.) 29 S. W. 919; Railway Co. v. Rossing (Tex. Civ. App.) 26 S. W. 243; Watts v. Railroad Co. (W. Va.) 19 S. E. 521; Comaskey v. Railroad Co. (N. D.) 55 N. W. 732; Campbell v. Alston (Tex. Civ. App.) 23 S. W. 33; Culberson v. Railway Co., 50 Mo. App. 556; Cousins v. Railway Co., 96 Mich. 386, 56 N. W. 14. In some cases injuries are sustained which are of such a nature as will, in themselves, warrant an inference that they will permanently affect the injured person's health, or lessen his or her capacity to labor; but in the present case we cannot say that the injuries inflicted by the surgical operation were of such a character that the jury were at liberty to infer therefrom that the health of the plaintiff would be permanently affected, or that her capacity to labor would be thereby impaired. It is just as reasonable to suppose, in the absence of any evidence on the subject, that she sustained no loss in either of these respects. The result is that the instruction last referred to was erroneous, and, as it may have had the effect of increasing the damages, the judgment of the circuit court must be reversed, and the cause remanded for a new trial. It is so ordered.

In re MOSES.

(Circuit Court, S. D. New York. December 11, 1897.)

1. ALIENS—EXCLUSION—REVIEW OF DECISION OF IMMIGRATION OFFICERS.
   Under the immigration law (28 Stat. 390, c. 301), providing that the decision of the immigration officers against the admission of an alien to the United States shall be final unless reversed on appeal by the secretary of the treasury, such decision is not reviewable by the courts, where it is shown that the person excluded is an alien, and that the decision was made in the way required by the statute.
2. SAME—FAMILY OF IMMIGRANT—DECLARATION OF INTENTION.
   An immigrant does not cease to be an alien merely by declaring his intention of becoming a citizen of the United States, so as to relieve his wife and minor children from the operation of the law governing the admission of aliens.

Petition of Marcus Moses for Writ of Habeas Corpus.

Petitioner came to this country from Roumania, of which country he was a native, and on March 23, 1897, declared his intention of becoming a citizen of the United States. Since his arrival he has resided in the city of New York. On November 23, 1897, Yette Moses, wife of the petitioner, and five of their children under ten years of age, arrived at this port by the steamship Obdam, and demanded to be permitted to land. On inspection made in accordance with the immigration laws of the United States, they did not appear to the inspecting officers to be clearly, beyond doubt, entitled to admission, and were thereupon detained for a special inquiry, as provided by section 5 of the act of March 3, 1893. Thereupon a special inquiry was held, as provided by the statute, and the officials conducting the same did not make the favorable decisions required by law to entitle them to admission, but held that two of the children were suffering from a loathsome contagious disease, and that the mother and the other three children were persons likely

to become a public charge. Thereupon all were excluded from admission into the United States, and are now detained at the barge office immigrant station pending their return to the country whence they came.

J. Brownson Ker, for the motion.
Lorenzo Ullo, opposed.

LACOMBE, Circuit Judge (after stating the facts). The act of August 18, 1894, c. 301 (28 Stat. 390), provides that:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or custom officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury."

If, therefore, the petitioner's wife and children are "aliens," this court cannot inquire into the correctness of the decision of the immigration officers. Lem Moon Sing v. U. S., 158 U. S. 540, 15 Sup. Ct. 967. In other words, the only jurisdictional facts which it is necessary for the respondent to establish in a proceeding of this character are—First, that the person seeking admission is an alien; and, second, that the immigration officers made their decision in the way in which the statute requires. It is no longer necessary for the respondent to offer proof in this court that such person is an immigrant, as was the case before the passage of the act of 1894, supra, and while the earlier acts only were in force. The decisions of this court cited on the brief (In re Martorelli, 63 Fed. 437; In re Maiola, 67 Fed. 114) were rendered under the earlier acts, and are no longer applicable.

The petitioner relies upon an exception contained in the statute which excludes persons suffering from a loathsome or contagious disease, or persons likely to become a public charge, in these words:

"But this section shall not be held to exclude persons living in the United States from sending for a relative or friend, who is not of the excluded classes," etc.

But under the act of 1894 the decision of the immigration officers that a person seeking admission is of the excluded class is not reviewable in the courts.

It is further contended that petitioner is not an alien, and that, therefore, his wife and children are not aliens. Undoubtedly the citizenship of his wife and children is the same as his own; but upon the record it does not appear that the petitioner is, as he contends, a citizen of the United States. He began as an alien,—a subject of the king of Roumania. He did not change his condition nor his allegiance by merely coming to this country nor by residing here. Nor has his declaration of intention altered the situation. He does not by that document renounce his allegiance, but merely declares that it is his intention so to do at some later day; and so long as his foreign allegiance continues he remains an alien. Lanz v. Randall, 4 Dill. 425, Fed. Cas. No. 8,080; Maloy v. Duden, 25 Fed. 673; City of Minneapolis v. Reum, 6 C. C. A. 31, 56 Fed. 576.

The writ is dismissed.

UNITED STATES v. WILLIAMS.

(District Court, N. D. California. December 8, 1897.)

No. 3,453.

1. ALIENS—DEPORTATION OF CHINESE—EVIDENCE OF RESIDENCE.
The provision of the act of May 5, 1892, § 6, as amended by Act Nov. 3, 1893 (28 Stat. 7), that any Chinese laborer found within the jurisdiction of the United States without the certificate of residence required by that act shall be ordered deported unless he shall establish "by at least one credible witness, other than Chinese," that he was a resident on May 5, 1892, leaves no room for construction, and gives the judge before whom such person is brought no discretion to accept any other testimony than that prescribed.

2. SAME.
The power of congress to prescribe such rule of evidence in proceedings for the deportation of Chinese aliens is included within its general authority to exclude aliens, or to prescribe the conditions upon which they may remain in the United States.

3. SAME—PROCEEDINGS—ALLEGATIONS IN COMPLAINT.
Where a complaint is filed for the deportation of a Chinese laborer under 28 Stat. 7, on the ground that he is without the certificate of residence required by that act, an allegation therein that such laborer was a resident of the United States on May 5, 1892, is surplusage, and cannot take the place of the evidence of such fact required to be furnished by the defendant.

Proceeding for the deportation of George Williams, a Chinese laborer.

Bert Schlesinger, Asst. U. S. Atty.
Thomas D. Riordan, for defendant.

DE HAVEN, District Judge. The complaint in this proceeding charges that the defendant, George Williams, was on and before the 5th day of May, 1892, a Chinese laborer, within the limits of the United States, and entitled to remain therein only upon the terms prescribed by the act of congress entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892 (27 Stat. 25), and the act of November 3, 1893 (28 Stat. 7), amendatory thereof; and that he had at all times since the first-mentioned date remained, and now is, within the limits of the United States, without having procured the certificate of residence required by the provisions of the said act of May 5, 1892, and the act of November 3, 1893, amendatory thereof. The testimony of the defendant himself was to the effect that he came to the United States about the year 1877, and has since that time regarded the city of New York as his home. On May 5, 1892, he was a steward on board an American ship, and at all times between November 3, 1893, and May 5, 1894, was also a steward on board of an American vessel sailing on the high seas, and without the actual territorial limits of the United States.

By the act of November 3, 1893 (28 Stat. 7), section 6 of the act entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892, was amended so as to read:

"And it shall be the duty of all Chinese laborers within the limits of the United States who were entitled to remain in the United States before the passage of the act to which this is an amendment to apply to the collector of internal revenue of their respective districts within six months after the

passage of this act for a certificate of residence; and any Chinese laborer within the limits of the United States who shall neglect, fail, or refuse to comply with the provisions of this act, and the act to which this is an amendment, or who, after the expiration of said six months, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested, * * * and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, * * * unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of said United States judge, and by at least one credible witness, other than Chinese, that he was a resident of the United States, on the 5th day of May, 1892."

The defendant is a Chinese laborer, and without the certificate of residence required by the acts of congress above referred to, and was the only person who testified to the fact that he was on board an American ship on the 5th day of May, 1892. This being the case, the finding of the special referee that defendant "has not established clearly to my satisfaction, by any witness whatsoever other than Chinese, that he was a resident of the United States on the 5th day of May, 1892," and his conclusion of law "that said defendant is unlawfully within the United States, and not entitled to be and remain therein," must be approved.

The language of the act of congress above quoted, which provides that a Chinese laborer without a certificate of residence must, in a proceeding like this, prove to the satisfaction of the judge, "by at least one credible witness other than Chinese," that he was a resident of the United States on the 5th day of May, 1892, is so clear that by no possible construction would the court be authorized to hold that such fact can be established without the testimony of such witness; and there is nothing in this conclusion which at all conflicts with the cases of In re Chin A On, 18 Fed. 506, and In re Leong Yick Dew, 19 Fed. 490. In these cases it was held, in effect, that the section of the act of congress of May 6, 1882, requiring all Chinese laborers seeking to land in this country to produce before the collector of the port, as the only evidence of their right to land, a certificate signed by a collector of customs, and showing that such laborers were residents of the United States on the 17th day of November, 1880, or had come into the United States before the expiration of 90 days after the passage of said act of May 6, 1882, should not be construed as apply-ly to Chinese laborers who left the United States between November 17, 1880, and the date on which collectors of customs were prepared to issue the certificates provided for by that act. The act thus construed was entitled "An act to execute certain treaty stipulations relating to Chinese"; and Sawyer, circuit judge, in delivering the opinion of the court in Re Leong Yick Dew, 19 Fed. 490, said that it was manifestly the intention of that law "to carry out in good faith the stipulations of the treaty," to the effect that Chinese laborers who were in this country on November 17, 1880, the date of such treaty, should be allowed to go from and come to the United States of their own free will and accord; and it was because any other construction would have been in conflict with such manifest intention that the conclusion was reached in that case that, notwithstanding the

broad language requiring all Chinese laborers to produce the certificates called for by that act, as the only evidence of their right to land in the United States, congress must necessarily have intended to except from such provision those Chinese laborers entitled to enter the United States under that treaty, but who, by reason of their departure from the United States after the date of such treaty, and prior to the time when collectors of customs were prepared to issue the certificates required by that act, could not possibly obtain such certificates. And this construction was approved by the supreme court of the United States in Chew Heong v. U. S., 112 U. S. 554, 5 Sup. Ct. 255, in which case the court said, in construing the same act of May 6, 1882:

"The plaintiff in error left this country after the ratification of the treaty, having the right, secured by its articles, to return, of his own free will, without being subject to burdens or regulations that materially interfere with its enjoyment. The legislative enactments in question should receive such a construction, if possible, as will save that right, while giving full effect to the intention of congress. That result can be attained consistently with recognized rules of interpretation. 'Lex non intendit aliquid impossible' is a familiar maxim of the law. The supposition should not be indulged that congress, while professing to faithfully execute treaty stipulations, and recognizing the fact that they secured to a certain class the 'right to go from and come to the United States,' intended to make its protection depend upon the performance of conditions which it was physically impossible to perform."

But the question presented here is entirely different. In providing that, in a proceeding like this, a Chinese laborer, who is without a certificate of residence, must prove by at least one credible witness, other than Chinese, that he was a resident of the United States on the 5th day of May, 1892, the law does not require a legal impossibility; nor does it impose upon the defendant or others of his race a condition not in harmony with the general intent and object of the statute. It may be inconvenient for the defendant at this time to produce such a witness before the court, and it is possible that there may be no person, other than Chinese, now living, who can testify to the fact necessary for him to show in this case, to wit, that he was a resident of the United States, or, what is the same thing, was, as is claimed by him, sailing in an American vessel upon the high seas, and therefore within the jurisdiction of the United States, at the date of the passage of the act of May 5, 1892. It may be that the law, in making the defendant, or any one of his race, incompetent as a witness to prove such fact, works in this particular case a hardship; but the court cannot, for this reason, suspend its operation. Congress has undoubted power to prescribe the conditions upon which aliens shall be permitted to remain in the United States; and, in the exercise of this power, it might have enacted that any Chinese laborer found in the United States without the certificate of residence required by the act of congress should "be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country." Fong Yue Ting v. U. S., 149 U. S. 728, 13 Sup. Ct. 1028. And, in the case just cited, it was said, in passing upon the question of the right of congress to require the defendant in this class of cases to prove the fact of his residence by at least one credible white witness:

"The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof, 'by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act,' is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government."

Indeed, it is perfectly apparent that the plenary authority of congress to prescribe the rules of evidence, or the competency of witnesses, upon the hearing or trial of a proceeding like this, is necessarily included within its general power to exclude aliens, or to prescribe the conditions upon which they shall be permitted to remain in the United States.

It is, however, claimed by the defendant that as the complaint in this proceeding alleges that he was a resident of the United States on the 5th day of May, 1892, the United States is bound by such allegation, and he was not called upon to establish the fact of such residence by proof. This contention presents, in my opinion, the most serious question in the case. It was said in the case of Fong Yue Ting v. U. S., 149 U. S. 729, 13 Sup. Ct. 1028, that in this class of cases "no formal complaint or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute." However this may be, I am satisfied that formal pleadings in a proceeding like this are perfectly proper; but it is not necessary for a complaint in such a proceeding to allege anything further than that the defendant is a Chinese person, and is found within the United States without the certificate of residence required by the act of congress of November 3, 1893 (28 Stat. 7). The allegation that defendant was a resident of the United States on May 5, 1892, is therefore to be regarded as surplusage. It was wholly unnecessary, and, in my opinion, such superfluous matter cannot be allowed to take the place of the testimony of one credible witness, other than Chinese, required by the act of congress just referred to. At most, it cannot be regarded as having any greater effect than a mere affidavit; and the affidavit of a credible white witness would not be competent evidence to prove the fact of residence, as required by the act of congress. In other words, the court is not permitted to accept any other proof of the fact of defendant's residence in the United States on May 5, 1892, than that prescribed by the act of congress.

For these reasons, the exceptions to the report of the special referee will be overruled, and a judgment will be entered to the effect that the defendant be deported from the United States to China.

UNITED STATES v. FIFTY CASES OF DISTILLED SPIRITS.

(District Court, D. Oregon. December 1, 1897.)

No. 4,251.

COMMERCE—IMPORTATION OF SPIRITS INTO ALASKA—VIOLATION OF REGULATIONS.

An attempt to export distilled spirits from a port of the United States cannot be construed as an attempt to import such spirits into the territory of Alaska, in violation of the regulations prohibiting such importation, made by the president under Rev. St. § 1955, though such importation was intended by the shipper.

John H. Hall, U. S. Atty., and Charles J. Schnabel, Asst. U. S. Atty.

John M. Gearin and W. T. Hume, for claimant.

BELLINGER, District Judge. This is a proceeding by the United States for the forfeiture, under section 1955 of the Revised Statutes, of 50 cases of distilled spirits, for an attempted unlawful importation thereof into the territory of Alaska. Shortly stated, this charge is that the 50 cases of spirits were placed upon the dock at Portland for unlawful importation into Alaska, and that, for the purpose of misleading the officers of the customs service, the packages were labeled "Cumberland and Homemade Tomato Catsup"; that while on said wharf for said unlawful exportation from Portland, and unlawful importation into Alaska, "and while then and there being attempted to be imported into" Alaska, and before they were actually placed on board the steamer for shipment, they were seized by the collector of customs. The packages were not, in fact, exported, but the government contends that they were attempted to be exported, in the act of placing them on the dock for shipment. It is also contended for the United States that this attempted exportation is, in effect, an attempt to import the packages into Alaska, for the reason that the attempted exportation from Oregon was with a view to their unlawful importation, as stated. That part of section 1955 necessary to be considered is as follows:

"The president shall have power to restrict and regulate or to prohibit the importation and use of fire-arms, ammunition, and distilled spirits into and within the territory of Alaska. The exportation of the same from any other port or place in the United States, when destined to any port or place in that territory, and all such arms, ammunition, and distilled spirits, exported or attempted to be exported from any port or place in the United States and destined for such territory, in violation of any regulations that may be prescribed under this section, and all such arms, ammunition, and distilled spirits landed or attempted to be landed or used at any port or place in the territory, in violation of such regulations, shall be forfeited."

It is probable that the words in this statute, "the exportation of the same from any other port or place in the United States, when destined to any port or place in that territory," with which the second sentence in this section begins, were intended as a part of the first sentence, which they follow; otherwise it is impossible to give a meaning to these words. In the Statutes at Large (15 Stat. 241) the clause quoted is preceded by the word "and," with which this sentence is made to begin. The section, as thus corrected, provides that:

"The president shall have power to restrict and regulate, or to prohibit the importation and use of fire-arms, ammunition and distilled spirits into and within the territory of Alaska, and the exportation of the same from any other port or place in the United States, when destined to any port or place in that territory, and all such arms, ammunition, and distilled spirits exported or attempted to be exported from any port or place in the United States and destined for such territory, in violation of any regulations that may be prescribed under this section, and all such arms, ammunition, and distilled spirits landed or attempted to be landed or used at any port or place in the territory, in violation of such regulations, shall be forfeited," etc.

As thus read, the president is empowered, not only to restrict and regulate or prohibit the importation of the prescribed articles into Alaska, but their exportation from any place in the United States. So far as the particular case is concerned, it is immaterial whether the statute is read to empower the president to regulate, restrict, or prohibit the exportation of the articles in question from places in the United States, since there has been no exercise of such power by the president, and there is therefor no prohibition against the exportation of spirits for importation into Alaska, unless the latter includes the former; and this is what is contended for by the government. However read, the section clearly distinguishes between the exportation of the contraband goods from places in the United States and their importation into Alaska. Each is made a ground of forfeiture "when it is in violation of the presidential regulation," and, without this, these words are opposed in their commonly accepted meaning. It would be an unnatural and unheard-of use of words to say that the attempt to export from one port involves an attempt to import into another, leaving out of consideration the fact that the act authorizes the president to prescribe regulations against each. The fact that the 50 cases of distilled spirits were labeled "Cumberland Homemade Catsup" has no bearing upon the question of an attempt to import into Alaska. This false designation is evidence of an intention to violate the presidential regulation against the importation of spirits into Alaska; but the intent is not the act, nor an attempt to commit it. The fraudulent device of the labels shows a contemplated crime against the United States, but this does not warrant the court in doing violence to the statute in order to punish those who are preparing to violate it. These packages of spirits were doubtless prepared for unlawful shipment to Alaska, and they were placed on the wharf for such shipment. It adds nothing to say that they were in transit from Portland when seized. They were not in transit from Portland, and the libel so shows. They were on the wharf in Portland. At most, there was an attempt to export; but, as already stated, there is no regulation against such an attempt. It is not for this that forfeiture is asked, or, under existing regulations, can be had. The exceptions to the libel are allowed.

HARTZELL v. UNITED STATES.

(District Court, S. D. Illinois. December 24, 1897.)

INTERNAL REVENUE—SPECIAL TAXES—WHAT CONSTITUTES DEALER IN OLEOMARGARINE.

A merchant does not become a dealer in oleomargarine, and subject to special tax as such, by permitting packages ordered by an hotel keeper from a wholesale house, through its salesman, to be shipped in his name, simply as an accommodation, and as a guaranty that the price would be paid, where he had no part in making the sales, and received no profit thereon.

This was a petition filed by Judd O. Hartzell to recover special taxes assessed against him as a wholesale dealer in oleomargarine, and paid under protest. The United States demurred to the petition.

Geo. Edmunds and O'Harra, Scofield & Hartzell, for petitioner.
J. O. Humphrey, for the United States.

ALLEN, District Judge. Judd O. Hartzell filed his petition on the 16th day of November, 1895, duly sworn to, in the United States district court, asking for judgment against the United States for an internal revenue tax as dealer in oleomargarine, which he alleges was improperly assessed against him. The petitioner states:

That about the 1st of March, 1894, he was notified by J. L. Wilcox, collector of internal revenue for the Eighth collection district, at Springfield, Ill., that an assessment had been made against him as a wholesale dealer in oleomargarine at Laharpe; that the amount of the taxes so assessed, under the internal revenue laws of the United States, was $160 for the 4 months ending June 30, 1893, and $480 for the 12 months ending June 30, 1894; that said taxes, with the penalty, amounted to $960; and that said collector demanded payment thereof, and notified petitioner that, if it was not paid, the collector would proceed to distrain and sell property of petitioner. Upon receiving this notice, petitioner prepared evidence, in the form of affidavits, and presented the same to said Wilcox, as such collector, showing that petitioner was not, and had not been, a dealer in oleomargarine. That these affidavits not then being in petitioner's possession (having been forwarded to Washington City), petitioner was unable to give a copy of the same, but they were substantially the same as Exhibits A and B, filed with the petition. And petitioner thereupon asked that the assessment be vacated, abated, and set aside, but his said request was refused. Upon such refusal, petitioner appealed to the commissioner of internal revenue, at Washington, D. C., and presented to him proof showing the fact, fully, that petitioner had never dealt in oleomargarine, and made exhibits of such proof, and asked said commissioner to set aside, vacate, and abate said assessment, which request was refused by said commissioner, and petitioner informed he must pay the tax and penalties thereon, and, if he desired redress, he must seek the same in court. That petitioner thereupon paid to said Wilcox, as such collector, under protest, the sum of $960, in full of said assessment and penalties required by said collector to be paid, on the 30th day of November, 1894. Petitioner then made application to said collector to refund to him said $960, tax and penalty exacted of him, and which he was required to pay under protest, as aforesaid. That the same was not refunded by said collector. Afterwards, in due time, petitioner took and made an appeal to the commissioner of internal revenue, according to the provisions of the law in that regard, and the regulations of the secretary of the treasury established in pursuance thereof, and furnished, upon blanks provided by said commissioner, the facts and circumstances in the case. That said appeal was taken in December, 1894, and the matter was pending before said commissioner until the spring of 1895, when a decision was rendered by said commissioner adverse to petitioner.

The petition further alleges that the substantial and material facts were:

That he was running a general store at Laharpe, a town of about 1,500 inhabitants, in Hancock county, Illinois, but that he never handled oleomargarine, in any manner. That an hotel keeper in said town of Laharpe (Harry Owens) wanting some oleomargarine for use in his hotel, applied to one Charles Clark, the traveling salesman of the wholesale grocery house of Reid, Murdock & Fisher, of Chicago, and who stopped at the hotel of said Owens when in Laharpe, on his regular trips, selling goods to merchants of Laharpe. That said Clark contracted with said Owens for one tub of oleomargarine. That after said order had been taken by said Clark from said Owens, and they had agreed upon the price and quantity, said Clark and Owens came to petitioner's store, and said Owens, in the presence of said Clark, stated to petitioner that he had bargained for a tub of oleomargarine from said Clark, but that he had no rating with said Clark's house, of Reid, Murdock & Fisher, and asked petitioner, in the presence of said Clark, to permit him

to have said oleomargarine shipped to him in the name of said petitioner. That said Clark thereupon assured petitioner that by so doing he would not incur any liability as a dealer in oleomargarine, but would simply be a guarantor for said Owens that he would pay for the same. That, with that understanding, petitioner consented that said tub of oleomargarine might be shipped in his name to said Owens. That said tub came billed and charged in petitioner's name, but was received and paid for by said Owens, and never was in any manner entered on petitioner's books, or became any part of his stock of goods. That said Owens afterwards, on two or three different occasions, ordered a tub of oleomargarine from said Clark. That all of said tubs contained about forty pounds, and each order was made by said Owens, and he ordered the oleomargarine for his own use, and the same was used by him in his hotel, and he so ordered the same by agreement between him and said Clark; petitioner, as a matter of accommodation to said parties, simply consenting that the same might be billed in petitioner's name to said Owens, and each tub was shipped in petitioner's name, the same as the first tub. That petitioner long afterwards learned, but did not then know, that said Reid, Murdock & Fisher did not have said oleomargarine in stock, but obtained the same from Armour & Co., of Chicago, and had that company ship the same, but that it was billed out to Owens in the name of petitioner by said Reid, Murdock & Fisher, and petitioner supposed that it was shipped by them. It was received by said Owens under his said agreement with said Clark, and paid for by said Owens. That afterwards said Owens in like manner purchased from one Pierce, a traveling salesman for Armour & Co., of Chicago, who also stopped with said Owens at his hotel on trips through the county selling goods, a tub of oleomargarine, of about the same size. That he purchased the same of said Pierce in the same way, and under a like agreement had with said Clark. That the same was shipped and billed to said Owens in the name of petitioner at the request of said Owens and Pierce, for the reason, as given by them, that said Owens had no rating with Armour & Co., and that petitioner would thereby become surety for the payment of the same. That petitioner never bought any oleomargarine of said Armour & Co., or any other person, for himself, or for the purpose of dealing in the same, or keeping it in stock, or trading in it, as a wholesale or retail dealer. That his name was simply used by said Owens and said traveling salesman and their said house, at their request, for the purpose aforesaid, and without any intention on the part of your petitioner to handle oleomargarine, or become a dealer therein. That altogether there were nine tubs, of about forty pounds each, sold to said Owens, and shipped and billed in the name of petitioner, including the sales made by both Clark and Pierce. The first tub was shipped about the last of February, 1893, and it was, if petitioner recollects correctly, all shipped between that date and June 30th following, except about two tubs which were shipped some time in June or July. That this is the only oleomargarine that petitioner, or his name, was ever connected with in any manner whatsoever, and that this was all sold to said Owens, and was shipped and billed in the name of petitioner. That most of it was received and taken from the freight depot in Laharpe direct to Owens' hotel. A few tubs may have been brought by freight haulers to petitioner's store, but, if so, it was taken immediately from there to Owens' hotel; and none of it was ever examined or inspected or seen by petitioner, and he knew nothing whatever about it, further than already stated. None of it was ever handled or carried in stock by petitioner, or sold or dealt in by him. Petitioner never at any time, directly or indirectly, dealt in oleomargarine, and never at any time had anything to do with the same, except as before set forth. That what he did then in connection with said nine tubs was done at the request of said parties, and as the agent of said Owens, and to accommodate him and said Clark and said Pierce, and their said wholesale houses. That said Clark and Pierce were general traveling salesmen for said wholesale houses, and each of them had a full knowledge of all the facts at the time said oleomargarine was sold to said Owens, and shipped to him in petitioner's name. That petitioner was never promised any remuneration, and never made any charge, and never at any time, directly or indirectly, received any profit or commission on said oleomargarine, and never at any time expected to or attempted

to receive any profit, commission, reward, or remuneration. That, in consenting that his name might be used, he did so solely for the accommodation of all parties, and for no other purpose whatsoever, and wholly without reward or remuneration.

To this petition the United States district attorney has interposed a general demurrer, and, such demurrer, under well-settled rules, admitting the truth of all facts well pleaded, the question arises, do the facts alleged in the petition entitle the petitioner to relief in this court?

It is provided in the United States statutes on the subject of internal revenue, relative to suits for recovery of taxes wrongfully collected (Rev. St. 1878 [2d Ed.] p. 619, § 3226), that:

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the commissioner of the internal revenue, according to the provisions of law in that regard, and the regulations of the secretary of the treasury established in pursuance thereof, and a decision of the commissioner has been had therein; provided, that if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the commissioner, at any time within the period limited in the next section."

Full compliance with the foregoing section is averred in the petition.

Section 2, p. 559, of the Supplement to the Revised Statutes of the United States of 1874–91 provides:

"That the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars."

All the necessary allegations required by section 5, p. 560, of the Supplement to the Revised Statutes of the United States are also contained in the petition. Indeed, it has not been contended in support of the demurrer that the petition is subject to technical objection; but it is strenuosly insisted that the substantial facts and circumstances set up in the pleading make the petitioner, Hartzell, a wholesale dealer in oleomargarine. The authorities cited in support of this position do not seem to sustain it. They are mainly liquor cases, under the internal revenue law, and establish fully the doctrine that one sale constitutes the party making it a dealer. This is unquestionably the rule, at least in this circuit, and would apply equally to the sale of oleomargarine. But do the facts set up in the petition, and admitted, for the purposes of the inquiry, to be true, show a sale of oleomargarine by Hartzell to Owens, or to any other person? Owens was an hotel keeper in the town of Laharpe. Clark was a traveling salesman for Reid, Murdock & Fisher, of Chicago. Hartzell was a merchant living and doing business also in Laharpe. Owens wanted a tub of oleomargarine to use at his hotel. Clark, the traveling man, stopping with Owens when in Laharpe, wanted to sell it to him. The terms were agreed upon, but, Owens having no rating with Clark's house, it became necessary to give some security for the payment of the price. The parties, Owens and Clark, went together to Hartzell, who agreed that the oleomargarine

might be shipped in his name, and that he would stand good for the purchase money, but expressly stipulated that he was not to receive or handle, or have anything to do with, the goods, except to see that Owens paid for them. It turned out that Reid, Murdock & Fisher, in Chicago, did not handle oleomargarine, or at least did not then have it in stock, but went to Armour & Co., Chicago manufacturers, and had it shipped to Owens in the name of Hartzell. Several tubs were shipped under the same circumstances. Afterwards Pierce, a traveling salesman for Armour & Co., who also stopped at the hotel kept by Owens, solicited and secured orders for oleomargarine from Owens under precisely the same circumstances and conditions existing at the time he purchased from Clark. In all, nine tubs were shipped to Owens in Hartzell's name, who received and paid for the same, including the freight, and used it in his hotel. Hartzell's act was that of a mere agent of Owens. He simply agreed to guaranty payment of the price of the oleomargarine, stipulating at the time that he was to have nothing to do in handling or caring for it. In no event was he to receive one cent of gain or profit out of the transaction. Was there any sale of the oleomargarine by Hartzell to Owens? In section 243 of Benjamin on Sales it is said:

"But then, in some cases, a broker, though acting as agent for a principal, makes a contract of sale and purchase in his own name. In such case he may be sued by the party with whom he has made such contract, for a nonfulfillment of it. But so, also, may his undisclosed principal; and, although the agent may be liable upon the contract, yet I apprehend nothing passes to him by the contract. The goods do not become his. He could not hold them, even if they were delivered to him, as against his principal. He could not, as it seems to me, in the absence of anything to give him a special property in them, maintain any action in which it was necessary to assert that he was the owner of the goods. The goods would be the property of his principal, and although two persons, it is said, may be liable on the same contract, yet it is impossible that two persons can each be the sole owner of the same goods. Although the agent may be held liable, as a contractor, on the contract, he still is only an agent, and has acted only as agent. He could not be sued, as it seems to me, merely because he had made the contract of purchase and sale in his own name with the vendor, even though the contract should be in a form which passes property in goods by the contract itself by a third person, as if he (the broker) were the owner of the goods; as if, for instance, the goods were a nuisance or an obstruction, or, as it were, trespassing, he would successfully answer such an action by alleging that he was not the owner of the goods, and by proving that they were the goods of his principal, till then undisclosed. If he could not be sued for any other tort merely on the ground that he had made thé contract in his own name with the vendor, it seems to me that he cannot be successfully sued merely on that ground by the real owner of the goods as for a wrongful conversion of the goods to his own use."

If the position should be assumed that there was no agency existing between Owens and Hartzell, unless knowledge of that agency should be shown to Armour & Co. and to Reid, Murdock & Fisher, the answer is a ready and complete one,—that they had such notice through their traveling salesmen, their agents, who respectively called upon Owens, and they together agreed upon the price and terms, and, after the price and terms had been agreed upon, then the matter was submitted to Hartzell, as alleged in the petition.

The knowledge of their traveling men, agents of Reid, Murdock & Fisher and of Armour & Co., is notice to their principal. "The general doctrine that the knowledge of an agent is the knowledge of the principal cannot be doubted." Hoover v. Wise, 91 U. S. 308, and cases there cited. It is conceded that the laws of the United States should be liberally construed, for the government, against all who attempt to commit fraud, or thwart the purpose and duty to collect revenue. But in this case, according to the petition, there was no bad purpose on the part of Hartzell or any one else. Nor was there anything in the transaction wearing the appearance of evil. The manufacturers of the oleomargarine, Armour & Co., had paid the special tax, $480, becoming wholesale dealers, and had a perfect right to sell the goods, of their own production, and at the place of manufacture, in the original packages, without paying any other tax. 1 Supp. Rev. St. (2d Ed.) p. 505, § 3. Under this statute, Armour & Co., manufacturers and wholesale dealers, through their agents, did sell, in all, nine packages of oleomargarine to Owens, shipping the same in the name of petitioner, Hartzell; but Hartzell, according to the petition, never had any such connection with same as made him a dealer; and the demurrer must be overruled.

BRADY v. DALY.

(Circuit Court of Appeals, Second Circuit. December 1, 1897.)

No. 8.

1. INFRINGEMENT OF COPYRIGHT—DRAMATIC COMPOSITION—STATUTORY DAMAGES.
   The unauthorized performance of a single scene in a copyrighted play (such as the railroad scene in Daly's "Under the Gaslight") may constitute a "dramatic composition," in the meaning of Rev. St. § 4966, giving damages of $100 for the first and $50 for every subsequent performance of "any dramatic composition" for which a copyright has been obtained; and such damages may be recovered though no other part of the play is taken. Daly v. Webster, 4 C. C. A. 10, 56 Fed. 483, 1 U. S. App. 573, followed.
2. SAME—APPEAL—ASSIGNMENTS OF ERROR.
   Under an assignment that the court erred in excluding evidence to show that a certain feature of an infringing scene in defendant's play was not a material part of "plaintiff's play," it cannot be held that the court erred in excluding evidence that this feature was not a material part of defendant's play, and that his play continued to be successful after this feature was eliminated.
3. SAME—RES JUDICATA.
   A decree in an equity suit that the copyright of a certain play is valid is conclusive in a subsequent action at law between the same parties to recover statutory damages, under Rev. St. § 4966.
4. SAME.
   Under Rev. St. § 4966, it is not essential to a recovery of the statutory damages that the giving of an infringing performance shall be a willful violation of the copyright.
5. SAME—PRIOR ADJUDICATION.
   In a suit in equity for injunction and accounting with respect to the infringement of a copyrighted play, where a perpetual injunction is granted, and the cause is referred to a master to ascertain the number of times the infringing scene was given, but no accounting of profits is in fact sought

or obtained, the decree does not operate to bar the plaintiff from bringing a subsequent action, under Rev. St. § 4966, to recover statutory damages.

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

This case comes here upon a writ of error brought by the defendant below to review a judgment rendered in the circuit court in favor of the plaintiff. The action was brought under section 4966, Rev. St. U. S., which provides that any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, shall be liable for damages therefor; such damages in all cases to be assessed at such sum, not less than $100 for the first and $50 for every subsequent performance, as to the court shall appear to be just. The history of the litigation, and the facts on which the judgment now under review was entered, are as follows:

On August 1, 1867, the plaintiff, Daly, duly copyrighted a dramatic composition or play, in five acts, of which he was the author, owner, and exclusive proprietor, entitled "Under the Gaslight." The play was subsequently produced by the plaintiff. It pleased the popular taste, and was successful and profitable; the plaintiff having received, as fees from different persons performing the same under his license, substantial license fees in almost every year since 1868. The popularity of the play seems to have depended in large measure upon a scene in the fourth act, known as the "railroad scene." Precisely what that is may be seen by reference to the opinions cited infra from 6 Blatchf. and 4 C. C. A. Soon after the play was produced, Dion Boucicault, without the consent of plaintiff, prepared a play called "After Dark," in which he introduced a scene varying slightly from the railroad scene as it appeared in "Under the Gaslight," so as to be colorably different, but substantially the same. Boucicault's play was performed in New York by one Palmer, against whom Daly brought suit in the circuit court, Southern district of New York. He obtained an injunction; Judge Blatchford filing an elaborate opinion, in which he held that the railroad scene in plaintiff's play was a dramatic composition, within the meaning of the copyright statutes, that plaintiff was as much entitled to protection in respect of a substantial and material original part of it as he was in respect to the whole, that the railroad scene in Boucicault's play contained everything which makes the railroad scene in plaintiff's play attractive as a representation on the stage, and that it infringed plaintiff's copyright. Daly v. Palmer (Dec., 1868) 6 Blatchf. 256, Fed. Cas. No. 3,552. Some time prior to May, 1889, the defendant in the action at bar, William A. Brady, in connection with others, without consent of plaintiff, began to produce on the stage the said play of "After Dark," including the railroad scene. On May 20, 1889, plaintiff began a suit in equity for injunction and accounting against Brady and his associates, in the same circuit court. An application for a preliminary injunction was denied upon the ground that there was a material variance between the registered title and the published title, of "Under the Gaslight." Daly v. Brady, 39 Fed. 265. When the equity suit came on for final hearing, the judge at circuit followed the decision on motion for preliminary injunction, and dismissed the bill. Daly v. Webster (Nov. 4, 1891) 47 Fed. 903. The plaintiff promptly appealed, and the cause came before this court for argument on May 13, 1892, and its decision will be found reported, under the title "Daly v. Webster," in 1 U. S. App. 573, 4 C. C. A. 10, 56 Fed. 483. We reversed the decision of the circuit court as to the supposed variances in title, and held that the plaintiff's railroad scene was a dramatic composition; that it was protected by copyright; that the railroad scene in "After Dark," as Boucicault composed it, and as it had been performed by defendant (the imperiled person being saved from death by the aid of a "rescuer"), was an infringement, but that, if performed without the introduction of a rescuer, it would not infringe. There was evidence in that suit showing that defendant had produced the scene, sometimes unchanged from Boucicault's, and sometimes without an independent rescuer, the imperiled person saving himself by inadvertently operating a switch. In conformity with the mandate of this court, a decree for perpetual injunction against defendants was entered November 5, 1892, and it was referred to a mas-

ter to take proof of the number of performances given by the defendants, and where each performance took place; the defendants being required to attend, give evidence, and produce their books and papers. Upon said examination, defendants' counsel objected to the defendants being compelled to produce the manuscript play of "After Dark," upon the ground that "neither the defendant nor his books can be used against him in any proceeding wherein it is sought to obtain a penalty, or for the purposes of this hearing before the master." The decree did not direct the master to ascertain anything in regard to profits. No evidence was offered upon that subject, and no finding was made thereon. A final decree in said cause, accepting the master's report, and making the findings of the master the findings of the court, was entered on April 1, 1893. No judgment or decree for profits was asked or rendered.

The action now under review was begun on July 14, 1893. As before stated, it is to recover statutory damages under section 4966 of the United States Revised Statutes. Issue being joined by the service of an answer, the cause came on for trial before Judge Shipman, sitting with a jury, on May 29, 1895, whereupon the parties, by their attorneys of record, filed with the clerk a stipulation in writing waiving a jury, in conformity to section 649, Rev. St. U. S., and the trial proceeded before the court without the jury. The plaintiff offered in evidence the record in the equity suit against Brady and others, which was admitted "for certain purposes"; and, having offered some testimony to show plaintiff's actual damages from the alleged infringement, he rested. The record thus admitted contained the finding of the master, adopted by the circuit court, as to the number of times that the play of "After Dark," with the infringing scene, had been publicly produced by defendant. The evidence upon which this finding was based was extorted from the defendant by the plaintiff's examination of him before the master in the equity suit. Defendant thereupon introduced some evidence, and offered more, which was rejected, and exception to such rejection reserved. The rejected evidence will be found referred to in the discussion of exceptions in the opinion infra. Having taken his proofs, and offered whatever testimony he chose to present, defendant rested. The court took the case under advisement, and on June 24, 1895, filed special findings of act and conclusions of law. 69 Fed. 285. The findings of fact set forth, substantially, what has been hereinbefore rehearsed. The court found, as conclusions of law, that Daly's copyright was good and valid; that it covered and protected his railroad scene; that the acts of defendant in producing "After Dark," including its railroad scene, without plaintiff's consent, were in disregard of said copyright, and violated plaintiff's exclusive rights thereunder; that the damages recoverable for such violation would be as prescribed in section 4966, but that there could be no recovery on the proofs submitted, because there was no testimony before the court showing the number of infringing performances, except the record in the equity case, adopting the finding of the master, which finding was based on evidence extorted from the defendant by examination in such suit; that section 4966, although it used the word "damages" only, in reality imposed a penalty; that the two-year statute of limitations (section 4968) applied; and that evidence obtained from a party by means of a judicial proceeding must not be used against him for the enforcement of a penalty. Thereupon, and before judgment was entered, plaintiff moved for a new trial, or such other and further relief as might be just. On November 4, 1895, the court granted the motion, "to the extent that the cause be opened for the purpose of allowing either party to present additional testimony in regard to the number and times of the representations, if any there were, of the play 'After Dark,' by the defendant, within two years prior to the commencement of this suit." The cause came on before the same judge on April 9, 1896; and the plaintiff produced the testimony of various witnesses as to the number of times defendant had, within the period limited, produced "After Dark" with the railroad scene unaltered, i. e. with an independent rescuer. Defendant offered no proof, and the cause was submitted. On July 14, 1896, the court filed special findings of fact upon the new proofs, holding that "After Dark" had been publicly produced by defendant and his agents, without plaintiff's consent, for more than two years before August 23, 1893; that such performances took place at least 126 times between August 24, 1891, and October 5, 1892; and that after the

latter date a change was made by the defendant in the representation of the railroad scene, whereby the infringement ceased. The court expressly stated that the evidence as to these performances, and all performances subsequent to August 24, 1891, "is entirely independent of the evidence obtained from the defendant by the plaintiff's examination of him in the accounting before the master in the equity suit mentioned in the prior findings of fact. No pleading or evidence of the defendant has been used or taken in evidence, in ascertaining any facts as to performances, or for the enforcement of any alleged liability in this case." Upon the new testimony, with the rest of the evidence, the court found, as a conclusion of law, that plaintiff was entitled to judgment of $50 for each of the 126 performances, amounting to the sum of $6,300, with costs. Judgment was duly entered for that sum, and defendant sued out this writ of error.

A. J. Dittenhoefer, for plaintiff in error.

Stephen H. Olin, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). There are 34 assignments of error, but it will be necessary to discuss only those which are relied upon in the brief of plaintiff in error.

1. It is contended that the penalty is incurred only when substantially the whole of a copyrighted play is reproduced. This contention, however, has been already disposed of by this court. The penalty of the statute is imposed when "any dramatic composition for which a copyright has been obtained" is publicly performed without the consent of the owner. In Daly v. Webster, 1 U. S. App. 573, 4 C. C. A. 10, 56 Fed. 483, we held the railroad scene in "Under the Gaslight," considered by itself, apart from all the other acts and scenes in such play, to be a dramatic composition, and, as such, protected by the copyright which plaintiff had obtained; and no reason is shown for reversing or modifying that decision. When any one, without the owner's permission, publicly performs substantially that whole railroad scene, he substantially performs a dramatic composition which is covered by the owner's copyright.

2. It is contended that it was error "to exclude evidence offered by defendant that the manner of the rescue is not a material part of plaintiff's play." We have searched the record carefully, but in vain, for any such offer. It does appear that defendant "offered to prove that the play 'After Dark' drew as much money, and was as valuable, in a pecuniary or in a commercial sense, with the railroad scene performed in the manner not violative of plaintiff's rights, as held by the circuit court of appeals," and, to support his offer, asked a witness who had testified as to performances of "After Dark" this question:

"Will you state the difference in business between the railroad scene as performed when one character was rescued by another, and as performed when the character rescued himself by staggering off the track?"

The question was excluded, and exception reserved. If it were material and proper for defendant to show that the "manner of the rescue" was "not a material part" of "Under the Gaslight," he certainly would not show it by proving that the manner of the rescue was not a material part of the other play "After Dark."

3. It is next assigned as error that the court below permitted defendant's answer in the equity suit to be used against him in this action. The answer came in as part of the record in the equity suit. When such record was offered by plaintiff, defendant objected to its introduction on eight separate grounds, which were set forth specifically, but not on the ground that a sworn pleading of the defendant was offered against him in an action to enforce a penalty. Incidentally, it may be noted that, in the answer in the action at bar, defendant repeatedly refers to the record in the equity suit, and asks that the first decree of the circuit court therein, and the proofs upon which it was granted, be made a part of his answer. It may well be doubted whether he is now in a position to urge the assignment of error above set forth; but, if he were, it certainly should not avail him. The answer in the equity suit contained no admission obtained from the pleader by the equity court. It denies all the material allegations of the complaint. Undoubtedly, as pointed out in the brief, it does admit that performances of "After Dark" were given by defendant, but only of the version which did not infringe. In view of the fact that the record in the equity suit was admitted "for certain purposes" only, and the statement by the circuit judge that no pleading of the defendant has been used or taken in evidence in ascertaining any facts as to performances, or for the enforcement of any alleged liability in this case, we are unable to find any harmful error in the admission of the answer in the equity suit.

4. It is next assigned as error that the court below held that the decree in the equity suit of itself established plaintiff's cause of action, and was res adjudicata as to plaintiff's copyright and defendant's alleged infringement. Manifestly, the court below did not hold that the "decree in the equity suit of itself established plaintiff's cause." When that decree was the only evidence, it declined to find for the plaintiff. Nor is there anything to show that the court held that the equity decree was res adjudicata as to defendant's alleged infringement. The record in the equity suit was competent evidence of the fact that the railroad scene in "After Dark"—the unaltered version—was substantially identical, in words, actions, circumstances, and accessories, with the railroad scene in "Under the Gaslight"; and defendant offered no evidence to controvert it. The court, however, did hold that the validity of the copyright, being determined by the equity decree, was res adjudicata between the parties to the action at bar, and excluded evidence offered by defendant (being the same evidence considered in the equity suit) to show that plaintiff's railroad scene was not novel. In this there was no error. The question of validity was one of the issues in the equity suit, and that court adjudged that the copyright obtained by Daly on August 1, 1867, was good and valid, that he was the author of the dramatic composition entitled "Under the Gaslight," and that the railroad scene in such play was itself a dramatic composition, and protected by said copyright. To this equity suit, Daly and Brady were parties. The action at bar is not brought by the government, but by the individual whose rights have been trespassed upon, to recover the damages which the statute gives him from the individual who

has committed the trespass. Both parties to the action were parties to the suit, and, under familiar principles, a question at issue between them, which has been once finally decided by a court of competent jurisdiction, cannot be again contested between them in the same or any other court.

5. It is further contended that the court below committed error in limiting the defendant, upon the new trial, to proof as to the number of performances. The record fails to disclose that defendant offered any evidence at all on the second trial, or that any was excluded. The order disposing of the motion for new trial provided that such motion be "granted to the extent that the cause is opened for the purpose of allowing either party to present additional testimony in regard to the numbers and times of the representation, if any there were, of the play of 'After Dark' by the defendant." It certainly did not preclude the defendant from offering any testimony which might become necessary or expedient by reason of the change of situation produced by plaintiff's additional proof, or, indeed, from offering any which he had neglected to put in through oversight. Manifestly, this assignment of error is an afterthought. Had defendant had any further proof which he wished to put in, it must be assumed that he would have offered it.

6. It is next contended that the trial judge "erred in permitting the plaintiff upon the new trial to present the evidence of the number of performances which was obtained from the information given by the defendant under compulsion in the equity suit." There is nothing in the record which will enable us to say that any of the evidence presented on the second trial "was obtained from the information given in the equity suit." The counsel for plaintiff in error so asserts, but his brief contains no references to support such assertion. No witness was interrogated upon this point, and no proof of the assertion offered.

7. It is further contended that the performances given by defendant intermediate the decisions of the circuit court in the equity suit holding the copyright invalid, and the reversal by the court of appeals, were not willful violations of plaintiff's rights, and for that reason the statutory penalty was not incurred. The statute, however, provides that "any person publicly performing or representing," etc., shall be liable for the damages therein fixed. It does not make willfulness an essential element of the offense, and no authority to which we are referred calls for such a construction.

8. It is contended that plaintiff, by first proceeding in equity for an accounting for profits, made an election barring him from a recovery for penalties. In view of the fact that there was in the equity cause no accounting of profits, and no election to endeavor to obtain profits, and no finding and no adjudication upon the subject of profits, we are not satisfied that plaintiff made any election barring him from suing for damages or penalties.

9. The last assignment of error is to the finding of the court below that there were 126 infringing performances. This, however, was a special finding by the court, a jury being waived; and an appellate court cannot look into the evidence upon which the finding is based,

except for the purpose of ascertaining whether an error was committed in admitting or excluding testimony, and no such error is here assigned. The judgment of the circuit court is affirmed.

NEW YORK FILTER MANUF'G CO. v. ELMIRA WATER-WORKS CO. et al.

(Circuit Court, N. D. New York. November 26, 1897.)

PATENTS—INFRINGEMENT—METHOD OF FILTRATION.

The Hyatt patent No. 293,740, for an improved method of clarifying water, *held* infringed, on motion for preliminary injunction. 82 Fed. 459, affirmed.

This was a suit in equity by the New York Filter-Manufacturing Company against the Elmira Water-Works Company and others, for alleged infringement of letters patent No. 293,740, issued February 19, 1884, to Isaiah S. Hyatt, for an improved method of clarifying water. This case was heretofore, on September 20, 1897, heard on a motion for a preliminary injunction, and the injunction was granted. 82 Fed. 459. A rehearing of the motion was granted, and the same has now been heard a second time.

John R. Bennett and M. H. Phelps, for complainant.
Frederic H. Betts, for defendants.

COXE, District Judge. As stated at the argument of the motion to strike out the complainant's replying affidavits I very much regret that the defendants should have felt aggrieved by the service and reception of these papers. How they came to be examined, almost inadvertently, was then explained. It was to remove any possible injustice in this regard that the defendants were permitted to reply to these affidavits and the case was reopened for the purpose of receiving everything, material to the issue, which the defendants desired to present. Surely neither side can now complain that the fullest and freest opportunity to be heard has not been accorded.

I have read the new affidavits and briefs but do not find that any new facts are presented. Old facts are reiterated or stated in a new way, but they are the old facts still. In my former opinion upon this motion I did not intend to announce any new construction of the claim of the Hyatt patent further than to make it plain that the use of tanks, which differed only in degree from the tanks condemned at Niagara, would not, in my judgment, enable the defendants to avoid the patent. The defendants seemed still to be laboring under an entirely honest, but, to my mind, mistaken impression as to the scope of the patent as interpreted by the circuit court of appeals in the original case. They still entertained the opinion, apparently, that the closing paragraphs of the opinion so limited the claim as to destroy the patent for all practical purposes and render it a prey to any one who has sense enough to locate a tank on the line of flow. It was the construction adopted by the defendants and not by the courts that I thought too narrow.

If the attempted process of philological filtration has produced turbidity instead of lucidity the excuse may be found in the fact that a vast mass of "suspended matter" was introduced directly to the judicial filter bed without the preliminary "sedimentation" of an oral argument. Suffice it to say, that I now disclaim any intention to place a new construction upon the claim of the Hyatt patent.

The Coventry process, which is practically the same as the Le Chatelier process, was elaborately discussed in the original suit in both courts and its inapplicability to the Hyatt process was clearly demonstrated. It is a sewage process; its tanks hold 225,000 gallons; its filtering ground covers nine acres.

I can add nothing to what has heretofore been said regarding this and similar efforts to anticipate and limit the Hyatt patent. If the view taken in my former opinion be correct further discussion is unnecessary. I regard the Elmira tanks only as enlarged and, possibly, improved types of the Niagara tanks. If the latter infringe, the former must infringe also.

The ordinary rules regarding the granting of preliminary injunctions are inapplicable here. Four times have the real defendants been adjudged infringers, twice by this court and twice by the circuit court of appeals. In such circumstances the doubt, if there be one, should be resolved in favor of the complainant. Surely there must come a time when it is permissible for the court to look with disfavor upon the persistent attempts of a defendant to evade a patent. I think that time is fast approaching, if it has not already arrived, in this litigation.

In conclusion I may add that I have now examined all the papers submitted on this motion, and after giving to them the most careful consideration I am of the opinion that the motion for an injunction should be granted.

ALLINGTON & CURTIS MFG. CO. et al. v. GLOR et al.

(Circuit Court, N. D. New York. December 13, 1897.)

No. 6,129.

1. PATENTS—TWO PATENTS TO SAME INVENTOR—ANTICIPATION.
   The granting of a patent for minor improvements and limited combinations pending an earlier application for the broad invention will not invalidate a patent subsequently granted for the latter, though the former necessarily described the broad invention. Thomson-Houston Electric Co. v. Elmira & H. Ry. Co., 69 Fed. 257, followed.

2. SAME—DUST COLLECTORS.
   The Morse patents, Nos. 403,362 and 403,363, the Holt patent, No. 409,465, and the Kutsche patent, No. 407,598, all for improvements in dust collectors, *held* valid and infringed as to certain claims.

This was a suit in equity by the Allington & Curtis Manufacturing Company and others against Peter Glor and others for alleged infringement of four patents for improvements in dust collectors.

Albert H. Walker, for complainants.

COXE, District Judge (orally). This action is based upon four letters patent for improvements in dust collectors. They are No.

403,362, granted May 14, 1889; No. 403,363, granted May 14, 1889; No. 409,465, granted August 20, 1889, and No. 407,598, granted July 23, 1889. The title to all of these patents is proved, by satisfactory evidence, to be vested in the complainants. The first three have been the subject of adjudication in the Northern district of Illinois, in the district of Connecticut and in the district of Vermont. All of the claims now involved were there passed upon and upheld. The case in the district of Vermont arose upon a motion for a preliminary injunction. The motion being granted, an appeal was taken to the circuit court of appeals for this circuit, and the decision of the circuit court was affirmed. These decisions will be found reported in 61 Fed. 297 (Knickerbocker Co. v. Rogers), in 71 Fed. 409 (Manufacturing Co. v. Lynch), in 72 Fed. 772 (Manufacturing Co. v. Booth), and in 24 C. C. A. 378, 78 Fed. 878 (Id.).

In the circumstances the court feels constrained to follow these decisions, but, as the issues have been explained upon this argument, the court would have reached similar conclusions were the questions now presented for the first time. The only patent not the subject of prior adjudication is the last above referred to, No. 407,598, granted to Oswald Kutsche. This patent upon its face is limited to an improvement upon the prior patented dust collectors and introduces, as such improvement, a downwardly inclined tangential inlet, which gives the dust laden air a spiral motion the moment it enters the chamber, thereby preventing the air currents from conflicting with each other in the interior. Nothing appears in the record which anticipates, or materially limits the effect of this improvement, and no reason is discovered why the patent should not be sustained.

Upon the question of infringement substantially all of the defenses have been passed upon in the adjudications heretofore mentioned. The only new question is based upon the theory that infringement is avoided because the upper or cylindrical part of the defendants' dust collector is considerably longer than the corresponding part, as shown in the drawings of the patent No. 409,465. This difference is in my judgment wholly immaterial.

It is also alleged by the defendants that the first patent referred to, viz. the patent to Morse, No. 403,362, is invalid, under the decision of the supreme court in the case of Miller v. Manufacturing Co., 151 U. S. 186, 14 Sup. Ct. 310, for the reason that the invention there described and claimed was disclosed in a prior patent to the same inventor, No. 370,021, in which the combinations of the claims in suit were disclosed as elements of a more limited combination. The patent in suit was applied for March 31, 1886. The patent relied on to defeat the patent in suit was applied for three months thereafter. The granting of the patent in suit was delayed by interference proceedings in the patent office. In the meantime patent No. 370,021 was issued. This, then, is a case where a patentee in order to secure minor improvements and limited combinations is compelled to describe his broad invention. Substantially the same situation was presented in the case of Thomson-Houston Electric Co. v. Elmira & H. Ry. Co., 69 Fed. 257. The court was and is of the opinion that

the doctrine of Miller v. Manufacturing Co. was not intended to defeat, and does not defeat, a patent issued in such circumstances.

Although this hearing has been ex parte, in the sense that only one counsel has been heard, the argument has proceeded upon a printed record containing the pleadings and proofs of both parties. The principal defenses have been fairly stated by the complainants' counsel. The complainants are entitled to a decree for an injunction and an accounting upon claims 1, 2 and 3, of the Morse patent, No. 403,-362, of May 14, 1889; claims 1 and 2 of the Morse patent, No. 403,-363, of May 14, 1889; claim 4 of the Holt patent, No. 409,465, of August 20, 1889; and claims 1 and 2 of the Kutsche patent, No. 407,-598, of July 23, 1889.

THE SCYTHIAN.

RAMSEY v. THE SCYTHIAN.

(District Court, D. New Jersey. November 30, 1897.)

SHIPPING—LIBEL FOR REPAIRS—EVIDENCE OF VALUE.

When, without previous contract for a specific sum, a vessel has been repaired by day's work, and a fair price charged therefor and for the materials used, the opinions of experts as to the cost or value of such repairs cannot be relied on as a basis for recovery. But, if there is a wide variance between the experts' estimates and the amount charged, this may tend to throw a doubt on the accuracy of the account, and subject the items to severe scrutiny.

This was a libel in rem by Hugh Ramsey against the steamer Scythian to recover for repairs made upon her at his dockyard.

James Parker, for libelant.

Bacot & Record, for claimant.

KIRKPATRICK, District Judge. Some time prior to December 1, 1895, the steamer Scythian was brought by her master, Capt. Hamilton, who was also her registered owner, to the dockyard of Hugh Ramsey, for repairs. The nature of the repairs required had been stated to Mr. Ramsey, and were confirmed by letter dated December 11, 1895. He was directed to proceed with the repairs on the steamer Scythian in accordance with the specifications of Lloyds surveyors, as required by them to give her class of 100 A1 at Br. Lloyds. The vessel was docked and cleared for inspection. Subsequently, without solicitation from Mr. Ramsey, Messrs. Congdon and Maucer, who were connected with Lloyds as surveyors, visited and inspected the vessel, and specified the repairs which they then considered necessary to be done to enable the Scythian to obtain the required class at Lloyds. On the 20th of December, 1895, Ramsey wrote to Hurlburt & Co., who were acting on behalf of the owners, and offered to make all the repairs included in the specifications which had then been made by the said surveyors for a sum not exceeding $11,300. Afterwards, on January 8, 1896, additional repairs were required by the said surveyors, and a supplementary specification of them was given to Ramsey. An estimate of the cost of this work seems to

have been made by Mr. Ramsey, but neither party was able to produce it. Still other repairs were required by the said surveyors. Ramsey did all the work specified by the surveyors, and kept an account of the same. A timekeeper visited the vessel daily, saw the men engaged in working upon her, took their names, and noted the character of work upon which they were engaged, and entered these items in a book kept for that purpose. Afterwards these men were paid by Ramsey for their work according to the time they had been engaged in working upon the vessel as the same had been reported by the timekeeper. The materials necessary for the repairs of the vessel were called for by the workmen, furnished by Ramsey's storekeeper, and charged at fair prices to the vessel. I fail to see how it is practicable to furnish any better proof of the amount of work done, or the quantity of materials furnished. The Lloyds surveyors say that all of the repairs put upon the vessel were made upon their specifications and orders, and that they were necessary to give her the class of 100 A1 in Br. Lloyds. They describe the vessel as being in very bad condition when it was first surveyed by them, in December, 1895, and that, as the work proceeded, new defects were found, which required repair, just as Martin, the claimants' expert, expected would be the case. The claimants, in their argument, though not by their answer, deny the validity of the libelant's claim on the ground that the work was done in pursuance of a contract. The evidence fails to sustain this view. An estimate was made of the probable cost of the repairs which, at an early stage of the work, seemed necessary; but the order to proceed with the work, and to do what was necessary to put the vessel in the class of 100 A1 Br. Lloyds, was not founded on that estimate, nor was there any suggestion made that the work should stop when the estimated price was exceeded. Hurlburt & Co. are represented as being agitated and disturbed when told that the cost of the repairs was exceeding the estimate, and the price at which they had agreed to sell the steamer after she had been classed at Lloyds. If there was a contract by which Ramsey was to do the work for a definite sum, there was no occasion for concern on their part, while, on the other hand, if the vessel was to be liable for repairs amounting to more than the price at which they had agreed to sell her when classed, it is easy to understand why they should "walk the floor," as has been described by one of the witnesses. The vessel was brought to the libelant's shipyard by the master and registered owner. He was present when the survey was made by the Lloyds surveyors, and his instructions were to comply with their directions, and that was done. I find from the record that no work was done except by the order of the Lloyds surveyors, and only so much as was necessary to give the steamer the class 100 A1, Br. Lloyds; that the labor and materials charged for were actually furnished, and the prices charged therefor fair and reasonable. When a vessel has been repaired by day's work, and a fair price charged therefor, the opinion of experts as to the cost or value of such work cannot be relied on as furnishing the basis of recovery. When there is a wide variance between the experts' estimate and the amount charged, it may tend to throw a doubt upon

the accuracy of the account, and subject the items to the severest scrutiny. The record shows that the libelant furnished, on the demand of Dr. Parker, and with the consent of Hurlburt & Co., a steam windlass, for which a charge of $525 was made. This windlass was not necessary to put the vessel in the stipulated class of Lloyds, nor was it ordered by the Lloyds surveyors. It was supplied on the order of Hurlburt & Co., not acting as the agent of the owners, but on their own behalf, in accordance with the terms of an agreement entered into between them and Dr. Parker, to whom, on their own account, they had sold the vessel. It was not furnished on the credit of the vessel, but upon that of Hurlburt & Co. There should also be deducted from the libelant's claim an allowance for the value of the coal taken from the ship's bunkers at the time she was stripped for the inspection of the survevors. It was about 50 tons, and the value not stated. For the amount of the bill rendered after making these deductions, the libelant is entitled to a decree.

THE THOMAS B. GARLAND.

FIFIELD et al. v. THE THOMAS B. GARLAND.

(District Court, D. New Jersey. November 30, 1897.)

SALVAGE—COMPENSATION—STRANDING.

The services of a steamer, worth about $7,000, which was loaded and ready to proceed to sea, in pulling off at high tide, at considerable risk and some danger to herself, after an unsuccessful attempt at the previous high tide, a schooner worth $8,000, grounded in the shifting sands on the inner shoal of the inlet to Great Egg Harbor, N. J., *held* to be salvage services, for which $500 should be awarded.

This was a libel in rem by John C. Fifield and others against the schooner Thomas B. Garland to recover compensation for salvage services.

H. H. Voorhees and Henry R. Edmunds, for libelants.

B. C. Godfrey and John J. Crandall, for claimants.

KIRKPATRICK, District Judge. On the 8th day of May, 1896, the schooner Thomas B. Garland, in attempting to enter Great Egg Harbor Inlet, in this district, with a cargo of ice consigned to Frank Champion, of Ocean City, in the county of Cape May, went aground on what is known as the "Inner Shoal," on the west side of the channel. The hour of her grounding was about 5:30 in the afternoon, at a time when the tide was at the top of the flood. The wind was light, and the schooner was unable of herself to float. The ebbing tide made matters worse, and the life-saving crews of the stations on the near-by land visited the vessel, and were unable to furnish any relief. The captain and pilot left the ship, and went to Somer's Point, which is on the inside of the inlet, across the bay on the mainland, and there interviewed the captain of the steam tug Nellie Rawson, and asked for assistance. The Rawson was loaded and ready to put to sea, but agreed that if able to reach the schooner, and pull

her off in the morning, so as to avail herself of the morning tide to cross the bar, she would render assistance. The amount of water in the channel on the side on which the schooner was grounded, as well as on the bar at the outlet of the inlet, was hardly sufficient at high water to float either the schooner or the steam tug. The Rawson, with the captain of the schooner aboard, visited the schooner on the top of the morning tide, and made several unsuccessful attempts to float her. The steam tug then went away, and endeavored to cross the outer bar of the inlet to proceed upon its voyage, but was unable to do so, on account of the want of sufficient water. At the request of the captain of the schooner, the Rawson again made fast to the schooner at the top of the flood tide in the evening, and after successive efforts, by aid of its own power and that of anchors which it had run, succeeded, by surging, in loosening the schooner from the sand, and setting her afloat. Prior to the afternoon attempts to float the schooner, she had been lightened of perhaps one-quarter of her cargo by jettison. The channel leading into the Great Egg Harbor Inlet is narrow and dangerous, surrounded on either side by treacherous shoals of shifting or quick sands, and the amount of water which the Rawson, loaded, required, was the full tide, and therefore the services which she rendered were of a dangerous nature. In the attempts to loosen the schooner from the sand by the surging operation, the bitts of the steamer were loosened, and the boat otherwise damaged, so much so that afterwards it was necessary to put her on the dock, and $151.90 of repairs were found to be necessary.

I am satisfied from the evidence that the position of the Garland after she went aground was a dangerous one. She was on the west bank of the channel, in shoal water, distant about one-quarter of a mile from the shore, on a bottom of shifting sand, exposed to any storm which might arise, and protected from the force of the open seas only by a bar upon which at high tide there was about eight feet of water. Of herself the schooner could do nothing, and the only available aid was that which was afforded by the Rawson. No nearer help was nigh, nor could any be obtained without sending to either New York or Philadelphia, which would entail a delay of perhaps 36 hours. Under the circumstances, I consider the services rendered by the Rawson meritorious, for which they are entitled to salvage.

This claim for salvage is objected to on the part of the claimants on the ground that, before entering upon it, the captain of the Rawson had agreed to perform the service for the sum of $50. This is denied by the captain of the Rawson, and the evidence on the part of the claimants does not support it. The value of the schooner is about $8,000, and that of the tug about $7,000. Under the circumstances, I think a fair award to the libelants for the services rendered would be $500. Let a decree be entered for that amount, with costs.

MEMORANDUM DECISIONS.

ALASKA GOLD & SILVER MIN. CO. v. BRADY. (Circuit Court of Appeals, Ninth Circuit. January 3, 1898.) No. 272. In Error to the District Court of the United States for the District of Alaska. Lorenzo S. B. Sawyer, for plaintiff in error. R. C. Harrison, for defendant in error. Dismissed.

ALLISON v. UNITED STATES. (Circuit Court of Appeals, Third Circuit.) In Error to the District Court of the United States for the Western District of Pennsylvania. Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

PER CURIAM. This case does not differ from that of Culp v. U. S., 82 Fed. 990, and for the reasons set forth in the opinion in that case the judgment herein is affirmed.

BOSWORTH et al. v. MELLOR et al. (Circuit Court of Appeals, Seventh Circuit. October 28, 1897.) No. 417. Appeal from the Circuit Court of the United States for the Southern District of Illinois. Bluford Wilson and P. B. Warren, for C. H. Bosworth and others. James H. Connolly, T. C. Mather, and John H. Overall, for Jesse B. Mellor and Clara C. Mellor. Dismissed on motion of appellants.

CARPENTER et al. v. EBERHARD MFG. CO. (Circuit Court of Appeals, Sixth Circuit. December 13, 1897.) No. 518. Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio. Poole & Brown, for appellants. Bakewell & Bakewell and Webster, Angell & Cook, for appellee. No opinion. Affirmed.

CENTRAL TRUST CO. OF NEW YORK v. FARMERS' LOAN & TRUST CO. (Circuit Court of Appeals, Sixth Circuit. November 11, 1897.) No. 515. Appeal from the Circuit Court of the United States for the Western District of Tennessee. Butler, Notman, Joline & Myndersee, Wallack & Cook, and Turley & Wright, for appellant. Turner, McClure & Ralston and Estes & Fentress, for appellee. No opinion. Affirmed, on appellant's motion, with certain directions as to the method to be pursued by the circuit court in exercising the right to redeem the mortgage being foreclosed.

CITY OF DENVER v. BARBER ASPHALT PAV. CO. (Circuit Court of Appeals, Eighth Circuit. September 27, 1897.) No. 902. In Error to the Circuit Court of the United States for the District of Colorado. This was an action at law by the Barber Asphalt Paving Company against the city of Denver to recover a balance alleged to be due it from the city for the performance of four contracts for grading and paving with sheet asphalt portions of four of its streets. In the circuit court a demurrer to the bill was sustained, and judgment entered for defendant, and complainant sued out a writ of error to this court. Heretofore, and on January 6, 1896, an opinion was filed, reversing the judgment below, and remanding the cause, with instructions to overrule the demurrer and permit the defendant to answer.

19 C. C. A. 139, 72 Fed. 336. The defendant accordingly filed an answer, to which a replication was filed by the plaintiff. The cause being called for trial, the court, upon the pleadings and an admitted statement of facts, directed the jury to find for the plaintiff, and the defendant thereupon sued out this writ of error. In this court the counsel for plaintiff have contended that the questions involved upon this writ of error are identical with those decided by this court on the former writ of error, and that the decisions then made must stand as the law of the case. Emerson J. Short (George C. Norris on brief), for plaintiff in error. Edward O. Wolcott, Joel F. Vaile, Charles W. Waterman, and James H. Brown, for defendant in error. Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

PER CURIAM. The judgment in this case is affirmed, on the authority of Barber Asphalt Pav. Co. v. City of Denver, 36 U. S. App. 499, 19 C. C. A. 139, and 72 Fed. 336; Thatcher v. Gottlieb, 19 U. S. App. 469, 8 C. C. A. 334, and 59 Fed. 872, and cases cited in the opinion; Balch v. Haas, 36 U. S. App. 693, 20 C. C. A. 151, and 73 Fed. 974.

CLEVELAND CITY CABLE RY. CO. v. YALE & TOWN MFG. CO. (Circuit Court of Appeals, Sixth Circuit. November 1, 1897.) No. 574. Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio. E. L. Thurston, for appellant. Garfield & Garfield, for appellee. Dismissed, on appellant's motion, at appellant's costs.

COBURN TROLLEY TRACK MFG. CO. v. McCABE MFG. CO. (Circuit Court of Appeals, Second Circuit. December 14, 1897.) No. 30. Appeal from the Circuit Court of the United States for the Southern District of New York. Arthur v. Briesen, for appellant. Thos. Ewing, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. Decree of circuit court affirmed, with costs, on opinion in circuit court. See 80 Fed. 915.

COPES v. NEW ENGLAND MUT. ACC. ASS'N. (Circuit Court of Appeals, Fourth Circuit. November 4, 1897.) No. 224. In Error to the Circuit Court of the United States for the District of South Carolina. Raysor & Summers, for plaintiff in error. Abial Lathrop, for defendant in error. Dismissed on agreement of attorneys.

FRANCIS v. RICHMOND & D. R. CO. (Circuit Court of Appeals, Fourth Circuit. November 6, 1897.) No. 195. In Error to the Circuit Court of the United States for the Western District of North Carolina. A. C. Avery (Pritchard & Gudger on the brief), for plaintiff in error. George F. Bason and Charles Price, for defendant in error. Before FULLER, Circuit Justice, GOFF, Circuit Judge, and BRAWLEY, District Judge.

BRAWLEY, District Judge. We do not find in the record in this case any testimony from which fair-minded men could justly conclude that the defendant company was guilty of negligence, and according to the principles which we have laid down in Patton v. Railway Co., 82 Fed. 979, a case heard at the same term, we are of opinion that there was no error in directing a verdict for the defendant. The judgment of the court below is affirmed.

JOSEPH BUERY MILL CREEK COAL & COKE CO. v. FIDELITY INSURANCE TRUST & SAFE DEPOSIT CO. et al. (Circuit Court of Appeals, Fourth Circuit. November 12, 1897.) No. 244. Appeal from the Circuit Court

of the United States for the Western District of Virginia. Wm. Gordon Robertson, for appellees. Dismissed, pursuant to the twenty-third rule, for failure to print record, on motion of appellees.

MATHUS et al. v. CARROLL. (Circuit Court of Appeals, Ninth Circuit. January 3, 1898.) No. 342. In Error to the District Court of the United States for the District of Alaska. L. S. B. Sawyer, for plaintiffs in error. Richardson C. Harrison, for defendant in error. Dismissed.

SHOWERS v. UNITED STATES. (Circuit Court of Appeals, Third Circuit.) In Error to the District Court of the United States for the Western District of Pennsylvania. Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

PER CURIAM. This case does not differ from that of Culp v. U. S., 82 Fed. 990, and for the reasons set forth in the opinion in that case the judgment herein is affirmed.

STRATIFF, L. T., v. UNITED STATES. (Circuit Court of Appeals, Third Circuit.) In Error to the District Court of the United States for the Western District of Pennsylvania. Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

PER CURIAM. This case does not differ from that of Culp v. U. S., 82 Fed. 990, and for the reasons set forth in the opinion in that case the judgment herein is affirmed.

STRATIFF, W. D., v. UNITED STATES. (Circuit Court of Appeals, Third Circuit.) In Error to the District Court of the United States for the Western District of Pennsylvania. Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

PER CURIAM. This case does not differ from that of Culp v. U. S., 82 Fed. 990, and for the reasons set forth in the opinion in that case the judgment herein is affirmed.

THORP v. BONNIFIELD et al. (Circuit Court of Appeals, Ninth Circuit. January 3, 1898.) No. 289. In Error to the District Court of the United States for the District of Alaska. Harrison Bostwick and W. E. Crews, for plaintiff in error. Richard C. Harrison, for defendants in error. Dismissed. See 71 Fed. 924.

TUNSTALL v. RICHMOND & D. R. CO. et al. (Circuit Court of Appeals, Fourth Circuit. November 3, 1897.) No. 194. In Error to the Circuit Court of the United States for the Western District of North Carolina. A. S. Barnard (W. A. Smith and T. H. Cobb on the brief), for plaintiff in error. George F. Bason and Charles Price, for defendants in error. Before FULLER, Circuit Justice, GOFF, Circuit Judge, and BRAWLEY, District Judge.

BRAWLEY, District Judge. This case was heard at the same term with Patton v. Railway Co., 82 Fed. 979, and is governed by the principles therein decided. The accident occurred at the same place where Patton was injured, and the attendant circumstances were substantially the same. This wreck was in 1890, and there was testimony of several accidents at the same place previous to that time. There was some testimony that the engineer of this train was reckless, and known to be so by the defendant company. To this

we attach no consequence, but, as the proof showed that there was no guard rail at the curve, and that there were other defects in the track, we are of opinion that there was sufficient testimony to go to the jury, and that there was error in granting the nonsuit. The judgment of the court below is reversed.

GOFF, Circuit Judge. For reasons stated in the opinion filed by me at the present term of the court, in the case of Patton v. Railway Co., supra, I dissent from the judgment entered by the court in this case. I think the cases there cited show conclusively that the court did not err in directing a nonsuit in this case. While it was shown that there was no guard rail at the point where the accident occurred, still there was no evidence that tended to prove that it would have been prevented had such a rail been placed at that point. On the contrary, there was positive evidence, and that of an expert, that a guard rail would not have prevented the accident. A careful examination of the testimony forces me to the conclusion that there was no evidence before the jury showing negligence on the part of the defendant, and I conclude that it would have been the duty of the court to set aside the verdict, had one been rendered in favor of the plaintiff. Therefore I hold that the action of the judge in directing a nonsuit was proper. In my opinion, the judgment of the court below should be affirmed.

UNITED STATES EXP. CO. v. HUBER. (Circuit Court of Appeals, Seventh Circuit. January 13, 1898.) No. 460. Appeal from the Circuit Court of the United States for the Western District of Wisconsin. F. C. Winckler, James G. Flanders, and W. W. Evans, for United States Express Co. T. F. Frawley and V. W. James, for Henry Huber. Dismissed on motion of plaintiff in error.

VILLAGE OF OQUAWKA v. PORTSMOUTH SAV. BANK. (Circuit Court of Appeals, Seventh Circuit. January 3, 1898.) No. 363. In Error to the Circuit Court of the United States, for the Southern Division of the Northern District of Illinois. I. M. Kirkpatrick and E. G. Alexander, for plaintiff in error. A. W. Martin, for defendant in error. Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

PER CURIAM. On the authority of the decision in Village of Oquawka v. Graves, 82 Fed. 568, the judgment in this case is reversed, and the cause remanded, with the direction that judgment be entered for the plaintiff in error.

WEST CHICAGO ST. RY. CO. v. ELLSWORTH. (Circuit Court of Appeals, Seventh Circuit. January 13, 1897.) No. 358. In Error to the Circuit Court of the United States for the Northern District of Illinois. John A. Rose and Egbert Jamison, for plaintiff in error. Elmer E. Beach, for defendant in error. Dismissed, on consent of counsel, pursuant to the twentieth rule. See 77 Fed. 664.

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A finding by the court that a Chinese person is unlawfully in the United States is sufficient to support a judgment of deportation, notwithstanding a further finding, not within the issues made by the pleadings, that she had unlawfully entered the United States.—In re Gut Lun (D. C.) 141.

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An immigrant does not cease to be an alien merely by making his declaration of intention to become a citizen.—In re Moses (C. C.) 995.

An admission, in a complaint for the deportation of a Chinese laborer, because of his being without a certificate of residence, that the defendant was a resident of the United States on May 5, 1892, is surplusage, and does not relieve the defendant from the burden of proving such fact by the evidence required by the statute.—United States v. Williams (D. C.) 997.

In proceedings for the deportation of a Chinese laborer, on the ground that he is without the certificate of residence required by the statute, the judge has no discretion to accept any other evidence that defendant was a resident on May 5, 1892, than the testimony of a credible white person, as prescribed by the act.—United States v. Williams (D. C.) 997.

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A single exception taken to the court's refusal of a series of instructions to the jury is of no avail unless all the instructions state correct propositions of law applicable to the case.—Waples-Platter Co. v. Turner (C. C. A.) 64.

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A memorandum of opinion filed by a trial judge is no part of the record in the case, and assignments of error based thereon, and not supported by exceptions taken and preserved in the record, will not be considered on proceedings in error.—North American Loan & Trust Co. v. Colonial & U. S. Mortg. Co. (C. C. A.) 796; Colonial & U. S. Mortg. Co. v. North American Loan & Trust Co., Id.

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If the instructions given to the jury by the court of its own motion substantially cover the issues involved, the refusal of other instructions, which are in themselves proper, constitutes no ground for reversal. — Waples-Platter Co. v. Turner (C. C. A.) 64.

It is not error to exclude, upon a trial, cumulative evidence of a state of facts which is not controverted.—National Masonic Acc. Ass'n v. Sparks (C. C. A.) 225.

That parts of the charge are open to criticism, as separate propositions, does not require reversal, if the entire charge, taken together, was not erroneous or misleading.—Texas & P. Ry. Co. v. Holliday (C. C. A.) 452.

A just judgment, warranted by the record and the facts, will not be reversed because it was based on a wrong reason.—Smiley v. Barker (C. C. A.) 684.

A judgment will not be reversed merely because the lower court erred as to the law of the case, if, upon the whole finding of facts, and a proper view of the law, it is right.—Gray v. Smith (C. C. A.) 824.

A cause will not be reversed for purely formal errors in an execution which are without prejudice.—Crawford v. Foster (C. C. A.) 975.

Decision.

In reversing on the merits a judgment for defendant in a case tried to the court without a jury on an agreed statement of facts, where the damages are a liquidated sum, the court will direct the entry of a judgment for plaintiff.—Rathbone v. Board of Com'rs of Kiowa County (C. C. A.) 125.

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A contract for the services of two attorneys named in the conduct of a certain lawsuit is not performed where one of them dies before the services are completed, though the other associates with himself other attorneys of equal ability, and carries the suit to a successful termination.—Baxter v. Billings (C. C. A.) 790.

An agreement by a client purporting to release an attorney from all the duties, burdens, obligations, and privileges incident to the relationship is void, as against public policy.—In re Boone (C. C.) 944.

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An agreement terminating the relation of attorney and client construed, and *held* not to authorize the attorney to accept employment against the client as to matters in which he had formerly represented him.—In re Boone (C. C.) 944.

Evidence *held* to establish unprofessional conduct of an attorney warranting his disbarment.—In re Boone (C. C.) 944.

The power of the United States courts to disbar attorneys for general unprofessional conduct, not constituting contempt, is not abridged by statute.—In re Boone (C. C.) 944.

A court has the power to disbar an attorney for any willful breach of his professional obligations.—In re Boone (C. C.) 944.

An answer filed by the duly-authorized attorney of a corporation, in an action pending against it, will be presumed to have been authorized by it.—Union Mut. Life Ins. Co. v. Thomas (C. C. A.) 803.

In dealings between attorney and client, the burden of showing absolute fairness is on the attorney, if the transaction is to his advantage.—United States v. Coffin (C. C.) 337.

AUTHORITY.

Of agent, see "Principal and Agent."
Of attorney, see "Attorney and Client."
Of city to fix street-railway fares, see "Municipal Corporations."
Of corporation, see "Corporations."

BAIL.

A bail bond charging conspiracy to defraud need not specify other conspirators or acts.—United States v. Dunbar (C. C. A.) 151.

"Unlawfully aiding and abetting the landing of Chinese laborers" is a sufficient charge in a bail bond.—United States v. Dunbar (C. C. A.) 151.

Under a bail bond, no notice to the sureties is required, except to call them in open court.—United States v. Dunbar (C. C. A.) 151.

In an action on an undertaking of bail, the obligation of the sureties is not affected by the question whether the prosecution of the offense was barred by the lapse of time.—United States v. Dunbar (C. C. A.) 151.

Any United States commissioner is empowered to take bail for the appearance for trial of one charged with crime against the United States.—United States v. Dunbar (C. C. A.) 151.

Rev. St. § 1014, relating to bail, assimilates the proceedings to those of the state.—United States v. Dunbar (C. C. A.) 151.

The laws of Oregon do not impair the power of a United States commissioner to accept bail after indictment and before trial.—United States v. Dunbar (C. C. A.) 151.

Various omissions in a bail bond considered, and *held* immaterial.—United States v. Dunbar (C. C. A.) 151.

"Conspiracy to defraud the United States" is a sufficient charge in a bail bond.—United States v. Dunbar (C. C. A.) 151.

BAILMENT.

See, also, "Banks and Banking."

A railroad company holding goods in its warehouse for a reasonable time, to be called for, is

a bailee for hire.—Hardman v. Montana Union Ry. Co. (C. C. A.) 88.

A railroad company is liable for destruction by fire of goods held by it as bailee for hire, due to its falsely representing to the firemen that powder is stored near by.—Hardman v. Montana Union Ry. Co. (C. C. A.) 88.

Management of World's Fair *held* liable to foreign exhibitors for want of extreme care.—French Republic v. World's Columbian Exposition (C. C.) 109.

Duty to use such care continues after close of fair.—French Republic v. World's Columbian Exposition (C. C.) 109.

Allowing fair building to become exposed to fire *held* negligence.—French Republic v. World's Columbian Exposition (C. C.) 109.

Local corporation in charge of grounds *held* liable for such negligence.—French Republic v. World's Columbian Exposition (C. C.) 109.

BANKS AND BANKING.

A cashier does not act for his bank in answering an inquiry addressed to him by another bank as to the business standing of a third person where the inquiry has no relation to the bank's business.—First Nat. Bank v. Marshall & Ilsley Bank (C. C. A.) 725.

Evidence *held* insufficient to establish an estoppel against a bank to assert a lien as against a subsequent mortgage.—First Nat. Bank v. Marshall & Ilsley Bank (C. C. A.) 725.

The purchase of a note for a bank by the president and managing officer for a large sum, with knowledge of a condition which might defeat its collection, is such negligence as will render the president liable to account to the bank for the loss resulting.—Stearns v. Lawrence (C. C. A.) 738.

Where the president of a bank negligently purchased a note, which was uncollectible, the bank may recover from him, as a part of the loss resulting, the expense of an unsuccessful action conducted by him for its enforcement.—Stearns v. Lawrence (C. C. A.) 738.

The borrowing of money on behalf of a national bank from its correspondent by one of its officers is ratified by the passing without objection of a monthly statement of the lending bank, showing the loan, and sent according to usage, where such statement was received by employés who were not concerned in making the loan.—Armstrong v. Chemical Nat. Bank (C. C. A.) 556.

The conduct of the directors of a national bank in permitting the vice president to exercise full control and management of its business, without inquiry or investigation, *held* to authorize him to borrow money on behalf of the bank.—Armstrong v. Chemical Nat. Bank (C. C. A.) 556.

Where, by general usage between correspondent banks, money is frequently borrowed by one from another,—the executive officers of the borrowing bank acting in its behalf, and no other authority being furnished or demanded,—the directors or a national bank will be presumed to have knowledge of such usage; and in absence of contrary provision, or notice to its correspondents, its vice president is authorized to borrow money from a correspondent on its behalf.—Armstrong v. Chemical Nat. Bank (C. C. A.) 556.

One induced by fraud to purchase stock of a national bank, and have it transferred to his name on the books, and who promptly rescinds the contract on discovery of the fraud, is not liable to assessment for obligations of the bank incurred prior to the transfer.—Stufflebeam v. De Lashmutt (C. C.) 449.

A bank is under no obligation to apply proceeds of the sale of personal property, deposited in it by the owner, to the discharge of known liens held by others on such property, but may pay it out in due course of business on the checks of the owners.—Cox v. Beck (C. C.) 269.

Where illegal interest is paid to a national bank, the remedy is a penal suit to recover twice the amount, and such payment is not available as a defense in an equitable proceeding to collect the debt on which it was paid.—Cox v. Beck (C. C.) 269.

BAR.

Of action by former adjudication, see "Judgment."

BEQUESTS.

See "Charities"; "Wills."

BILL OF DISCOVERY.

See "Equity."

BILLS AND NOTES.

Validity of married woman's note, see "Husband and Wife."

The indorsement of a note without recourse after maturity, by a bank to whom it is sent for collection, to a stranger paying full value therefor, is not a payment, but a valid transfer of the note with its security.—McDonnell v. Burns (C. C. A.) 866.

The first maturing note of a series secured by chattel mortgage is entitled to priority of payment out of the security.—McDonnell v. Burns (C. C. A.) 866.

BONDS.

In legal proceedings, see "Bail."
Of cities, see "Municipal Corporations."
Of counties, see "Counties."

BREACH.

Of condition, see "Insurance."
Of contract, see "Contracts"; "Sales"; "Vendor and Purchaser."

BRIBERY.

An offer made to a person in contemplation of a mere probability that he may be called to perform official functions, and intended to influence his conduct in performance of such functions if he shall be so called, does not violate a statute making it a crime to offer to bribe a person exercising official functions, with intent to influence him in his official capacity.—In re Yee Gee (D. C.) 145.

CANCELLATION.

Of mining claim, see "Mines and Minerals."

CARGO.

See "Shipping."

CARRIERS.

See, also, "Commerce"; "Shipping."

A mere requirement or command by a conductor to a passenger to get off a moving train, if unattended with force, threats, or overpowering intimidation, is not enough to make the railroad company liable for injuries resulting from the passenger's compliance.—Bosworth v. Walker (C. C. A.) 58.

CHANCERY.

See "Equity."

CHARGE.

To jury in civil actions, see "Trial."

CHARITIES.

Bequests for a public library and for a protectory for boys are charitable bequests, and entitled to the benefit of Gen. St. Conn. § 2951.—Duggan v. Slocum (C. C.) 244.

Such a bequest is not void for uncertainty as to the object, or for want of a provision for the selection of the beneficiaries.—Duggan v. Slocum (C. C.) 244.

The failure of the testator to provide for the appointment of other trustees in case of the death of the trustees named or their refusal to act does not invalidate the gift.—Duggan v. Slocum (C. C.) 244.

Charitable bequests are entitled to a favorable construction in courts of equity.—Duggan v. Slocum (C. C.) 244.

The validity of a charitable bequest is determined by the law of the testator's domicile.—Duggan v. Slocum (C. C.) 244.

CHATTEL MORTGAGES.

Purchasers of lambs and wool from the mortgagor in possession of a flock of mortgaged sheep take title discharged of the mortgage lien.—Cox v. Beck (C. C.) 269.

A mortgage lien on sheep and their wool is subject to the necessary expense of shearing, storing, and marketing the wool.—Cox v. Beck (C. C.) 269.

One who takes a chattel mortgage on a flock of sheep, with knowledge of prior mortgages on a part of them, is estopped from denying the validity of such mortgages for uncertainty of description of the sheep mortgaged.—Cox v. Beck (C. C.) 269.

Where the notes secured by two chattel mortgages were canceled, and a new mortgage taken for the same and an additional debt, on the same and other property, *held*, that the lien of the former mortgages was lost, as against intervening incumbrances.—Cox v. Beck (C. C.) 269.

A chattel mortgage covering machinery afterwards placed in a mill is prior to a subsequent deed of trust conveying the mill property, where the mortgagor treated the machinery as personalty, and the trust deed recites that it is subject to the chattel mortgage.—McDonnell v. Burns (C. C. A.) 866.

A California mortgage on "sheep and the increase thereof" covers wool thereafter shorn from such sheep.—Alferitz v. Ingalls (C. C.) 964.

A chattel mortgage made in California on property there, and valid by the laws of that state, need not have the affidavit required by the laws of Nevada annexed before it can be recorded and enforced in that state, after the removal there of the mortgaged property by the mortgagor.—Alferitz v. Ingalls (C. C.) 964.

Description of property in a chattel mortgage as "8,000 sheep and the increase thereof, * * * now in the county of Merced, state of California," *held* sufficient.—Alferitz v. Ingalls (C. C.) 964.

The taking by the holder of a chattel mortgage of a second mortgage on the same property, to secure the same debt, does not extinguish the first mortgage, where it is not released, nor any agreement for its merger made. —Alferitz v. Ingalls (C. C.) 964.

CHINESE.

Exclusion or expulsion, see "Aliens."

CIRCUIT COURTS OF APPEALS.

See "Courts."

CITIES.

See "Municipal Corporations."

CITIZENS.

See "Indians."

Citizenship ground of jurisdiction of federal courts, see "Courts"; "Removal of Causes."

CIVIL SERVICE LAWS.

See "Officers"; "United States Marshals."

CLAIMS.

Against municipal corporations, see "Municipal Corporations."
Mining claims, see "Mines and Minerals."
Of patents, see "Patents."
Of public lands, see "Public Lands."

CLIENTS.

See "Attorney and Client."

COLLISION.

A tug meeting a steamer at night in a narrow channel during a light fog *held* in fault, in that, after giving the proper signal, which was properly answered, she misunderstood the answering signal, and changed her course so as to cross the steamer's bows.—Goodwyn v. The Newport News (D. C.) 522.

A steamer approaching another vessel at night in a narrow channel, in weather so thick as to affect the visibility of lights and the hearing of sounds, *held* in fault for violating rule 21 by continuing her regular speed of over 12 miles an hour.—Goodwyn v. The Newport News (D. C.) 522.

Necessary towage of the injured vessel to a place of repair is a proper item of damages, as is also the expense of a survey of the vessel.—The Bulgaria (D. C.) 312.

In the absence of a charter party, or of a market price, demurrage is recoverable, during delay for necessary repairs, on the basis of average net profits during the trip of the collision and those immediately preceding and succeeding it. —The Bulgaria (D. C.) 312.

Interest is allowable on the various items of damage recoverable in a collision case.—The Bulgaria (D. C.) 312.

COMBINATIONS.

Enjoining unlawful combinations, see "Injunction."
Patentable combinations, see "Patents."
To restrain competition in bidding for public work, see "Contracts."
Unlawful combinations, see "Monopolies."

COMMERCE.

Carriage of goods and passengers, see "Shipping."

The interstate commerce commission has no power to fix maximum rates.—Interstate Commerce Commission v. Northeastern R. Co. of South Carolina (C. C. A.) 611.

An order of the interstate commerce commission, binding on a railroad company, is binding on its successor.—Behlmer v. Louisville & N. R. Co. (C. C. A.) 898.

To justify a greater charge for a shorter haul, because of water competition, such competition must be concerning freight which could reach the longer distance point by water transportation.—Behlmer v. Louisville & N. R. Co. (C. C. A.) 898.

Competition does not exist between two lines as to the carriage of traffic from any particular locality, unless one line could perform the service if the other did not.—Behlmer v. Louisville & N. R. Co. (C. C. A.) 898.

The burden is on the carrier, who charges a greater rate for a shorter than for a longer haul, to show such substantially different circumstances and conditions as would justify it. —Behlmer v. Louisville & N. R. Co. (C. C. A.) 898.

Competition between carriers, subject to the interstate commerce law, does not produce such dissimilarity of circumstances and conditions as will justify a greater charge for a shorter haul.—Behlmer v. Louisville & N. R. Co. (C. C. A.) 898.

The importance of the smaller charge, to the people of the longer distance point, is no justification for a greater charge for a shorter haul. —Behlmer v. Louisville & N. R. Co. (C. C. A.) 898.

An attempt to export distilled spirits from a port of the United States cannot be construed as an attempt to import such spirits into Alaska in violation of law, though such was the intention of the shipper.—United States v. Fifty Cases of Distilled Spirits (D. C.) 1000.

An order by the interstate commerce commission, authorizing a railway company to make commodity rates on competitive traffic to terminal points, less than rates on like traffic to intermediate points, but directing that such commodity rates must not be lower than necessary to meet competition, nor be applied to articles not actually subject thereto, is a mere general statement of legal duty too indefinite to be enforced.—Farmers' Loan & Trust Co. v. Northern Pac. Ry. Co. (C. C.) 249; In re Holly, Id.

In an application to enforce an order of the interstate commerce commission against railroad receivers, the same rules and principles must be applied as if the railroad were being operated by the railroad company itself.—Farmers' Loan & Trust Co. v. Northern Pac. Ry. Co. (C. C.) 249; In re Holly, Id.

In a proceeding to enforce an order made by the interstate commerce commission, the court has no general power to adjust defenses between the litigants, but can only determine the validity of the order, and either enforce it or dismiss the petition.—Farmers' Loan & Trust Co. v. Northern Pac. Ry. Co. (C. C.) 249; In re Holly, Id.

The interstate commerce commission is not authorized to fix rates either absolutely or relatively.—Farmers' Loan & Trust Co. v. Northern Pac. Ry. Co. (C. C.) 249; In re Holly, Id.

COMMISSION.

Interstate commerce commission, see "Commerce."

COMMISSIONERS.

In admiralty, see "Admiralty."

COMMON CARRIERS.

See "Carriers."

COMPENSATION.

Salvage, see "Salvage."

COMPETENCY.

Of evidence, see "Evidence."

COMPETITION.

See "Trade-Marks and Trade-Names."
Between carriers, see "Commerce."
In bidding for public work, agreements in restraint of, see "Contracts."

COMPROMISE AND SETTLEMENT.

See "Accord and Satisfaction."

COMPUTATION.

Of interest, see "Interest."

CONDEMNATION.

Of land by mining company, see "Mines and Minerals."

CONDITIONS.

In contracts, see "Contracts."
In insurance policies, see "Insurance."

CONFIDENTIAL RELATIONS.

Of parties to conveyance, see "Fraudulent Conveyances."

CONSIDERATION.

Of accord and satisfaction, see "Accord and Satisfaction."
Of fraudulent conveyance, see "Fraudulent Conveyances."

CONSPIRACY.

Restraining by injunction, see "Injunction."

CONSTITUTIONAL LAW.

Statutes relating to particular subjects, see "Intoxicating Liquors"; "Officers"; "Taxation."

The Wisconsin statute of 1897, enabling a debtor, by making an assignment for creditors, to dissolve an attachment against him, impairs the obligation of contracts as applied to debts contracted before its enactment.—Heath & Milligan Mfg. Co. v. Union Oil & Paint Co. (C. C.) 776.

A statutory amendment allowing but one, instead of two, new trials as of right in ejectment suits, is not unconstitutional retrospective legislation, as applied to a pending action in which one new trial is had as of right long after the date of the act.—Campbell v. Iron-Silver Min. Co. (C. C. A.) 643.

A statute giving two new trials as of right in ejectment suits confers a mere privilege pertaining to the remedy, and not a vested right protected by constitutional guaranties.—Campbell v. Iron-Silver Min. Co. (C. C. A.) 643.

Under the Kansas constitution (article 2, § 17), prohibiting special legislation unless necessary, it is for the legislature, and not the courts, to determine whether a special law is necessary.—Rathbone v. Board of Com'rs of Kiowa County (C. C. A.) 125.

The denial, to a foreign corporation not authorized to do business in the state, of the right to become the purchaser at its own foreclosure sale, is denying it the equal protection of the laws.—Black v. Caldwell (C. C.) 880.

CONSTRUCTION.

Of chattel mortgages, see "Chattel Mortgages."
Of contracts, see "Contracts."
Of particular patents, see "Patents."
Of policies, see "Insurance."
Of wills, see "Wills."

CONTRACTS.

Between attorney and client, see "Attorney and Client."
By agents, see "Principal and Agent."
Impairing obligation, see "Constitutional Law."
In restraint of trade, see "Monopolies."
Of corporation, see "Corporations."
Of married women, see "Husband and Wife."
Particular classes of express contracts, see "Insurance"; "Partnership"; "Sales"; "Vendor and Purchaser."
Specific performance, see "Specific Performance."
With municipal corporations, see "Municipal Corporations."

Where a railroad subcontractor agrees to accept, in part payment, stock and bonds of the railroad, and thereafter the principal contractor pledges all the stock and bonds to a third party, so as to disable himself from delivering them, this authorizes the subcontractor to rescind the agreement to take the stock and bonds, and gives him a right to sue for the amount thereof.—Reynolds v. Manhattan Trust Co. (C. C. A.) 593.

A provision of a lease of ground by a railroad company for an hotel site, that the company would stop its trains for meals at the hotel, *held* not to go to the whole consideration of the contract, so as to entitle the lessee on its breach to recover as for a total breach of the entire contract. — Union Pac. Ry. Co. v. Travelers' Ins. Co. (C. C. A.) 676.

An agreement by a purchaser of property that in its use he will not do anything to con-

flict with the business of the grantor is violated by a leasing of the property to another to be used in carrying on a business in direct competition with that of the grantor.—Hitchcock v. Anthony (C. C. A.) 779.

Where one party to a contract notifies the other that he will not comply with its terms, in an action for such breach the other need not aver or prove a tender of performance on his part.—Gray v. Smith (C. C. A.) 824.

A written instrument cannot be avoided for fraud or mistake unless the evidence thereof is clear, unequivocal, and convincing.—Chicago, St. P., M. & O. Ry. Co. v. Belliwith (C. C. A.) 437.

One who cannot read a contract which he is about to execute is bound to procure it to be read and explained to him before he signs it, and is chargeable with knowledge of its contents whether he does so or not.—Chicago, St. P., M. & O. Ry. Co. v. Belliwith (C. C. A.) 437.

Facts relating to an alleged breach of a railroad construction agreement considered, and *held* not to present a cause of action.—Porter v. Blair (C. C.) 104.

Under a contract to haul logs, acceptance of them after the agreed date is evidence of a continuing contract.—Godkin v. Monahan (C. C. A.) 116.

Requisites and validity.

Agreements to restrain rivalry and competition in bidding for public work are void.—Hoffman v. McMullen (C. C. A.) 372.

An honest co-operation is not within the rule against combinations to stifle competition.—Hoffman v. McMullen (C. C. A.) 372.

The statute of Michigan prohibiting agreements in restraint of competition in business, does not render invalid an agreement by a purchaser of property not to use it during a term of years in competition with the business of the vendor.—Hitchcock v. Anthony (C. C. A.) 779.

The fact that a cause of action is remotely connected with an illegal transaction is not fatal.—Hoffman v. McMullen (C. C. A.) 372.

A contract based on a transaction void as against public policy is unenforceable.—Hoffman v. McMullen (C. C. A.) 372.

The validity of an agreement between rivals for public work depends on the purpose of the parties.—Hoffman v. McMullen (C. C. A.) 372.

Property rights may be enforceable, though procured with the profits of an illegal transaction.—Hoffman v. McMullen (C. C. A.) 372.

A party holding profits of an illegal transaction may become liable to another party on an account stated.—Hoffman v. McMullen (C. C. A.) 372.

Mere delay in accepting or rejecting a proposal does not make a contract. — Equitable Life Assur. Soc. v. McElroy (C. C. A.) 631.

The acceptance of an offer, if not communicated to the proposer, does not make a contract. —Equitable Life Assur. Soc. v. McElroy (C. C. A.) 631.

An agreement by the purchaser of property not to engage in a certain business during a term of years construed, and *held* valid.—Hitchcock v. Anthony (C. C. A.) 779.

Construction and operation.

A contract between a newspaper and a news association in relation to furnishing the news reports of the association construed in connection with the by-laws thereof, and *held* not to prevent the news association from furnishing its reports to a certain rival publication in the same locality. — Minnesota Tribune Co. v. Associated Press (C. C. A.) 350.

A contract which declares in its seventh paragraph that the duties and obligations of the parties, "except as hereinbefore specifically provided for," shall be controlled and governed by the by-laws of one of the parties thereto, is modified in respect to its subsequent paragraphs by such by-laws, where there is any conflict between the two.—Minnesota Tribune Co. v. Associated Press (C. C. A.) 350.

Where residents of two different states enter into a contract which would be invalid in one state, but valid in the other, and by its terms make it a contract of the latter state, and to be there performed, it will be presumed that they intended it to be governed by the laws of such state.—Cæsar v. Capell (C. C.) 403.

The fact that a bond for the payment of money, dated and payable in one state, is secured by mortgage on land in another, does not make it a contract of the latter state.—Cæsar v. Capell (C. C.) 403.

An engagement to perform an act involves an undertaking to secure the necessary means.—Godkin v. Monahan (C. C. A.) 116.

Under a contract to deliver logs by a specified date, the contractor's obligation is absolute.—Godkin v. Monahan (C. C. A.) 116.

CONTRIBUTORY NEGLIGENCE.

See "Master and Servant"; "Railroads."

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."
Particular classes of, see "Chattel Mortgages"; "Mortgages."
Wrongful conveyance by trustee, see "Trusts."

CONVICTS.

See "Criminal Law."

COPYRIGHTS.

The unauthorized appropriation and performance of a single scene of a copyrighted play may be such an infringement as to authorize recovery of statutory damages, under Rev. St. § 4966.—Brady v. Daly (C. C. A.) 1007.

Under Rev. St. § 4966, statutory damages may be recovered for the giving of an infringing performance, though it was not given in

willful violation of plaintiff's right.—Brady v. Daly (C. C. A.) 1007.

One suing for infringement has the burden of showing literal compliance with every statutory requirement requisite to acquisition of a valid copyright.—Osgood v. A. S. Aloe Instrument Co. (C. C.) 470.

Under the act of June 18, 1874, two copies of the book must be delivered to the librarian of congress not later than the day of publication thereof.—Osgood v. A. S. Aloe Instrument Co. (C. C.) 470.

A notice of copyright which omits the name of the person by whom the copyright is taken out is insufficient.—Osgood v. A. S. Aloe Instrument Co. (C. C.) 470.

CORPORATIONS.

Particular classes of, see "Banks and Banking"; "Insurance"; "Municipal Corporations"; "Railroads"; "Street Railroads."
Receivers of, see "Receivers."
Taxation of corporations and corporate property, see "Taxation."

An authenticated copy of a certificate of change of corporate name filed in the office of the secretary of state of Kansas is sufficient prima facie proof of such change of name.—Whitman v. National Bank of Oxford (C. C. A.) 288.

The binding character of the obligation of one whose name appears as a stockholder on the books of a corporation is because of the principle of estoppel, forbidding him to deny a relation he has assumed, and upon the strength of which others have acted.—Stufflebeam v. De Lashmutt (C. C.) 449.

Before a stockholder can maintain an action to compel the surrender to the corporation of stock illegally transferred, a repayment of dividends, and to prevent further payments of dividends, he must apply to the corporation itself to remedy the wrong.—Hutton v. Joseph Bancroft & Sons Co. (C. C.) 17.

The beneficial owner of stock in a corporation is not precluded from asserting his right thereto by the fact that he has permitted it to stand in the name of another, as against an attaching creditor of the nominal holder, in the absence of fraud or grounds of estoppel.—New York Commercial Co. v. Francis (C. C. A.) 769.

An action by a judgment creditor of an insolvent Kansas corporation to charge a stockholder with the amount of the judgment is transitory.—Whitman v. National Bank of Oxford (C. C. A.) 288.

Where a suit is pending against an insolvent corporation, and a receiver of all its property has been appointed, other creditors may still sue it, and judgments secured before they are notified to file their claims with the receiver are entitled to a preference.—Moore v. Southern States Land & Timber Co. (C. C.) 399.

Corporate powers and liabilities.

It is not necessary for a corporation to allege its authority to make a contract on which it sues, as the contract of a corporation is presumed to be within its powers.—Commonwealth Title Insurance & Trust Co. v. Cummings (C. C.) 767.

If, after judgment against a corporation in South Carolina, execution is issued and levied, and at the date of the teste the defendant is in full enjoyment of its franchises, the subsequent dissolution of the corporation does not defeat the right to sell its property under the execution.—Boyd v. Hankinson (C. C.) 876.

A corporation, succeeding to the business of a partnership, and of which the former partners were the officers and directors, *held* to have rendered certain services under a contract made by the partnership and in fulfillment of its obligations.—North American Loan & Trust Co. v. Colonial & U. S. Mortg. Co. (C. C. A.) 796; Colonial & U. S. Mortg. Co. v. North American Loan & Trust Co., Id.

Under Civ. Code Cal. §§ 869, 2243, relating to purchasers from trustees, the issue by a corporation of its own stock in payment for land makes it a purchaser for value.—Whittle v. Vanderbilt Mining & Milling Co. (C. C.) 48.

The court may often look behind the corporate character of a party, and consider the position of the individuals composing it.—Whittle v. Vanderbilt Mining & Milling Co. (C. C.) 48.

A necessary sale and distribution of corporate assets need not be delayed because other questions in suit are pending, if they are wholly separable.—Whittle v. Vanderbilt Mining & Milling Co. (C. C.) 48.

Knowledge of a corporation officer that land sold by him to it is affected by a trust is not imputable to the corporation.—Whittle v. Vanderbilt Mining & Milling Co. (C. C.) 48.

Foreign corporations.

A foreign corporation may do business in Montana by filing copies of its charter, etc., in the office of the secretary of state and in the recorder's office of the county where it has its principal office, without filing copies in every county where it desires to do business.—Black v. Caldwell (C. C.) 880.

The New York statute providing for service on a foreign corporation having property in the state, or on a cause of action arising in the state, by serving the resident managing agent, applies to service of process of a federal court.—Union Associated Press v. Times Printing Co. (C. C.) 822; Brewer v. Same, Id.

Debts due a foreign corporation from solvent debtors residing in New York constitute property within the state so as to authorize service on a "managing agent" under the provisions of the Code.—Fontana v. Chronicle-Telegraph Co. (C. C.) 824.

A loan of money by a nonresident corporation to a citizen of Tennessee, secured by mortgage on land in that state, the bond secured being dated and payable in the state of the domicile of the corporation, does not constitute "doing business" in the state of Tennessee by the corporation, within the provisions of the state statutes regulating foreign corporations doing business in the state.—Cæsar v. Capell (C. C.) 403.

The statutes of Tennessee regulating foreign corporations doing business in the state apply only to such corporations as become, in a sense, domesticated in the state.—Cæsar v. Capell (C. C.) 403.

The provisions of the statutes of Tennessee prohibiting foreign corporations, unless they comply with its requirements, from owning or acquiring property within the state, do not invalidate a mortgage on lands in the state, given to such a corporation to secure a valid debt.—Cæsar v. Capell (C. C.) 403.

A contract made in Tennessee by a foreign corporation which has not complied with the statutes to authorize it to do business in the state becomes enforceable on a subsequent compliance. —Cæsar v. Capell (C. C.) 403.

COSTS.

Costs *held* not taxable against the government. —United States v. Dunbar (C. C. A.) 151.

The expense of printing records, briefs, supplemental briefs, copies of testimony, and the cost of charts, paper exhibits, models, etc, in patent cases in the circuit court, are not taxable.—Kelly v. Springfield Ry. Co. (C. C.) 183.

An order of court, entered by stipulation and consent, substituting a printed copy of the testimony and record for the originals, does not make the expense of printing the same a taxable cost.—Kelly v. Springfield Ry. Co. (C. C.) 183.

The granting of leave to file supplemental briefs does not make the expense of printing them taxable costs.—Kelly v. Springfield Ry. Co. (C. C.) 183.

The attorney's fee of $2.50 for each deposition is not taxable in the federal court until the deposition has been both taken and admitted in evidence.—Barnardin v. Northall (C. C.) 241.

COUNTIES.

Recitals in county refunding bonds *held* to estop the county, as against an innocent purchaser, from setting up that a part of the indebtedness refunded consisted of void railway aid bonds.— Board of Com'rs of Kiowa County, Kan., v. Howard (C. C. A.) 296.

A statute authorizing counties to refund matured and maturing indebtedness of every description whatsoever gives the county commissioners authority to refund outstanding warrants as well as bonds, and to do so without a vote of the people.—Board of Com'rs of Kiowa County, Kan., v. Howard (C. C. A.) 296.

Statutory authority in the county commissioners to refund the county's indebtedness implies authority to fix the time and terms of payment of the refunding bonds.—Board of Com'rs of Kiowa County, Kan., v. Howard (C. C. A.) 296.

Certain bonds of Kiowa county, Kan., were issued in August, 1887, under an act limiting such issues to a certain proportion of the assessed valuation. *Held*, that the assessment for 1887 controlled.—Rathbone v. Board of Com'rs of Kiowa County (C. C. A.) 125.

The proviso in the Kansas law of February 18, 1886, authorizing Kiowa county to vote bonds as soon as it was organized, is valid.—Rathbone v. Board of Com'rs of Kiowa County (C. C. A.) 125.

Kiowa county, Kan., issued two series of bonds, each within the legal limit, but, together, exceeding it. Plaintiff acquired coupons from two distinct parties. *Held*, that he had no notice of the excess.—Rathbone v. Board of Com'rs of Kiowa County (C. C. A.) 125.

COURTS.

Jurisdiction of federal courts in habeas corpus proceedings, see "Habeas Corpus."
Power to disbar attorneys, see "Attorney and Client."
Removal of action from state court to United States court, see "Removal of Causes."

United States courts.
The courts follow the executive in matters which it is the duty of the latter to determine. —United States v. Boyd (C. C. A.) 547.

The courts cannot control executive action in matters involving discretion.—Dudley v. James (C. C.) 345.

Jurisdiction of the circuit court of appeals determined, when challenged on the ground that the case involved the construction and application of the contract clause of the federal constitution.—City of Indianapolis v. Central Trust Co. (C. C. A.) 529.

The fact that property affected by a judgment in ejectment rendered by a state court is used as a highway for interstate commerce, and as a national mail route, cannot be urged in support of the jurisdiction of the federal court over a suit to restrain the enforcement of the judgment, in which the United States, or the attorney general, is not a party complainant.— Central Trust Co. v. Grantham (C. C. A.) 540.

The fact that the roadbed of a railroad company has been sold under a decree of foreclosure in a federal court gives that court no jurisdiction over a subsequent suit to restrain the enforcement of a judgment of ejectment procured in a state court by an alleged owner of part of the roadbed, who was not a party to the foreclosure suit. — Central Trust Co. v. Grantham (C. C. A.) 540.

A suit to enjoin the principal officers of a state from proceeding, under an unconstitutional statute, to sell, as school lands, lands previously granted to a railroad company, is within the jurisdiction of a federal court.—Cobb v. Clough (C. C.) 604.

Where appeals are taken both to the supreme court and to the circuit court of appeals, the latter court will continue the case until the appeal to the supreme court is disposed of, and will not certify to that court the question whether it has jurisdiction to hear and determine the cause.— Pullman's Palace-Car Co. v. Central Transp. Co. (C. C. A.) 1.

A circuit court of appeals has no jurisdiction to make an original order directing the court be-

low to vacate an order suspending the operation of an injunction.—North Bloomfield Gravel Min. Co. v. United States (C. C. A.) 2.

—— Jurisdiction dependent on citizenship, residence, or character of parties. A federal court has jurisdiction of a taxpayer's suit brought under the New York statute, where the requisite diversity of citizenship exists between the parties to the record.—Seccomb v. Wurster (C. C.) 856.

A federal court is not deprived of jurisdiction of a suit for an injunction against numerous individual defendants because others, who were citizens of the same state as the complainant, were also joined as defendants, where as to them the bill has been dismissed.—Hopkins v. Oxley Stave Co. (C. C. A.) 912.

The federal court is without jurisdiction of suits between a person who, by intermarriage with an Indian, has become by adoption a member of the Cherokee Nation, and other members of his tribe, though such person, if a citizen of the United States, does not, by such adoption, lose his citizenship.—Raymond v. Raymond (C. C. A.) 721.

The fact that a cause of action was transferred for the purpose of enabling the transferee to sue thereon in the federal courts does not deprive such courts of jurisdiction, where the transfer was real and absolute. — Ashley v. Board of Sup'rs of Presque Isle County (C. C. A.) 534.

Where municipal bonds have been really and in good faith transferred to a citizen of another state, who could sue thereon in the federal courts, a subsequent transfer, though only colorable, does not deprive such courts of jurisdiction. — Ashley v. Board of Sup'rs of Presque Isle County (C. C. A.) 534.

A will considered, and *held* that, if it created a mere life estate, the bill would not be objectionable for nonjoinder or misjoinder, in view of the citizenship of the omitted parties.—Martin v. Fort (C. C. A.) 19.

Where a plaintiff's pleading, in the federal courts, sets out the necessary diverse citizenship of the parties, the burden of both allegation and proof to the contrary rests upon the party who seeks to defeat the jurisdiction.—National Masonic Acc. Ass'n v. Sparks (C. C. A.) 225.

—— State laws as rules of decision. A federal court, on a motion for a preliminary injunction, will follow the decision of an appellate court of the state in construing a state statute, though the question has not been settled by the state court of last resort.—Seccomb v. Wurster (C. C.) 856.

In determining whether an agent of a foreign corporation, on whom federal process is served, is a "managing agent" in the meaning of a state statute, the court will give full consideration to the state decisions construing the statute.—Union Associated Press v. Times Printing Co. (C. C.) 822; Brewer v. Same, Id.

The rule established by the Iowa decisions that, in order to fasten a special trust on funds held by a bank receiver, it is sufficient merely to show that the estate in his hands has been augmented by the deposit in question, without tracing it into any specific property, is a rule of property binding on the federal courts.—Independent Dist. of Pella v. Beard (C. C.) 5.

A federal court is not required to adopt a construction of a state statute based on implications from the language of an opinion of the state court.—Cæsar v. Capell (C. C.) 403.

Federal courts are not bound by the construction of a state statute by the courts of the state, as applied to contracts made before such construction was adopted.—Cæsar v. Capell (C. C.) 403.

The decision of a state court construing a contract is not binding upon the federal courts.—Hambly v. Bancroft (C. C.) 444.

COVENANTS.

In lease, see "Landlord and Tenant."

A covenant of title of shore lots extending beyond the line of ordinary high tide *held* not to constitute a warranty of title as against the state.—Feurer v. Stewart (C. C.) 793.

COVERTURE.

See "Husband and Wife."

CRIMINAL LAW.

Bail, see "Bail."
Extradition of persons accused, see "Extradition."
Particular offenses, see "Bribery"; "Robbery."

A person arrested in a state upon a bench warrant issued by the supreme court of the District of Columbia on an indictment there found can only be removed there for trial by proceedings in accordance with the practice of the state where the arrest is made.—In re Price (C. C.) 830.

Evidence *held* sufficient to authorize the removal of a prisoner to the District of Columbia for trial on an indictment there found.—In re Price (C. C.) 830.

A federal convict in the New York penitentiary is not entitled to an unconditional allowance for good behavior, under Rev. St. § 5543, but to the same rule of credits provided by the state laws for state convicts, under Rev. St. § 5544.—In re Willis (C. C.) 148.

A federal convict in a New York penitentiary, who is conditionally discharged according to the state law, must, on conviction of another offense before the end of his original term, even if this offense be against the state, serve the remainder of his original sentence in the place where he is confined for the new felony.—In re Willis (C. C.) 148.

CROSS BILL.

See "Equity."

CROSSINGS.

Accidents at, see "Railroads."

CUSTOMS DUTIES.

"Tapioca flour" was dutiable under the tariff act of 1890 as a preparation "fit for use as starch," under paragraph 323, and was not free of duty as "tapioca," under paragraph 730.—Wise v. Chew Hing Lung (C. C. A.) 162.

Hemstitched handkerchiefs, embroidered with an initial, were dutiable as "handkerchiefs composed of cotton or other vegetable fibre," under paragraph 349 of the tariff act of 1890.—United States v. Jonas (C. C. A.) 167.

Chiffon, imported in widths of 14 inches, with a border on each side, and generally known as "chiffon veiling," was dutiable as "veilings," under paragraph 301 of the act of 1894.—United States v. Lahey (C. C. A.) 691.

In determining whether certain handkerchiefs were dutiable as "embroidered and hemstitched handkerchiefs," *held*, that certain evidence as to commercial designation was admissible.—United States v. Jonas (C. C. A.) 167.

Refined carbonate of potash was entitled to free entry under paragraph 595 of the tariff act of 1894.—United States v. Giese (C. C. A.) 692.

Dredges and scows are not dutiable as "goods, wares, and merchandise" under the tariff laws. —Connelly v. The International (D. C.) 840.

DAMAGES.

For breach of contract, see "Contracts"; "Vendor and Purchaser."
For infringement of copyrights, see "Copyrights."
For particular injuries, see "Collision"; "Death."

In an action for breach of an agreement by a purchaser of property not to use it to the injury of plaintiff's business, loss of profits in such business in consequence of competing business carried on upon said property may be shown as damages.—Hitchcock v. Anthony (C. C. A.) 779.

Instructions authorizing damages for permanent impairment of health and ability to perform physical labor, claimed to have resulted from a surgical operation, *held* erroneous for want of any evidence to support the claim.—Western Union Tel. Co. v. Morris (C. C. A.) 992.

DEATH.

Of party, see "Abatement and Revival."

A charge that the jury, in estimating damages, might consider the loss of decedent's "society" to his family and children, construed in connection with the other elements of damage enumerated by the court, and *held* to have meant loss of society in a material and pecuniary sense.—Northern Pac. R. Co. v. Freeman (C. C. A.) 82.

DEBTOR AND CREDITOR.

See "Fraudulent Conveyances."
Satisfaction of debt, see "Accord and Satisfaction."

DECISION.

On appeal, see "Appeal and Error."

DECLARATION.

See "Pleading."

DECLARATIONS.

As evidence, see "Evidence."

DEEDS.

Necessity for recording trust deed, see "Trusts."
Tax deeds, see "Taxation."

When a deed is attacked as made through confidential relations and undue influence, the burden is on the grantee, the relations being admitted, to show that the grantor was not influenced thereby. —German Savings & Loan Soc. v. De Lashmutt (C. C.) 33; Starr v. German Savings & Loan Soc., Id.

A deed obtained from a person of weak mind, while in a home for inebriates, by one acting as her agent and confidential adviser, is void, in the absence of a showing that she was not influenced by such relations, and that she acted on independent advice.—German Savings & Loan Soc. v. De Lashmutt (C. C.) 33; Starr v. German Savings & Loan Soc., Id.

Even an unacknowledged deed of lands in California may be recorded upon proof of its execution. Civ. Code Cal. §§ 1161, 1183, 1195, 1198, 1199.—Whittle v. Vanderbilt Mining & Milling Co. (C. C.) 48.

DEFECTS.

In appliances, see "Shipping."

DELAY.

Waiver of maritime lien by delay, see "Maritime Liens."

DEMURRER.

See "Equity"; "Pleading."

DEPORTATION.

Of aliens, see "Aliens."

DEPOSITIONS.

In taking depositions, counsel cannot assume to pass upon questions of competency, materiality, and relevancy, and instruct the witnesses not to answer questions put to them on cross-

examination. — Thomson-Houston Electric Co. v. Jeffrey Mfg. Co. (C. C.) 614.

DESCRIPTION.

Of property mortgaged, see "Chattel Mortgages."

DIRECTING VERDICT.

In civil actions, see "Trial."

DIRECTORS.

Of banks, see "Banks and Banking."

DISBARMENT.

Of attorney, see "Attorney and Client."

DISCHARGE.

Of mechanic's lien, see "Mechanics' Liens."
Of public officer, see "Officers."

DISCOVERY.

In equity, see "Equity."

DISSOLUTION.

Of corporation, see "Corporations."

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts"; "Removal of Causes."

DOMICILE.

Residence as ground of jurisdiction, see "Courts."

DONATIONS.

Of public lands, see "Public Lands."
To charities, see "Charities."

DUTIES.

Customs duties, see "Customs Duties."

EJECTION.

Of passenger, see "Carriers."

EMPLOYES.

See "Master and Servant."

EQUALITY.

Equal protection of the laws, see "Constitutional Law."

EQUITY.

Particular subjects of equitable jurisdiction and equitable remedies, see "Copyrights"; "Injunction"; "Patents"; "Receivers"; "Specific Performance"; "Trusts."

A court of equity retains jurisdiction of a foreclosure suit, so as to permit interventions, during the term at which the final decree of foreclosure and sale is entered, though the decision directing such foreclosure and sale was announced at the previous term.—New York Guaranty & Indemnity Co. v. Tacoma Railway & Motor Co. (C. C. A.) 365.

Equity will interfere to prevent a resurvey by government officials of patented lands bordering on a lake, when it appears that it will result in the destruction of much valuable timber, cast a cloud upon the title to lands conveyed by the government, and involve the owner in a multiplicity of lawsuits.—Kirwan v. Murphy (C. C. A.) 275.

A nonresident plaintiff in a state court, who has, by attachment, obtained a lien on property of the defendant, may maintain a bill in a federal court to protect such lien by preventing the sale of the property under an execution issued from that court, though his claim has not passed to judgment.—New York Commercial Co. v. Francis (C. C. A.) 769.

Where, after levy of an attachment, and before final judgment, the defendant dies, and his foreign executors refuse to revive the action, the plaintiff may resort to equity to preserve and enforce his lien against the fund arising from the attached property.—Montgomery v. McDermott (C. C.) 576.

A delay of some three years and a half in presenting a claim for payment in a foreclosure suit *held* not laches, the intervener having in the meantime obtained a judgment against the defendant.—New York Guaranty & Indemnity Co. v. Tacoma Railway & Motor Co. (C. C. A.) 365.

On a demurrer to the bill the court is not precluded from examining the entire record in the cause for aid in determining the actual verity of a mere bald allegation that a certain thing will be done by another, unaccompanied by any circumstances giving it weight or credence.—Hutton v. Joseph Bancroft & Sons Co. (C. C.) 17.

Equity rule 39, dispensing with a full answer where defendant might, by plea, protect himself from answering, will not excuse the defendant in a patent infringement suit from answering interrogatories where he has set up every possible defense, including noninfringement. — National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. (C. C.) 26; Chicago Ry. Equipment Co. v. Same, Id.

Waiver of an answer under oath is not a waiver of a right to except to the answer for insufficiency.—National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. (C. C.) 26; Chicago Ry. Equipment Co. v. Same, Id.

Though bills of discovery are not as commonly used as formerly when parties were disqualified from testifying, they are still permissible, and

discovery is an invaluable aid in the administration of equitable remedies.—National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. (C. C.) 26; Chicago Ry. Equipment Co. v. Same, Id.

In a patent infringement suit, where one of the issues is as to infringement, interrogatories going directly to this issue cannot be objected to on the theory that the bill is for discovery in aid of accounting, and that, if any of the defenses prevail, answers would be unnecessary.—National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. (C. C.) 26; Chicago Ry. Equipment Co. v. Same, Id.

Such matters as mistake or fraud in the execution of a note and mortgage, whereby they do not express the true contract, should be set up by cross bill for their reformation.—Commonwealth Title Insurance & Trust Co. v. Cummings (C. C.) 767.

That an injunction bill is not verified in the usual manner employed when the bill is made the basis of a temporary injunction, is immaterial on demurrer to the bill.—Cobb v. Clough (C. C.) 604.

Where a defendant in a foreclosure suit before plea or answer deposits a sum in court without conditions, as a tender of the amount admitted to be due the plaintiff, it is within the power of the court to refuse to permit its withdrawal, and to order it paid to plaintiff as payment pro tanto of the mortgage debt, though the defendant by his pleadings puts in issue the validity of the mortgage.—Cæsar v. Capell (C. C.) 403.

Laches of a complainant, which is excused by the bill, cannot be availed of by demurrer.—Carey v. Roosevelt (C. C.) 242.

Where a cross-examination has been closed after notice to the complainant, the court will not, on his motion, require respondent to produce a witness for further cross-examination. — Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co. (C. C.) 490.

After the filing of a special master's report and exceptions thereto, the cause will not be reopened, to permit the taking of additional evidence.—Central Trust Co. v. Georgia Pac. Ry. Co. (C. C.) 386.

In an equity case in a federal court the answer should deny or expressly admit each material allegation of the bill, or it will be insufficient.—Commonwealth Title Insurance & Trust Co. v. Cummings (C. C.) 767.

ESTATES.

Created by will, see "Wills."

ESTOPPEL.

By judgment, see "Judgment."
To avoid or forfeit insurance policy, see "Insurance."

Devisees of a remainder in fee, where the life tenant lived nearly 40 years after selling the land in fee under a doubtful power created in the will, are not estopped from claiming their interest in the land 10 years after the death of the life tenant, who was their mother.—Smith v. McIntire (C. C.) 456.

EVIDENCE.

See, also, "Witnesses."
In particular civil actions or proceedings, see "Admiralty"; "Libel and Slander."
—— criminal prosecutions, see "Robbery."
Reception at trial, see "Trial."
Review on appeal or writ of error, see "Appeal and Error."
To sustain plea in abatement, see "Abatement and Revival."

Evidence that a railroad claim agent had said that the company had never made a general settlement with one claiming damages for personal injuries *held* inadmissible as hearsay, and because there was no evidence to show that he had authority to abrogate or waive settlements previously made.—Chicago, St. P., M. & O. Ry. Co. v. Belliwith (C. C. A.) 437.

On the question whether one who buys goods on credit, and fails three weeks later, was insolvent at date of purchase, proof of the value of his assets six weeks later still, as shown by the receiver's invoice, is competent against him.—Waples-Platter Co. v. Turner (C. C. A.) 64.

On the question whether one who buys goods on credit upon his written representation of perfect solvency, and fails three weeks later, was insolvent at date of purchase, and knew it, it is not competent for him to show that he had made some profits during the two years previous.—Waples-Platter Co. v. Turner (C. C. A.) 64.

Evidence of the original cost of an article is relevant upon the question of its value at a subsequent period.—Burke v. Pierce (C. C. A.) 95.

An agreement to deliver and bank timber involves an agreement to obtain a banking place, and evidence of a prior parol agreement of the other party to provide the banking place is inadmissible.—Godkin v. Monahan (C. C. A.) 116.

A written contract merges prior and contemporaneous oral promises.—Godkin v. Monahan (C. C. A.) 116.

A written contract cannot be contradicted by parol evidence.—Godkin v. Monahan (C. C. A.) 116.

An engineer, testifying as an expert in regard to the strength of certain timbers, may read in support of his opinion excerpts from standard authorities giving tabulated results of tests made to determine the strength of the same kinds of wood.—Western Assur. Co. v. J. H. Mohlman Co. (C. C. A.) 811.

Hypothetical question calling for the opinion of an expert *held* properly excluded.—Western Assur. Co. v. J. H. Mohlman Co. (C. C. A.) 811.

Statements by a servant, immediately after receiving injury from the incompetency of a fellow servant, that the injury would not have occurred if, as he had theretofore requested, the incompetent servant had been discharged,

are admissible as part of the res gestæ.—Cross Lake Logging Co. v. Joyce (C. C. A.) 989.

Declarations of fault on the master's part, made by an injured servant immediately after an accident to one in charge of the work and competent to deny them, are admissions of the truth of the declaration, when no denial is made.—Cross Lake Logging Co. v. Joyce (C. C. A.) 989.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error."

EXCLUSION.

Of aliens, see "Aliens."

EXECUTION.

The fact that a party has made a conditional offer for property, which has not been accepted, does not incapacitate him from buying the property in for his own benefit at an execution sale.—Boyd v. Hankinson (C. C.) 876.

EXECUTORS AND ADMINISTRATORS.

The old law of Ohio that, when a single woman appointed executor should marry, her marriage should vacate her office of executor, probably does not apply to a wife nominated as executor in the will of her husband.—Smith v. McIntire (C. C.) 456.

If legatees make themselves privies to an action brought against the administrator after his discharge, they are bound by the judgment against him.—Carey v. Roosevelt (C. C.) 242.

EXHIBITS.

Annexed to pleading, see "Pleading."

EXPERT TESTIMONY.

In civil actions, see "Evidence."

EXTRADITION.

One accused of poisoning resulting in death in Canada may be extradited, though it appears that the poison, if administered at all, was given in this country.—Sternaman v. Peck (C. C. A.) 690.

In an extradition warrant, a recital that the requisition is accompanied by a copy of the indictment, certified by the governor of the demanding state to be "in due form," is sufficient. —Ex parte Dawson (C. C. A.) 306.

A federal court will not on habeas corpus discharge one held for interstate extradition under a charge of crime, where the extradition papers show that no right secured to the prisoner by the constitution or laws of the United States has been violated.—Ex parte Dawson (C. C. A.) 306.

FEDERAL COURTS.

See "Courts."

FELLOW SERVANTS.

See "Master and Servant."

FINDINGS.

Review of findings by commissioner in admiralty, see "Admiralty."
—— on appeal or writ of error, see "Appeal and Error."

FIRES.

Caused by operation of railroad, see "Railroads."

FORECLOSURE.

Of mortgages, see "Mortgages."

FOREIGN CORPORATIONS.

See "Corporations."

FORFEITURES.

Of insurance, see "Insurance."

FORMER ADJUDICATION.

See "Judgment."

FRAUD.

In contract, see "Contracts."

FRAUDULENT CONVEYANCES.

The assignment of mortgages by a prisoner to his wife and attorneys between the time of his conviction and sentence *held* valid. — United States v. Coffin (C. C.) 337.

Circumstances considered, and *held* to sustain a conveyance by a debtor to his wife, as against his creditors.—Voorhees, Miller & Co. v. Blanton (C. C.) 234.

Mere inadequacy of consideration in honest family settlements is not a badge of fraud.—Voorhees, Miller & Co. v. Blanton (C. C.) 234.

In the absence of a statute forbidding preferences, a debtor may prefer one creditor to another.—Voorhees, Miller & Co. v. Blanton (C. C.) 234.

Any conveyance whose object or manifest tendency is to hinder, delay, or defeat is voidable by creditors.—Voorhees, Miller & Co. v. Blanton (C. C.) 234.

If a conveyance by a debtor in failing circumstances is void as to one creditor, it is void as to all.—Voorhees, Miller & Co. v. Blanton (C. C.) 234.

The grantee in a deed set aside in favor of the grantor's creditors may be entitled to reimbursement for certain payments.—Voorhees, Miller & Co. v. Blanton (C. C.) 234.

Where a deed of land is set aside for fraud as to the grantor's creditors, an innocent party who has erected a house on it may be allowed a lien.—Voorhees, Miller & Co. v. Blanton (C. C.) 234.

FREIGHT.

Rates for carriage, see "Commerce."

GENERAL DENIAL.

See "Pleading."

GIFTS.

Charitable gifts, see "Charities."

GRANTS.

Of public lands, see "Public Lands."

HABEAS CORPUS.

Federal courts have authority, in habeas corpus proceedings, to inquire into the guilt or innocence of persons committed on preliminary examination by a state tribunal on a criminal charge for acts done in the service of the United States, so far as to determine whether the acts were done wantonly and with criminal intent.—In re Lewis (D. C.) 159.

HARMLESS ERROR.

In civil actions, see "Appeal and Error."

HEARSAY EVIDENCE.

See "Evidence."

HIGHWAYS.

Accidents at railroad crossings, see "Railroads."

HUSBAND AND WIFE.

Under the former law of Tennessee a married woman had no power during coverture to dispose of her separate estate except as provided by the instrument creating it.—Martin v. Fort (C. C. A.) 19.

Under Tennessee act of 1869–70 (Mill & V. Code, § 3350) the mere mention of one mode of disposition by a married woman does not exclude others.—Martin v. Fort (C. C. A.) 19.

Tennessee act of 1869–70 (Mill & V. Code, § 3350), relating to disposition of separate property by married women, was retroactive.—Martin v. Fort (C. C. A.) 19.

A married woman's promissory note, valid under the laws of the state where made, will be enforced against her in Indiana, though, by the local law, she could not make such a contract.—Bowles v. Field (C. C.) 886.

A married woman cannot claim credit on her note for proceeds applied in discharge of her husband's obligation, where she took and retained the obligation.—Bowles v. Field (C. C.) 886.

HYPOTHETICAL QUESTIONS.

See "Evidence."

IMMIGRATION.

See "Aliens."

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law."

IMPEACHMENT.

Of witness, see "Witnesses."

IMPORTS.

Duties, see "Customs Duties."

IMPROVEMENTS.

On mining claim, see "Mines and Minerals."

INDEMNITY.

See "Insurance."

INDIANS.

Neither the constitution of a state, nor an act of its legislature, can prevent the application of an act of congress to the Indian tribes.—United States v. Boyd (C. C. A.) 547.

The refusal of the interior department to sanction a sale of Indian lands is conclusive.—United States v. Boyd (C. C. A.) 547.

It is the right and duty of the United States to protect its Indian wards.—United States v. Boyd (C. C. A.) 547.

The Eastern Band of Cherokee Indians are wards of the United States.—United States v. Boyd (C. C. A.) 547.

The act of February 8, 1887, declaring certain Indians to be citizens, has no application to a tribe.—United States v. Boyd (C. C. A.) 547.

The political departments of the government have recognized the Eastern Band of Cherokee Indians as a tribe.—United States v. Boyd (C. C. A.) 547.

INDORSEMENT.

Of promissory note, see "Bills and Notes."

INFRINGEMENT.

Of copyright, see "Copyrights."
Of patent, see "Patents."

INJUNCTION.

Against use of trade-names, see "Trade-Marks and Trade-Names."
Restraining infringements of patents, see "Patents."

A bill for injunction against the enforcement of an ordinance sufficiently shows the interest of the complainant when it shows he has a well-grounded apprehension of loss by the enforcement of the ordinance.—Old Colony Trust Co. v. City of Atlanta (C. C.) 39.

A combination between the members of a labor organization to compel a manufacturer to discontinue the use of certain machinery in the making of barrels, by warning customers not to buy the barrels so made, and by notifying members of other organizations not to buy products packed in such barrels, is an unlawful conspiracy, and the carrying into effect of such conspiracy may be enjoined where irreparable injury would result.—Hopkins v. Oxley Stave Co. (C. C. A.) 912.

A corporation may maintain a suit to enjoin the carrying into effect of an unlawful conspiracy to injure its business against all or any number of the conspirators.—Hopkins v. Oxley Stave Co. (C. C. A.) 912.

The mere granting of consent to build and operate a street railroad in a street does not constitute irreparable injury to abutting property, so as to entitle the owner to enjoin such action by the local authorities.—Seccomb v. Wurster (C. C.) 856.

IN REM.

Remedies in admiralty, see "Admiralty."

INSOLVENCY.

Of corporations, see "Corporations."

INSTRUCTIONS.

In civil actions, see "Trial."

INSURANCE.

Assignment of a life policy construed.—Penn Mut. Life Ins. Co. v. Union Trust Co. (C. C.) 891.

Evidence *held* insufficient to establish undue influence to induce a reassignment of a life policy.—Penn Mut. Life Ins. Co. v. Union Trust Co. (C. C.) 891.

Where a policy of fire insurance provides that its stipulation can be waived only by written indorsement, a breach by the assured cannot be cured by silent acquiescence of the company's agents.—Fischer v. London & L. Fire Ins. Co. (C. C.) 807.

An allegation in a complaint on a fire policy that the fire did not happen by reason of any of the causes excepted in the policy is unnecessary, and need not be proved.—Western Assur. Co. v. J. H. Mohlman Co. (C. C. A.) 811.

A provision of a fire policy, that the insurance should cease in case the building in which the insured property was contained fell, *held* to be a condition subsequent, the burden of proving a defense under which rested upon the insurer.—Western Assur. Co. v. J. H. Mohlman Co. (C. C. A.) 811.

A provision of a fire policy, that the insurance described is insured while contained in a certain building does not cast on the insured the burden of proving that the building did not fall before the destruction of the property by fire, where the policy contained a clause expressly covering such case.—Western Assur. Co. v. J. H. Mohlman Co. (C. C. A.) 811.

The refusal of an instruction that the burden rested upon the plaintiff to prove that the property insured was destroyed by fire was not error where such fact was proved by uncontradicted evidence, and the only contention was over another issue.—Western Assur. Co. v. J. H. Mohlman Co. (C. C. A.) 811.

An indemnity policy insuring a lumber company having mills, dwellings, and stores in a remote settlement, and a short railroad connecting with a railway system, against liability to any persons sustaining personal injuries for which the company would be liable, *held* to cover a liability to two commercial travelers injured by the overturning of a locomotive on the company's railroad.—Travellers Ins. Co. v. Wild River Lumber Co. (C. C. A.) 977.

When all the acts done or to be done concerning or under a policy of life insurance occur in the state of its issue, except the application and conditional payment of the advance premium, it is a contract of the state where issued.—Equitable Life Assur. Soc. v. Trimble (C. C. A.) 85.

Laws N. Y. 1877, c. 321, as to forfeiture of life insurance policies, cannot be waived.—Equitable Life Assur. Soc. v. Trimble (C. C. A.) 85.

A lapsed life insurance policy cannot be revived without a new contract.—Equitable Life Assur. Soc. v. McElroy (C. C. A.) 631.

The intentional omission, by an applicant for life insurance, to disclose every material fact which comes to his knowledge before the contract is finally closed, vitiates the contract.—Equitable Life Assur. Soc. v. McElroy (C. C. A.) 631.

Where no policy of life insurance has been issued, and no premium paid, the presumption is that there was no contract.—Equitable Life Assur. Soc. v. McElroy (C. C. A.) 631.

Failure to pay a life insurance premium as agreed is not waived unless the assured was led by the company to omit it.—Equitable Life Assur. Soc. v. McElroy (C. C. A.) 631.

The parties to a contract of life insurance are as important as the subject-matter.—Equitable Life Assur. Soc. v. McElroy (C. C. A.) 631.

Where a life insurance policy is tendered, a conditional acceptance does not close the contract.—Equitable Life Assur. Soc. v. McElroy (C. C. A.) 631.

False statements in an application that are made warranties only render the policy voidable at the option of the company, and the company, after knowledge, may waive the breach and insist on insured performing the contract, or it may, by conduct, estop itself from taking advantage of a known breach.—New York Life Ins. Co. v. Baker (C. C. A.) 647.

Where a company, with full knowledge of its right to declare the policy void, continued to treat it as a subsisting claim, induced the appointment of a guardian for minor children of insured, entered into negotiations to induce the guardian to settle for less than the face of the policy, and then first claimed it was void, and retained the premium for a year, such acts amounted to both a waiver and an estoppel in pais.—New York Life Ins. Co. v. Baker (C. C. A.) 647.

INTEREST.

Interest on a recovery may be computed to date of entry of judgment.—Equitable Life Assur. Soc. v. Trimble (C. C. A.) 85.

INTERIOR DEPARTMENT.

See "Indians."

INTERLOCUTORY JUDGMENT.

Review on appeal or writ of error, see "Appeal and Error."

INTERNAL REVENUE.

Removal of revenue officer, see "Officers."

A merchant does not become liable to the special tax as a dealer in oleomargarine simply because he permitted packages sold by a wholesale house to another, without his agency, to be shipped in his name as a matter of accommodation only.—Hartzell v. United States (D. C.) 1002.

INTERPLEADER.

Adverse claimants to a fund, joined as codefendants in a bill of interpleader, as between themselves occupy the relation of complainant and defendant, and sworn denials by one of allegations made in a cross bill filed by the other have the same effect as evidence as though in an answer to an original bill.—Penn Mut. Life Ins. Co. v. Union Trust Co. (C. C.) 891.

INTERSTATE COMMERCE.

Regulation, see "Commerce."

INTERSTATE EXTRADITION.

See "Extradition."

INTOXICATING LIQUORS.

A state statute forbidding the employment of women in any saloon or other place of amusement where intoxicating liquors are sold as a beverage, does not abridge the privileges and immunities of, or deny the equal protection of the laws to, citizens of the United States.—In re Considine (C. C.) 157.

INVENTION.

See "Patents."

JOINDER.

Of causes of action, see "Action."

JUDGMENT.

Limitation of action on, see "Limitation of Actions."
On appeal or writ of error, see "Appeal and Error."

The presumptions are in favor of the regularity of a judgment, and it is for the defendant to show that it was collusive, or that an attorney who appeared for defendant was an intruder.—Whitman v. National Bank of Oxford (C. C. A.) 288.

Judgments are binding on privies, as well as parties, but only those are privies who acquire their interest after the commencement of the suit.—Carroll v. Goldschmidt (C. C. A.) 508.

A judgment on appeal, directing the dismissal on the merits of a patent infringement suit, will be followed without re-examining the merits on an appeal in a subsequent suit against a purchaser of the identical machine involved in the prior litigation.—Norton v. San José Fruit-Packing Co. (C. C. A.) 512.

A finding that the president of a bank purchased a certain note with knowledge of a condition on which it was given, made in an action in which both the bank and its president were defendants, is conclusive of such fact in a subsequent action between the bank and the president.—Stearns v. Lawrence (C. C. A.) 738.

A decree of foreclosure in an action by an assignee of the mortgage concludes all questions of the validity of the mortgage and the assignment, as to parties and privies.—Black v. Caldwell (C. C.) 880.

A decree in equity that the copyright of a certain play is valid, is binding in a subsequent action at law between the same parties to recover statutory damages for infringement.—Brady v. Daly (C. C. A.) 1007.

In an equity suit for injunction and accounting, for infringement of a copyrighted play, where a perpetual injunction is granted, but where no accounting is in fact sought or obtained, the decree is not a bar to a subsequent action to recover statutory damages for the same infringements.—Brady v. Daly (C. C. A.) 1007.

An opinion of the supreme court of Michigan, which is required by the constitution to be

made, signed, and filed with the clerk, is competent evidence of the questions adjudicated, in a subsequent action in which the decision is relied on as an estoppel.—Stearns v. Lawrence (C. C. A.) 738.

JURISDICTION.

Objections to jurisdiction as ground for abatement, see "Abatement and Revival."
Of equity, see "Equity."
Particular courts, see "Courts."

LABOR.

Exclusion of Chinese laborers, see "Aliens."

LACHES.

Effect in equity, see "Equity."
Waiver of maritime lien by delay, see "Maritime Liens."

LAKES.

See "Waters and Water Courses."

LANDLORD AND TENANT.

If a lessee covenants that he will, upon surrendering, pay for putting the premises in as good condition as when received, the landlord is entitled to the full amount, though new materials are necessary.—Burke v. Pierce (C. C. A.) 95.

An agreement by lessor and lessee to submit disputes as to repairs, etc., to arbitration, is no defense to an action by one of them against the other.—Burke v. Pierce (C. C. A.) 95.

A covenant by a lessee against the use of the premises for a particular business runs with the leasehold.—American Strawboard Co. v. Haldeman Paper Co. (C. C. A.) 619.

LAND OFFICE.

Appropriations for contingent expenses, see "Officers."

LANDS.

See "Public Lands."

LEASES.

See "Landlord and Tenant."

LEGISLATIVE POWER.

See "Constitutional Law."

LETTERS PATENT.

For public lands, see "Mines and Minerals."

LIBEL AND SLANDER.

Allegations in an answer to a suit for life insurance of a conspiracy between plaintiff and her husband to defraud, and that they averred the death of the insured without having any knowledge or information to that effect, are libelous, and not privileged.—Union Mut. Life Ins. Co. v. Thomas (C. C. A.) 803.

Matters in pleadings, to be privileged, must be legitimately related to the issues.—Union Mut. Life Ins. Co. v. Thomas (C. C. A.) 803.

No proof of malice in making a libelous charge in a pleading is required, except that afforded by the charge itself and the circumstances under which it was made.—Union Mut. Life Ins. Co. v. Thomas (C. C. A.) 803.

LIENS.

Particular classes of, see "Chattel Mortgages"; "Maritime Liens"; "Mechanics' Liens"; "Railroads."

LIFE INSURANCE.

See "Insurance."

LIMITATION OF ACTIONS.

An amendment to the petition, whereby plaintiff, instead of suing for himself, alleges that he sues for the benefit of a third party, does not introduce a new cause of action which will be barred by the intermediate completion of the statutory period.—Middlesex Banking Co. v. Smith (C. C. A.) 133.

After 50 years it will be conclusively presumed that debts for the payment of which real estate of a decedent's estate was sold were not barred by the statute of limitations in force at the time, if it appears that they might have been within any of its exceptions.—Smith v. McIntire (C. C.) 456.

In an action on a judgment, it is no defense that the original claim was barred by the statute of limitations.—Carey v. Roosevelt (C. C.) 242.

LITERARY PROPERTY.

See "Copyrights."

MAIL.

Use of mail to defraud, see "Post Office."

MALICE.

See "Libel and Slander."

MANDAMUS.

Mandamus will lie to require a railroad company to maintain the crossings of its tracks in safe and convenient condition.—State of Indiana v. Lake Erie & W. R. Co. (C. C.) 284.

MARITIME LIENS.

A dredge, tugs, scows, and water boats, composing a dredging plant, cannot be treated as a single vessel, so that supplies furnished to one of them, without showing which, will constitute a lien payable out of the proceeds of all, under the New York statute.—Darling v. The Knickerbocker (D. C.) 843.

A delay of over two years by a pilot, who first sued the owner personally, in attempting to assert a lien for damages for wrongful discharge, *held* to be a waiver of the lien as against innocent purchasers of the vessel.—Van Hoesen v. The Angler (D. C.) 845.

MARRIED WOMEN.

See "Husband and Wife."

MARSHALS.

Of United States, see "United States Marshals."

MASTER AND SERVANT.

Whether one who complained of the incompetency of a fellow servant was guilty of contributory negligence in returning to work on assurances that the incompetent servant would soon be removed, and in the meantime watched, is a question for the jury.—Cross Lake Logging Co. v. Joyce (C. C. A.) 989.

Requested instructions as to an alleged request by one servant for the removal of an incompetent fellow servant, through whose negligence he was injured, *held* to have been properly refused.—Cross Lake Logging Co. v. Joyce (C. C. A.) 989.

MEASURE OF DAMAGES.

See "Damages."

MECHANICS' LIENS.

After a contractor's right to a lien has accrued, it is not taken away by any mere promises to pay, and if such promises are not performed he may enforce the lien.—Reynolds v. Manhattan Trust Co. (C. C. A.) 593.

Under the Nebraska law the lien of a subcontractor continues only for two years from the date of the last act done in performance of his contract.—Reynolds v. Manhattan Trust Co. (C. C. A.) 593.

Mechanics' liens filed against a railroad company after a mortgage is executed and delivered to the trustee, but before any bonds have been issued or mortgage debt created, are entitled to priority over the mortgage lien.—Reynolds v. Manhattan Trust Co. (C. C. A.) 593.

Under the Nebraska statute a subcontractor's lien exists for two years, without the filing of any statement or notice of lien whatever, as against parties whose rights accrue after the commencement of work, and before the end of 60 days from the last day of the month in which the contract is completed.—Reynolds v. Manhattan Trust Co. (C. C. A.) 593.

MINES AND MINERALS.

Under the Nevada statute, a mining company may condemn for its use an old unused tunnel in a neighboring claim.—Byrnes v. Douglass (C. C. A.) 45.

The report of the commissioners in condemnation proceedings that no damage will be done by the construction of the proposed tunnel through certain claims, and that such claims would rather be benefited thereby, will not be disturbed on appeal.—Byrnes v. Douglass (C. C. A.) 45.

In a suit to cancel a patent to a mining claim, the fact that the surveyor general's certificate refers to "two disinterested witnesses" does not show that it meant to refer to two particular persons who had made a certain fraudulent affidavit.—United States v. King (C. C. A.) 188.

A surveyor general may determine the value of improvements on mining claims from the knowledge of himself or his deputy or from witnesses. —United States v. King (C. C. A.) 188.

The presumption is that a surveyor general's certificate as to mining claims was made in pursuance of his duty.—United States v. King (C. C. A.) 188.

To cancel a mining claim, the government must make out a clear case of fraud.—United States v. King (C. C. A.) 188.

A patent for a consolidated claim, issued under the act of 1866, is not void merely because the patented ground exceeds the 300 feet in width allowed by Rev. St. § 2320, for one location.—Carson City Gold & Silver Min. Co. v. North Star Min. Co. (C. C. A.) 658.

A patent issued on an application filed under the act of 1866 entitles the owner to extralateral rights, however irregular the shape of his claim.—Carson City Gold & Silver Min. Co. v. North Star Min. Co. (C. C. A.) 658.

A patent for a consolidated mining claim is conclusive that the grantees were the owners both of the surface ground and of any vein whose apex is found therein, and all the rights and privileges incident thereto, that the location was legally made, and that the amount of work required by law had been performed.—Carson City Gold & Silver Min. Co. v. North Star Min. Co. (C. C. A.) 658.

The owner of a patented claim consisting of a consolidation of several claims located prior to the act of May 10, 1872, is entitled to extralateral rights, without regard to the interior lines defining the boundaries of the original claims.—Carson City Gold & Silver Min. Co. v. North Star Min. Co. (C. C. A.) 658.

MISREPRESENTATION.

By insured, see "Insurance."

MISTAKE.

In contract, see "Contracts."

MONOPOLIES.

An agreement among rival manufacturers considered, and *held* to constitute an unlawful combination in restraint of trade.—National Harrow Co. v. Hench (C. C. A.) 36.

The fact that several patentees are exposed to litigation does not justify the creation by them of monopolies to public disadvantage.—National Harrow Co. v. Hench (C. C. A.) 36.

MORTGAGES.

By corporation, see "Corporations."
Of personal property, see "Chattel Mortgages."
Of railroad property, see "Railroads."

If a junior mortgagee of real property which is not worth the amount due on the prior mortgage pays delinquent taxes thereon, the senior mortgagee cannot secure a decree in equity restraining him from obtaining a tax deed, without reimbursing him for such payment.—Allison v. Corson (C. C.) 752.

Property added to the plant of a street-railroad company, and which becomes an essential and integral part of its road, passes under a mortgage previously executed and recorded, covering its entire property and road, constructed and to be constructed, although furnished under a contract by which the title was to remain in the seller until payment made.—Phœnix Iron-Works Co. v. New York Security & Trust Co. (C. C. A.) 757.

A record made from a copy of a mortgage after the original has been filed for recording, and the copy verified by such original, is valid as constructive notice.—Central Trust Co. v. Georgia Pac. Ry. Co. (C. C.) 386.

A mortgagor of timber lands may reserve the right to cut logs and sell the lumber made therefrom.—Moore v. Southern States Land & Timber Co. (C. C.) 399.

Averments of a bill for foreclosure *held* insufficient to give the plaintiffs a standing as innocent purchasers before maturity of the bond secured. —Cæsar v. Capell (C. C.) 403.

Averments of a plea to a bill for foreclosure *held* insufficient to show that the mortgage was invalid, as having been taken in violation of the statutes of Tennessee regulating foreign corporations doing business in the state.—Cæsar v. Capell (C. C.) 403.

MUNICIPAL CORPORATIONS.

See, also, "Counties."
Injunctions affecting, see "Injunction."

A proviso in a street-railroad charter that its rates of fare and freight shall be subject to the approval of the mayor and city council, does not authorize the city to fix such fares.—Old Colony Trust Co. v. City of Atlanta (C. C.) 39.

The authority of a city, derived from the charter of a street railroad, to fix the rate of fares thereon, is exhausted by fixing such rates in an ordinance granting the use of the streets to such railroad company.—Old Colony Trust Co. v. City of Atlanta (C. C.) 39.

Laws of Georgia *held* not to authorize the city of Atlanta to fix rates of fare on street railroads.—Old Colony Trust Co. v. City of Atlanta (C. C.) 39.

A provision in a city charter authorizing it to pass ordinances in relation to hacks, carriages, wagons, and other vehicles, and such ordinances as it may deem proper for the peace, health, order, or good government of the city, does not authorize it to fix rates of fare on street railroads.—Old Colony Trust Co. v. City of Atlanta (C. C.) 39.

Where the use of the streets is granted for a street railroad, "subject to all the laws and ordinances now in force and such as may be hereafter made," the city cannot legally pass an ordinance fixing rates of fare on such road, unless it is authorized so to do by a law of the state.—Old Colony Trust Co. v. City of Atlanta (C. C.) 39.

A preliminary injunction will be granted in a taxpayer's suit, restraining the doing of an alleged illegal act, only when the right to such relief is made clear and certain.—Seccomb v. Wurster (C. C.) 856.

A city invited bids for the construction of an aqueduct in accordance with plans and specifications on file, among which were certain instructions to bidders, containing a statement of the approximate quantities of each class of work required. *Held,* that such estimate became a part of the contract, and, where work was required in a class largely in excess of such estimate, the contractor was entitled to recover the reasonable value of such excess.—Smith v. Salt Lake City (C. C.) 784.

The engineer or other officers of a city cannot change the terms of a written contract for work by parol statements made either before or after the execution of the contract.—Smith v. Salt Lake City (C. C.) 784.

Where a claim against a city for extra work under a contract has been referred to the city attorney for adjustment, he has authority to authorize the payment of a sum allowed by the council, without prejudice to the right of the contractor to demand more. — Smith v. Salt Lake City (C. C.) 784.

Where bids are invited on plans and specifications on file, a survey and location of the improvement contemplated is conclusively presumed.—Smith v. Salt Lake City (C. C.) 784.

Bonds purporting to have been issued in conformity with a certain law, but which in fact were not issued until after the law was repealed, being antedated and signed by former town officials, who were not such at the time of signing, are void, even in the hands of innocent purchasers.—Lehman v. City of San Diego (C. C. A.) 669.

Charter power "to borrow money on the faith and credit of the city" gives no authority to is-

sue negotiable bonds.—Lehman v. City of San Diego (C. C. A.) 669.

Bonds issued under a city ordinance which has been legalized and confirmed by act of the legislature are void if the method of issuance and delivery prescribed therein are not followed.—Lehman v. City of San Diego (C. C. A.) 669.

NAMES.

See "Trade-Marks and Trade-Names."
Of corporations, see "Corporations."

NATIONAL BANKS.

See "Banks and Banking."

NATURALIZATION.

See "Aliens."

NAVIGATION.

See "Collision."

NEGLIGENCE.

See, also, "Collision"; "Master and Servant"; "Railroads"; "Shipping."
Of bailee, see "Bailment."
Of bank officer in purchasing notes, see "Banks and Banking."

Whether negligence in transmitting a telegram, whereby a physician was prevented from reaching a patient earlier, was the proximate cause of injuries resulting from a subsequent operation claimed to have become necessary by reason of the delay, *held* to have been properly submitted to the jury.—Western Union Tel. Co. v. Morris (C. C. A.) 992.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of claim to public lands, see "Public Lands."
Of copyright, see "Copyrights."
Of mortgage, see "Mortgages."
Of petition for removal of causes, see "Removal of Causes."
To principal, see "Principal and Agent."

OATH.

Of office, see "Officers."

OBJECTIONS.

To evidence, see "Trial."

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law."

OFFICERS.

Particular classes of, see "Banks and Banking"; "Counties"; "Corporations"; "Municipal Corporations"; "Receivers"; "United States Marshals."

There is an implied obligation on the part of the government to reimburse the register of the local land office for moneys expended for necessary office rent.—United States v. Swiggett (C. C. A.) 97.

Under the sundry civil appropriation acts, which merely appropriate a gross sum for contingent expenses of the several land offices, it is the duty of the secretary of the interior to make an equal distribution of the sum among the several offices, having regard in the matter of rent for those offices not accommodated in government buildings.—United States v. Swiggett (C. C. A.) 97.

An interpreter of Chinese language, appointed by the secretary of the treasury, is not acting within the scope of his official duty under such appointment while serving as interpreter of such language at a hearing of a criminal charge before a United States commissioner.—In re Yee Gee (D. C.) 145.

An officer who, acting in good faith, exceeds his authority, is answerable therefor to the government under whose appointment he acts, and liable to individuals injured by his acts; but, in the absence of criminal intent, he is not liable to answer the criminal process of another government.—In re Lewis (D. C.) 159.

Subordinate officers in the internal revenue service are not subject to removal at the will of the commissioner, nor at all, except in accordance with the provisions of the civil service law and rules.—Butler v. White (C. C.) 578; Berry v. Same, Id.; Ruckman v. Same, Id.

The rank or position of a subordinate officer under the civil service law and rules cannot be changed by his superior or the appointing power, except for causes other than political.—Butler v. White (C. C.) 578; Berry v. Same, Id.; Ruckman v. Same, Id.

A court of equity has jurisdiction to restrain the appointing power from removing an officer from his position, where such removal is in violation of the civil service law.—Butler v. White (C. C.) 578; Berry v. Same, Id.; Ruckman v. Same, Id.

The act of congress of January 16, 1883, known as the "Civil Service Law," is within the legitimate scope of the power conferred upon congress by article 1, § 8, cl. 18, of the constitution.—Butler v. White (C. C.) 578; Berry v. Same, Id.; Ruckman v. Same, Id.

The act of congress approved January 16, 1883, does not delegate legislative power to the president and civil service commissioners.—Butler v. White (C. C.) 578; Berry v. Same, Id.; Ruckman v. Same, Id.

Storekeepers and gaugers are officers of the United States, and have been placed under the protection of the civil service law.—Butler v. White (C. C.) 578; Berry v. Same, Id.; Ruckman v. Same, Id.

Where the law provides that an officer shall be commissioned and take an oath of office, an appointee to such office cannot legally demand, or take, possession of the office, and the property connected therewith, until he has received his commission and taken the oath.—Butler v. White (C. C.) 578; Berry v. Same, Id.; Ruckman v. Same, Id.

OPTIONS.

To rescind contract of sale, see "Sales."

ORDERS.

Appealability, see "Appeal and Error."

ORDINANCES.

Enjoining enforcement, see "Injunction."
Municipal ordinances, see "Municipal Corporations."

PAROL EVIDENCE.

In civil actions, see "Evidence."

PARTIES.

On appeal, see "Appeal and Error."

In an action to recover damages for a tort committed by a corporation prior to the appointment of a receiver, the latter is not a proper party.—Northern Pac. R. Co. v. Heflin (C. C. A.) 93.

PARTNERSHIP.

The terms of an agreement considered, and *held* to constitute an employment, and not a partnership.—Hambly v. Bancroft (C. C.) 444.

PASSENGERS.

See "Carriers."

PATENTS.

For public lands, see "Mines and Minerals"; "Public Lands."

Patentability.
There is no invention in applying the process of swageing metals to the making of artificial tooth crowns.—Rynear Co. v. Evans (C. C.) 696.

There is no invention in swaging up by a die a malleable blank of iron so as to form a rail brace of a form previously made of cast metal. —Strom Manuf'g Co. v. Weir Frog Co. (C. C. A.) 170.

The substitution of wrought iron or steel for cast iron or steel involves no invention, nor are the products thereof patentable because one may possess greater advantages than the other.—Strom Manuf'g Co. v. Weir Frog Co. (C. C. A.) 170.

A new combination of old elements, producing a new result, is patentable.—American Tobacco Co. v. Streat (C. C. A.) 700.

An article made in a machine cannot be considered as an element in the combination of a patent for a machine.—American Tobacco Co. v. Streat (C. C. A.) 700.

A device does not infringe unless, if used earlier than the patent, it would have been an anticipation thereof.—American Tobacco Co. v. Streat (C. C. A.) 700.

The granting of a patent for minor improvements pending an earlier application by the same inventor for the broad invention will not invalidate a patent subsequently issued for the latter.—Allington & Curtis Mfg. Co. v. Glor (C. C.) 1014.

Infringement.
In an equity infringement suit, a defense that the infringing machines were made under a different patent from that sued on, which was also owned by plaintiff, and had expired before commencement of the suit, is a defense going to the merits, and not to the jurisdiction.—Reedy v. Western Electric Co. (C. C. A.) 709.

A decree pro confesso for want of answer leaves open, on a reference to a master, only the question of the amount of damages and profits.—Reedy v. Western Electric Co. (C. C. A.) 709.

A patent may be declared void on demurrer to the bill in a clear case.—Strom Manuf'g Co. v. Weir Frog Co. (C. C. A.) 170.

Persons acquiring the legal title to a patent, with notice of the prior equitable right of another, take in subordination thereto, and cannot hold as infringers purchasers of the patented articles from them.—Carroll v. Goldschmidt (C. C. A.) 508.

A court of equity will not, even if it has the power, on complainant's motion, require respondent to repeat certain experiments under an alleged anticipating patent, in the presence of plaintiff's witnesses, except where so extraordinary a course is plainly necessary.—Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co. (C. C.) 490.

On motion for preliminary injunction, a prior adjudication, sustaining the patent on final hearing after full and fair contest, is conclusive of its validity.—United Indurated Fibre Co. v. Whippany Mfg. Co. (C. C.) 485.

Interference proceedings raise a presumption of the validity of a patent only as against the parties thereto and their privies. — Western Electric Co. v. Williams-Abbott Electric Co. (C. C.) 842.

An averment of a consent decree will be stricken from the bill in a suit against another party to restrain infringement of a patent.—Western Electric Co. v. Williams-Abbott Electric Co. (C. C.) 842.

A preliminary injunction will not be denied, on account of hardship, where defendant com-

pany was organized by persons prominently connected with another company previously adjudged an infringer for making the same article.—United Indurated Fibre Co. v. Whippany Mfg. Co. (C. C.) 485.

Decisions on the validity, construction, and infringement of particular patents.

The Alkins patent, No. 352,286, for improvements in the manufacture of rail braces for railroad tracks, is void for want of invention,—Strom Manuf'g Co. v. Weir Frog Co. (C. C. A.) 170.

The Atwood patent, No. 253,572, for an improved support for spindles for spinning machines, construed, and *held* not infringed.—Sawyer Spindle Co. v. Morrison Co. (C. C. A.) 693.

The Bergman patent No. 311,110, for improvements in sockets for electric lamps, construed narrowly, and *held* not infringed.—Edison Electric Light Co. v. Electric Engineering & Supply Co. (C. C. A.) 473.

The Blackwell patent, No. 470,817, for a railway motor, is void for want of invention.—Thomson-Houston Electric Co. v. Athol & Orange St. Ry. Co. (C. C.) 203.

Brent patent, No. 281,964, for improvements in window-screen frames, *held* not infringed by the use of screen frames constructed wholly of wood. —A. J. Phillips Co. v. Owosso Manuf'g Co. (C. C.) 176.

The Campbell patent, No. 253,156, for improvements in wax thread sewing machines, construed, and *held* valid and infringed as to the 19th claim.—Campbell Mach. Co. v. Eppler Welt Mach. Co. (C. C.) 208.

The Campbell patent, No. 374,936, for a device for reducing the momentum of the take-up mechanism of a wax thread sewing machine, is void for want of invention.—Campbell Mach. Co. v. Eppler Welt Mach. Co. (C. C.) 208.

The Conley patent, No. 526,517, for an improvement in tobacco wrappers, is void for want of invention.—Conley v. Marum (C. C.) 309.

The Cowles patent No. 319,795, for a process of smelting ores by an electric current, construed, and *held* not infringed by the Acheson process (patent No. 492,767), for the manufacture of carborundum.—Electric Smelting & Aluminium Co. v. Carborundum Co. (C. C.) 492.

The Cowles patent No. 319,945, for an electric smelting furnace, construed, and *held* not infringed by the form of furnace used in the Acheson process of producing carborundum.—Electric Smelting & Aluminium Co. v. Carborundum Co. (C. C.) 492.

The Evans patent, No. 494,999, for alleged improvements in processes of chipping glass, is void for want of novelty and invention.—Evans v. Suess Ornamental Glass Co. (C. C. A.) 706.

The Hyatt patent, No. 293,740, for an improved method of clarifying water, *held* infringed, on motion for a preliminary injunction.—New York Filter Mfg. Co. v. Elmira Water-Works Co. (C. C.) 1013.

Reissue No. 10,282 (original No. 267,492), for a process of rendering paper or pulp articles hard and impervious, and the Keyes patent No. 342,609, for making a pail or similar article of wood pulp or similar material, *held* valid and infringed, on motion for preliminary injunction.—United Indurated Fibre Co. v. Whippany Mfg. Co. (C. C.) 485.

The Lechner patent, No. 432,754, for an improved mining machine, construed, and *held* not infringed.—Jeffrey Manuf'g Co. v. Independent Electric Co. (C. C. A.) 191.

The Lucas patent No. 274,797, for an improvement in machines for separating cockle from grain, construed, and *held* not infringed.—J. L. Owens Co. v. Bradley (C. C.) 482.

The Marchetti patent No. 23,362, for a design for a carpet, is void because of anticipation as to claim 1.—John Crossley & Sons v. Hogg (C. C.) 488.

The Morse patents, Nos. 403,362 and 403,363, the Holt patent, No. 409,365, and the Kutsche patent, No. 407,598, all for improvements in dust collectors, *held* valid and infringed.—Allington & Curtis Mfg. Co. v. Glor (C. C.) 1014.

The Mulvaney patent, No. 437,785, for improvements in barrel-heading machines, construed, and *held* not infringed.—Queen City Barrel-Header Co. v. Standard Oil Co. (C. C.) 755.

The Osgood patent, No. 293,192, covering an arresting stop or spring buffer in a cash-carrier system, *held* valid, and infringed.—Consolidated Store-Service Co. v. Wilson (C. C.) 201.

The Osgood patent, No. 357,851, for a cash-carrier system, discloses patentable invention.—Consolidated Store-Service Co. v. Wilson (C. C.) 201.

The Rice patent, No. 488,260, for a motor suspension for railway work, analyzed and construed, and *held* not infringed.—Thomson-Houston Electric Co. v. Athol & Orange St. Ry. Co. (C. C.) 203.

The Rynear patent, No. 305,238, for an artificial metal tooth crown, is void for want of invention.—Rynear Co. v. Evans (C. C.) 696.

The Streat patent, No. 290,811, for improvements in cigar-making implements, *held* valid and not infringed.—American Tobacco Co. v. Streat (C. C. A.) 700.

The Toepfer patent, No. 226,890, for improvements in malt kilns, construed, and *held* not infringed as to claim 1.—Toepfer v. Galland-Henning Pneumatic Malting Drum Mfg. Co. (C. C. A.) 712.

The Urbahn patent No. 289,872, for an improved loom for making French harness, is void because of anticipation.—Walder v. Ulrich (C. C.) 477.

Patent No. 407,684, for process of treating nuts, *held* void for want of invention.—Pratt v. Thompson & Taylor Spice Co. (C. C.) 516.

Patents Nos. 472,094 and 472,095, for sewing machines for making overseams, construed, and *held* not infringed by a machine made under patent No. 541,732.—Wilcox & Gibbs Sewing-Mach. Co. v. Merrow Mach. Co. (C. C.) 179.

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290,811. Cigar makers' implements, 700, 701
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319,945. Smelting furnace, 492, 493, 506, 507
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PAYMENT.

See "Accord and Satisfaction."
Of promissory note, see "Bills and Notes."

PERFORMANCE.

See "Specific Performance."

PERPETUITIES.

A direction to trustees to invest the trust fund for a term of 10 years or more, at their discretion, does not contravene the rule against perpetuities, as the trustees can be compelled to apply the fund to the use of the beneficiaries within a reasonable time after the expiration of 10 years.—Duggan v. Slocum (C. C.) 244.

PERSONAL INJURIES.

See "Carriers"; "Railroads"; "Shipping."

PLEADING.

In action for libel and slander, see "Libel and Slander."
—— to foreclose mortgage, see "Mortgages."
—— to restrain infringement of patents, see "Patents."
In equity, see "Equity."

In an action to recover for services rendered under a contract, averments showing that plaintiff entered defendant's employment thereunder at a specified time, and continued therein during a specified period, are a sufficient averment of performance.—Joy v. Glidden Varnish Co. (C. C.) 90.

Under the practice acts of Massachusetts it is sufficient to set out the parts of a contract relied on, and the declaration is not necessarily de-

fective because it annexes a copy of the contract which refers to other contracts, without setting them out also.—Joy v. Glidden Varnish Co. (C. C.) 90.

Where a contract sued on is set up by formal allegations, and a copy thereof is also annexed, and it appears from the latter that it requires interpretation from surrounding circumstances, then the formal allegations of the declaration will be controlling.—Joy v. Glidden Varnish Co. (C. C.) 90.

In an action to recover for services rendered under a contract, the fact that the declaration does not show the nature of the services contemplated by the contract will not require the court to hold it void for illegality on demurrer to the declaration.—Joy v. Glidden Varnish Co. (C. C.) 90.

A general denial, in a federal court, is a plea to the merits, and does not put in issue averments of citizenship, upon which the jurisdiction depends; the matter of jurisdiction is waived unless it is challenged by a special plea.—National Masonic Acc. Ass'n v. Sparks (C. C. A.) 225.

The title of a complaint is no part of the cause of action, and a defect therein cannot be reached by demurrer.—State of Indiana v. Lake Erie & W. R. Co. (C. C.) 284.

POLICY.

Of insurance, see "Insurance."

POST OFFICE.

A "scheme to defraud" by the use of the mails involves the element of some plausible device calculated to deceive persons of ordinary prudence.—United States v. Fay (D. C.) 839.

POWERS.

Creation by will, see "Wills."

PRACTICE.

See "Action"; "Pleading"; "Process"; "Trial."

PRE-EMPTION.

See "Public Lands."

PREFERENCES.

By debtor, see "Fraudulent Conveyances."

PREMIUMS.

For insurance, see "Insurance."

PRESUMPTIONS.

Of negligence in communication of fire from locomotives, see "Railroads."

PRINCIPAL AND AGENT.

Under a provision in a railroad mortgage that, on default in payment of interest, the principal secured might be declared due by the holders of the bonds, a declaration of maturity, signed by one as attorney in fact for bondholders, whose act was ratified by the principals after the filing of a bill for foreclosure, was effective as against the defendant railroad company and a junior mortgagee.—Farmers' Loan & Trust Co. v. Memphis & C. R. Co. (C. C.) 870.

A purchaser of goods from an agent is liable to the principal for the price.—Moline Malleable Iron Co. v. York Iron Co. (C. C. A.) 66.

Quære: Whether a principal's right of action on a contract of his agent can be affected by an election by the purchaser.—Moline Malleable Iron Co. v. York Iron Co. (C. C. A.) 66.

There is a presumption that a principal is the contracting party in a contract made by his agent.—Moline Malleable Iron Co. v. York Iron Co. (C. C. A.) 66.

A qualified title in an agent who sells goods does not impair the principal's right of action against the purchaser.—Moline Malleable Iron Co. v. York Iron Co. (C. C. A.) 66.

A purchaser of goods from the agent of a known principal cannot set off a sum owing to him from the agent.—Moline Malleable Iron Co. v. York Iron Co. (C. C. A.) 66.

Notice to an agent or attorney present in his mind while exercising the powers and duties of his agency is notice to his principal.—Chicago, St. P., M. & O. Ry. Co. v. Belliwith (C. C. A.) 437.

PRINCIPAL AND SURETY.

See "Bail."

PRIORITIES.

Of mechanics' liens, see "Mechanics' Liens."

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see "Libel and Slander."

PROCESS.

Service of, on corporation, see "Corporations."

A suit to establish title, and secure possession of a certificate of stock within the district, which has been fraudulently surrendered for cancellation and a new certificate issued, is one warranting service by publication or without the district.—Ryan v. Seaboard & R. R. Co. (C. C.) 889.

The Missouri statute as to service by publication does not apply to an action where the demand for specific performance is conditioned on the granting of other relief strictly in personam.—Adams v. Heckscher (C. C.) 281.

Under the Missouri statute as to service by publication, an order stating the action to be

for "specific performance" is not broad enough to cover a petition conditioning that demand upon relief in personam.—Adams v. Heckscher (C. C.) 281.

PROMISSORY NOTES.

See "Bills and Notes."

PROPERTY.

Particular species of property, see "Copyrights"; "Trade-Marks and Trade-Names."
Subject to taxation, see "Taxation."

PROXIMATE CAUSE.

Of injury, see "Negligence."

PUBLICATION.

Service of process, see "Process."

PUBLIC DEBT.

See "Counties."

PUBLIC IMPROVEMENTS.

See "Municipal Corporations."

PUBLIC LANDS.

The grant to a railroad company of a right to take timber, etc., for construction purposes, from lands "adjacent" to its line, authorizes it to take timber from public lands within reasonable hauling distance by wagon.—Bachelder v. United States (C. C. A.) 986.

Failure of a claimant under the Oregon donation act to request a survey of his claim, or provide for the expense thereof, was fatal.—Henry v. Lilliwaup Falls Land Co. (C. C.) 747.

Mere affidavits taken before a notary, and filed in the surveyor general's office, were not sufficient proof of residence and cultivation, under section 7 of the Oregon donation act.—Henry v. Lilliwaup Falls Land Co. (C. C.) 747.

The mere building of a log cabin, the occupation thereof as a residence, and the cultivation of a garden spot not over 10 feet square, was not a sufficient cultivation and improvement under the Oregon donation act.—Henry v. Lilliwaup Falls Land Co. (C. C.) 747.

The filing of notice of a claim under the Oregon donation act in the office of the surveyor general after the creation of a district land office was without effect.—Henry v. Lilliwaup Falls Land Co. (C. C.) 747.

When the government has issued its patent for public lands, it can exercise no further control over them. If it has been wronged or defrauded, it must seek relief through the courts.—Kirwan v. Murphy (C. C. A.) 275.

Where a government survey lays down a meander line next to a lake, and the plat referred to in the patents granted exhibits them as bordering on such lake, the waters of the lake, and not the meander line, is the fixed boundary of the lands conveyed.—Kirwan v. Murphy (C. C. A.) 275.

An amendment to the Minnesota constitution requiring all swamp lands held by the state to be sold as school lands did not affect a previous grant of swamp lands to a railroad company, though one terminus of the road was subsequently somewhat changed.—Cobb v. Clough (C. C.) 604.

No rights can be acquired under the pre-emption laws in lands withdrawn by order of the commissioner of the general land office.—Thompson v. St. Paul, M. & M. Ry. Co. (C. C.) 546.

Authority is vested in the commissioner of the general land office to withdraw from sale or entry lands within the indemnity limits of the grant to the Northern Pacific Railroad Company.—Thompson v. St. Paul, M. & M. Ry. Co. (C. C.) 546.

PUBLIC POLICY.

Contracts in violation of, see "Attorney and Client"; "Contracts."

RAILROADS.

See, also, "Carriers"; "Commerce"; "Street Railroads."
As bailees, see "Bailment."
Compelling railroads to maintain crossings, see "Mandamus."
Grants of land in aid, see "Public Lands."

If railroad contractors have a lien under the Mississippi statute superior to an earlier mortgage, such superiority is limited to the embankments and structures actually made by them, as distinguished from the land and right of way.—Central Trust Co. v. Georgia Pac. Ry. Co. (C. C.) 386.

Railroad contractors entitled to a lien on embankments and structures actually created by them can have no relief where they fail to prove with sufficient certainty what improvements they actually constructed.—Central Trust Co. v. Georgia Pac. Ry. Co. (C. C.) 386.

A judgment creditor, whose claim originated in the negligent act of the company's servant, is not entitled to a preference over the holders of preexisting liens.—Farmers' Loan & Trust Co. v. Longworth (C. C. A.) 336.

The duty imposed by the Indiana statute, on railroad companies, to restore any highway crossed by their roads to a safe and convenient condition, requires them to keep such crossings in such condition even in the changed situation brought about by the subsequent inclusion of the highway in the limits of a city, so that it becomes a part of a street.—State of Indiana v. Lake Erie & W. R. Co. (C. C.) 284.

Facts *held* to entitle the holders of a second mortgage on a railroad to an order directing the receiver to pay interest on a first mortgage.—Peoria, D. & E. Ry. Co. v. Central Trust Co.

(C. C.) 910; Central Trust Co. v. Peoria, D. & E. Ry. Co., Id.

One is not a trespasser who goes upon a bridge track laid upon a public thoroughfare, unless by the ordinance authorizing the location of the bridge and track the public was deprived of that part of the thoroughfare.—Toledo, P. & W. R. Co. v. Chisholm (C. C. A.) 652.

An ordinance granting the right to locate one end of a bridge, approaches thereto, and a railroad track, on public levee grounds, does not indicate a purpose to deprive the public of all use of the ground on which such track is laid, by requiring the track to be laid 60 feet from the lots fronting on the levee, leaving a street 60 feet in width, and that a passageway for teams shall be maintained under the embankment at the end of the bridge.—Toledo, P. & W. R. Co. v. Chisholm (C. C. A.) 652.

Where one not a trespasser was killed on the track by the negligence of employés operating a train, it was not incumbent on his administrator to prove that he was in the exercise of ordinary care.—Toledo, P. & W. R. Co. v. Chisholm (C. C. A.) 652.

One who went upon a railroad track, where the public had a right to go, to inspect coal cars, was not thereby guilty of negligence, if the place was not dangerous when ordinary care was exercised by him, and trains were run with due regard for the safety of persons who might be on the track.—Toledo, P. & W. R. Co. v. Chisholm (C. C. A.) 652.

The mere fact that one approaching a railroad crossing in a wagon was not seen by the witnesses of the accident to stop or turn his head to look and listen, *held* not conclusive of contributory negligence requiring withdrawal of the case from the jury, where there were circumstances indicating that he may have seen the train as soon as it was possible from the nature of the ground to do so, and thereupon attempted to avoid it.—Northern Pac. R. Co. v. Freeman (C. C. A.) 82.

To stand or walk on a railroad track, or so near thereto as to be in the way of a passing train, is negligence warranting the direction of a nonsuit.—Brennan v. Delaware, L. & W. R. Co. (C. C. A.) 124.

The use of a smaller engine which emits more and hotter sparks in its ordinary and proper operation than would a larger one doing the same work, thus increasing the danger from fire to adjacent property, does not amount to negligence if the engine is sufficient for the service, and properly equipped and operated.—Rosen v. Chicago G. W. Ry. Co. (C. C. A.) 300.

The statutory presumption of negligence in the communication of fire from cars and engines, in Minnesota, is overcome by showing that the engine causing the fire was properly equipped and carefully and skillfully operated.—Rosen v. Chicago G. W. Ry. Co. (C. C. A.) 300.

RATIFICATION.

Of bank officer's act, see "Banks and Banking."

RECEIVERS.

Of corporations, see "Corporations."

A receiver of a corporation, appointed in an action to foreclose a mortgage, is not liable for a tort committed by the corporation prior to the receivership.—Northern Pac. R. Co. v. Heflin (C. C. A.) 93.

It is the right and duty of a receiver, if he considers the legality of a tax questionable, to apply to the court for instruction or protection. —Ledoux v. La Bee (C. C.) 761.

The rule that unauthorized interference with the possession of property in custodia legis constitutes contempt finds no exception in favor of officers employed in the collection of taxes.—Ledoux v. La Bee (C. C.) 761.

The ordinary grounds of equity interposition need not be alleged in an application by a receiver to the court which appointed him for protection of the property from invasion.—Ledoux v. La Bee (C. C.) 761.

A valid tax upon property of a corporation in the hands of a receiver is a first lien after the judicial costs.—Ledoux v. La Bee (C. C.) 761.

Funds realized by ancillary receivers of a foreign corporation in the Southern district of New York cannot, it seems, be transmitted to the court of primary jurisdiction before distribution to resident creditors, so long as any of such creditors object thereto.—Sands v. E. S. Greeley & Co. (C. C.) 772.

Where abundant notice has been given to all creditors in a receiversnip case of proceedings before the master with full opportunity to appear and present testimony, the proceedings will not be reopened after his report is filed, to permit dilatory creditors to appear for the first time.—Sands v. E. S. Greeley & Co. (C. C.) 772.

Expenses paid by certain creditors in procuring an expert accountant to investigate the affairs of an insolvent corporation, which results in the realization of a large sum to the receivership, will be reimbursed out of such fund.— Sands v. E. S. Greeley & Co. (C. C.) 772.

On final distribution, where the principal creditor held collaterals on which it received over half of its claim, and the receivership had been continued at its request, and to its advantage and the disadvantage of the general creditors, the pro rata share of such principal creditor in the fund for distribution was based on the unpaid portion of its claim.—London & San Francisco Bank v. Snell, Heitshu & Woodard Co. (C. C.) 603.

RECORDS.

Of particular instruments, see "Deeds"; "Mortgages"; "Trusts."
On appeal, see "Appeal and Error."

REFERENCE.

To commissioner in admiralty, see "Admiralty."

REFORMATION OF INSTRUMENTS.

See "Equity."

RELEASE.

See "Accord and Satisfaction."

RELEVANCY.

Of evidence in civil actions, see "Evidence."

REMOVAL.

From office in general, see "Officers."
Of deputy marshals, see "United States Marshals."

REMOVAL OF CAUSES.

A suit by an alien against a citizen who is a nonresident of the state may be removed by the defendant on the ground of diversity of citizenship.—Creagh v. Equitable Life Assur. Soc. of United States (C. C.) 849.

It is not necessary that pleadings should have been filed before a cause is removed, to establish the existence of a controversy by the record.—Creagh v. Equitable Life Assur. Soc. of United States (C. C.) 849.

The federal court cannot, after removal, but before its next term, hear an application to dissolve an order of the state court temporarily staying a sale under a mortgage, the purpose of the suit being to enjoin such sale.—Hamilton v. Fowler (C. C.) 321.

Failure of plaintiff after removal to prosecute an application for injunction on a day fixed by the state court is not an abandonment of the application, when such day comes before the next term of the federal court.—Hamilton v. Fowler (C. C.) 321.

The federal court obtains plenary jurisdiction of a cause immediately on the filing of the removal papers in the state court, but, according to the practice and procedure established by the removal acts, it can hear no application involving a determination of the merits until the beginning of its next term; but meantime, on due notice, may take any extraordinary steps necessary for preserving the property or the rights of the parties.—Hamilton v. Fowler (C. C.) 321.

No notice of a petition for removal is required. —Creagh v. Equitable Life Assur. Soc. of United States (C. C.) 849.

A defendant sued by an alien in a state court is not precluded from removing the cause to the federal court because a nonresident of that federal district.—Creagh v. Equitable Life Assur. Soc. of United States (C. C.) 849.

A proceeding in the orphans' court of Pennsylvania, on appeal from a decision of the register admitting a writing to probate as a will, is not removable.—In re Aspinwall's Estate (C. C.) 851.

Appearing, filing a demurrer to the complaint, and procuring the discharge of an attachment by giving the necessary bond, all before the time defendant is required by the state practice to plead, is not a waiver of his right to remove.—Whiteley Malleable Castings Co. v. Sterlingworth Railway Supply Co. (C. C.) 853.

An action against a district attorney for malicious prosecution is removable, where the criminal action was conducted by federal officials in a federal court for a violation of federal laws.—Eighmy v. Poucher (C. C.) 855.

REPAIRS.

Of premises demised, see "Landlord and Tenant."

REQUISITION.

See "Extradition."

RESCISSION.

Of contract, see "Contracts"; "Sales."

RES GESTÆ.

In civil actions, see "Evidence."

RESIDENCE.

As ground of jurisdiction of federal courts, see "Removal of Causes."

RES JUDICATA.

See "Judgment."

RESTRAINT OF TRADE.

Trusts and other combinations, see "Monopolies."

RETROSPECTIVE LAWS.

See "Constitutional Law."

REVENUE.

See "Internal Revenue"; "Taxation."

REVIEW.

In admiralty, see "Admiralty."
On appeal, see "Appeal and Error."

REVIVAL.

Of action, see "Abatement and Revival."
Of lapsed policy, see "Insurance."

RIPARIAN RIGHTS.

See "Waters and Water Courses."

ROBBERY.

A charge of robbery cannot be sustained by evidence that the defendants participated in a

search of premises and seizures made under a warrant technically insufficient, and that they acted in excess of the authority of the warrant. —In re Lewis (D. C.) 159.

RULES OF NAVIGATION.

See "Collision."

SALES.

See, also, "Vendor and Purchaser."
On execution, see "Execution."

After complete performance by a seller, he may recover from the purchaser under the common counts.—Moline Malleable Iron Co. v. York Iron Co. (C. C. A.) 66.

Strict performance of a contract subject to the statute of frauds may be waived by words and acts inconsistent with an intention to require it, which have induced the other party to omit it.—Smiley v. Barker (C. C. A.) 684.

A contract of sale providing for delivery and payment "about" a specified date may be performed as late, at least, as midnight of that day, and if, during the day, the seller sells the articles to a stranger, the former purchaser has the option to rescind, and sue for money had and received, or to sue for damages for a breach.—Smiley v. Barker (C. C. A.) 684.

In an action for damages for breach of warranty of title, *held*, on the evidence, that plaintiff did not purchase from defendants, but from a third party, to whom defendants had previously sold.—Post v. Burnham (C. C. A.) 79.

SALVAGE.

An award of $400 for the services of a tug and crew in pulling off a bark from the mud at the mouth of one of the passes of the Mississippi, approved on appeal.—The Laura (C. C. A.) 311; Noriea v. Castellano, Id.

Five hundred dollars awarded to a steamer for pulling off at high tide a schooner worth $8,000, from the shifting sands on the inner shoal of the inlet to Great Egg Harbor.—Fifield v. The Thomas B. Garland (D. C.) 1018.

The fact that a vessel receives injuries in the course of salvage operations may tend to reduce the amount of compensation.—The Haxby v. Merritt's Wrecking Organization (C. C. A.) 715.

The merit of salvors in going through the breakers during the salvage operations is somewhat diminished by the fact that a life-saving crew is at hand, ready to effect a rescue in case of accident.—The Haxby v. Merritt's Wrecking Organization (C. C. A.) 715.

$16,666.66⅔ allowed, on a salved value of $100,000, for hauling off a stranded steamer in about 3½ days.—The Haxby v. Merritt's Wrecking Organization (C. C. A.) 715.

SCHOOL LANDS.

See "Public Lands."

SEPARATE ESTATE.

Of married women, see "Husband and Wife."

SERVICE.

Of process, see "Process."
—— on corporation, see "Corporations."

SHIPPING.

See, also, "Admiralty"; "Collision"; "Salvage"; "Towage."

A ship is not liable for personal injuries caused by the slipping of the steward on a wet place in the floor about a water cooler, so as to spill hot gruel upon a passenger.—Mulvana v. The Anchoria (C. C. A.) 847.

A ship is liable for damage to sugar by neglect to provide dunnage, whereby the lower tier of bags are allowed to remain in the moisture draining from above.—Franklin Sugar-Refining Co. v. The Earnwood (D. C.) 315.

The value of goods damaged through the neglect of the ship is best determined by a public sale within a reasonable time after arrival, and intermediate market fluctuations are not to be regarded.—Franklin Sugar-Refining Co. v. The Earnwood (D. C.) 315.

Where by a charter party only the freight room is hired, and the loading is to be done with the ship's appliances, and under the supervision of the master, the ship is liable for injury to a stevedore's employé by reason of defective appliances.—The Elton (C. C. A.) 519; Marquest v. Grant, Id.

A member of a stevedore's gang does not assume extraordinary risks which arise from the use of unsafe appliances in loading.—The Elton (C. C. A.) 519; Marquest v. Grant, Id.

When a vessel has been repaired by days' work, and a fair price charged therefor, the opinion of experts as to the cost of such repairs cannot be relied on as a basis of recovery.—Ramsey v. The Scythian (D. C.) 1016.

SIGNALS.

Of vessels, see "Collision."

SPECIAL LAWS.

See "Constitutional Law."

SPECIFIC PERFORMANCE.

Specific performance will not be granted if the contract is so far indefinite as to render it uncertain what were the intentions of the parties, and what obligations they intended to assume.—Minnesota Tribune Co. v. Associated Press (C. C. A.) 350.

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STOCKHOLDERS.

Of corporations, see "Corporations."

STREET RAILROADS.

Authority of city to fix fares, see "Municipal Corporations."

A claim for the price of the cable furnished to a cable railway is entitled, on the appointment of a receiver for the road, to priority over the mortgage bonds, without showing any diversion of income. Such priority may be allowed though the cable was furnished more than two years before the appointment of the receiver.—New York Guaranty & Indemnity Co. v. Tacoma Railway & Motor Co. (C. C. A.) 365.

A partial change in the membership of a committee of the common council having under consideration the granting of a franchise to a street railroad does not necessitate a new publication of notice of the hearing, required by section 92 of the New York railroad law.—Seccomb v. Wurster (C. C.) 856.

That a street-railroad company is without the certificate of the board of railroad commissioners required by section 59 of the New York railroad law does not so clearly incapacitate it from receiving a franchise in the streets of a city as to warrant a court in restraining the granting of such a franchise on a motion for a preliminary injunction in a taxpayer's suit.—Seccomb v. Wurster (C. C.) 856.

The date on which a statute took effect *held* not so clear, in the absence of a construction by

the state courts, as to authorize a preliminary injunction in a taxpayer's suit, which might work great injury to the defendant.—Seccomb v. Wurster (C. C.) 856.

SUBSTITUTION.

Of parties, see "Abatement and Revival."

SUPREME COURTS.

See "Courts."

SURVEYS.

Of public lands, see "Public Lands."

SWAMP LANDS.

See "Public Lands."

TARIFF.

See "Customs Duties."

TAXATION.

See, also, "Internal Revenue."

The board of equalization of California has power to assess to a lessee rolling stock owned by it, and used in the operation of a leased line of railroad, in more than one county of the state.—Smith v. Rackliffe (C. C.) 983.

The decision of assessing officers within their jurisdiction is conclusive unless changed by the regularly constituted boards of review.—Ledoux v. La Bee (C. C.) 761.

If a corporation regularly lists its property for years as personalty, it cannot thereafter attack delinquent taxes because assessed on that basis.—Ledoux v. La Bee (C. C.) 761.

Lands lying within the place limits of the Northern Pacific Railroad grant, but to which issuance of patents is withheld pending an investigation as to whether or not they are mineral lands, are subject to state taxation.—Myers v. Northern Pac. Ry. Co. (C. C. A.) 358.

There is nothing in the Montana statutes which deprives the state of its authority to tax railway grant lands, to which the issuance of patents is suspended an investigation as to whether they are mineral lands, and excepted as such from the grant.—Myers v. Northern Pac. Ry. Co. (C. C. A.) 358.

Laws N. Y. 1885, c. 448, making tax deeds recorded two years prior to the date of the act conclusive evidence of the regularity of the sale, if not directly attacked within six months after the law took effect, is not repugnant to any provisions of the federal constitution.—Saranac Land & Timber Co. v. Roberts (C. C.) 436.

TAXATION OF COSTS.

See "Costs."

TELEGRAPHS AND TELEPHONES.

Negligence in transmitting message, see "Negligence."

TESTAMENT.

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TITLE.

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See "Negligence."
Liability of receiver for tort of corporation, see "Receivers."
Maritime torts, see "Collision."

TOWAGE.

Collisions with tugs and vessels in tow, see "Collision."

A default decree against a tug for stranding of her tow will not prevent the tug's pilot, after obtaining a decree for wages, from denying negligence on his part, which would prevent him from obtaining priority of payment from the tug's proceeds.—Flannery v. The Alexander Barkley (D. C.) 846; Pennsylvania R. Co. v. Same, Id.

A decree for pilot's wages against a tug is entitled to priority over a decree for damages for stranding of her tow, where it appears that the pilot was not in fault for the stranding.—Flannery v. The Alexander Barkley (D. C.) 846; Pennsylvania R. Co. v. Same, Id.

TRADE-MARKS AND TRADE-NAMES.

One is not guilty of unfair competition where there is no attempt to deceive purchasers, and where the latter obtained the identical article which they seek.—Vitascope Co. v. United States Phonograph Co. (C. C.) 30.

The grounds on which equity will enjoin unfair competition are either that the means used are dishonest, or that there is an attempt to induce the public to accept a spurious article.—Vitascope Co. v. United States Phonograph Co. (C. C.) 30.

One making corset waists at Chicago, and selling them as "Chicago Waists," so that his goods had come to be known by that designation, is entitled to enjoin another, who afterwards makes similar articles in a different city, and sells them as "Chicago Waists," with intent to profit by the reputation of the other's goods.—Gage-Downs Co. v. Featherbone Corset Co. (C. C.) 213.

TRANSFERS.

Of promissory notes, see "Bills and Notes."

TRESPASS.

Injuries to trespassers, see "Railroads."

TRIAL.

In criminal cases, see "Criminal Law."

It is error to charge the jury upon an assumed state of facts, to which no evidence applies.—Equitable Life Assur. Soc. v. McElroy (C. C. A.) 631.

A verdict should be directed for the party who is clearly entitled to it, where a verdict for his opponent would be set aside.—Equitable Life Assur. Soc. v. McElroy (C. C. A.) 631.

Federal judges should direct a verdict for the party clearly entitled to it when it would be their duty to set aside a verdict for his opponent if one were rendered.—Chicago, St. P., M. & O. Ry. Co. v. Belliwith (C. C. A.) 437.

An objection that the proper foundation has not been laid for the introduction of evidence otherwise relevant and competent should point out the specific ground on which the objection rests.—In re Wong Sing (D. C.) 147.

It is proper for the court to prevent counsel on cross-examination from repeating a question which has already been asked and answered several times.—Middlesex Banking Co. v. Smith (C. C. A.) 133.

Insufficiency of notice of a motion to revive a judgment and irregularity in its service are cured by appearance at the trial.—Crawford v. Foster (C. C. A.) 975.

In order that the opinion of the court, in a case tried without a jury, may be treated as a special finding of facts, so that assignments of error may be based thereon, its statement of the facts found should not be mingled with the evidence or with discussions of law or the reasons for the court's conclusions.—National Masonic Acc. Ass'n v. Sparks (C. C. A.) 225.

TRUSTS.

Charitable trusts, see "Charities."
Combinations to monopolize trade, see "Monopolies."

If a beneficiary neglects to record the trust deed, he must, as against an innocent party, suffer any resulting loss.—Whittle v. Vanderbilt Mining & Milling Co. (C. C.) 48.

The negligence of the creator of a trust in failing to acknowledge the trust deed so that it may be recorded may be imputable to the beneficiary as against an innocent purchaser.—Whittle v. Vanderbilt Mining & Milling Co. (C. C.) 48.

A beneficiary may recover from his trustee the consideration received for a wrongful conveyance.—Whittle v. Vanderbilt Mining & Milling Co. (C. C.) 48.

TUGS.

See "Collision"; "Shipping"; "Towage."

UNDUE INFLUENCE.

In procuring execution of deed, see "Deeds."
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Courts, see "Courts."
Indians, see "Indians."
Liability for costs, see "Costs."

UNITED STATES COMMISSIONERS.

Power to take bail in criminal proceedings, see "Bail."

UNITED STATES MARSHALS.

A court of equity is without jurisdiction to restrain the removal of a deputy United States marshal from his office.—Flemming v. Stahl (C. C.) 940.

The power to remove a deputy marshal is incident to the power of appointment.—Flemming v. Stahl (C. C.) 940.

Under the civil service law, neither the civil service commission nor the president, nor both combined, can make any regulations having the force and effect of law, so that courts will enforce them.—Flemming v. Stahl (C. C.) 940.

As a general proposition, the tenure of a deputy marshal expires with the term of the marshal.—Dudley v. James (C. C.) 345.

VENDOR AND PURCHASER.

See, also, "Sales."

When a purchaser has refused to accept a deed containing any conditions, he cannot recover damages for breach of contract because the deed tendered contains a condition different from one authorized by the contract.—American Strawboard Co. v. Haldeman Paper Co. (C. C. A.) 619.

Where a lease, containing an option to the lessee or his assigns to purchase, restricted the use to be made of the property for 20 years, either during the term of the lease, or in case of purchase under the option, the lessor, on an election to purchase by an assignee of the lessee, has a right to insert such restriction in the deed.—American Strawboard Co. v. Haldeman Paper Co. (C. C. A.) 619.

One who sells property to which he has no title, nor the certain means of procuring title, cannot recover damages for the purchaser's withdrawal from the contract.—Gray v. Smith (C. C. A.) 824.

VERIFICATION.

Of pleadings in equity, see "Equity."

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See "Admiralty"; "Collision"; "Shipping"; "Towage."

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Of maritime lien, see "Maritime Liens."
Of performance of contract, see "Sales."

WARRANT.

For extradition, see "Extradition."

WARRANTY.

Of title, see "Covenants."

WATERS AND WATER COURSES.

The common law in regard to the rights of riparian owners prevails in Minnesota, and the law applicable to such rights on nonnavigable streams is also applicable to nonnavigable lakes. —Kirwan v. Murphy (C. C. A.) 275.

WIFE.

See "Husband and Wife."

WILLS.

Charitable bequests and devises, see "Charities."
Restrictions on perpetuities, see "Perpetuities."

Where a doubtful power created in a will has been exercised, and land sold thereunder, after a lapse of nearly 50 years, every doubt will be resolved, and every reasonable presumption indulged, in favor of titles of bona fide purchasers of such land.—Smith v. McIntire (C. C.) 456.

A bequest of personalty to a trustee for the use and benefit of another, without words of restriction, vests the absolute property in the fund of the beneficiary.—Martin v. Fort (C. C. A.) 19.

In a bequest of personal property to a trustee, words of limitation over are to be construed, if possible, in harmony with the general intent of the testator to give an absolute property to the beneficiary.—Martin v. Fort (C. C. A.) 19.

A devise to testator's son by name "and to his children" *held* to give a life estate to the son, and an estate in remainder to his children living at testator's death, which afterwards opened to let in after-born children.—Forest Oil Co. v. Erskine (C. C. A.) 109; Same v. Davis, Id.; Same v. Reed, Id.; Same v. Crawford, Id.

Will construed to confer on the widow power to sell lands to pay debts.—Smith v. McIntire (C. C.) 456.

WITNESSES.

See, also, "Evidence."

Evidence of statements made by a Chinaman, on examination by the customs officers when attempting to land, is admissible in subsequent habeas corpus proceedings, to impeach conflicting statements then made by him.—In re Wong Sing (D. C.) 147.

WORK AND LABOR.

Liens for work and materials, see "Mechanics' Liens."

WRITS.

See "Process."
Of error, see "Appeal and Error."

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