tract as a question of fact, for one so learned in the law would have permitted no other verdict to stand. The judgment of the circuit court is affirmed.

PHILBROOK v. NEWMAN et al.

(Circuit Court, N. D. California. January 19, 1898.)

No. 12,512.

1. CONSPIRACY—CIVIL ACTIONS—DISBARMENT OF ATTORNEY.
An action will not lie for conspiracy to disbar an attorney, where a valid judgment of disbarment has been entered, and is still standing, as the judgment is conclusive that the disbarment was lawful.

2. DISBARMENT OF ATTORNEY—STATE AND FEDERAL COURTS.
A judgment of a state court, having jurisdiction of the subject-matter and of the defendant, disbarring an attorney from practicing before it, cannot be reviewed in an action in a federal court for damages for a conspiracy to procure such disbarment.

3. SAME—PRACTICE.
Disbarment proceedings are of a civil nature, and the charges need not be presented with the particularity and formality required in criminal proceedings.

4. SAME—CONSTITUTIONAL PRIVILEGE.
A judgment of a state court disbarring an attorney from practicing before it does not deprive him of any privilege or immunity secured by the constitution or laws of the United States.

5. SAME—VALIDITY OF JUDGMENT.
A judgment disbarring an attorney for three years, and "until the further order of the court," is not invalidated by the quoted clause, even if it itself is void, for it may be considered as mere surplusage.

6. JUDGES—CIVIL LIABILITY—JUDICIAL ACTS.
Judges of courts of superior or general jurisdiction are not liable to civil suits for their judicial acts, even when in excess of their jurisdiction, and alleged to have been done maliciously or corruptly. Bradley v. Fisher, 13 Wall. 335, followed.

This was an action at law by Horace W. Philbrook against William J. Newman and others to recover damages for conspiring to have plaintiff disbarred from practicing in the courts of California.

Horace W. Philbrook, in pro. per.

John Garber, W. W. Foote, William Craig, R. B. Carpenter, and Edward R. Taylor, for defendants.

KNOWLES, District Judge (orally). This is an action on the part of plaintiff for damages claimed to have been sustained by him because of his wrongful disbarment by the supreme court of California. It is charged that the defendants conspired and wrongfully procured said judgment. Many adjectives are used to describe what are alleged to be the wrongful acts complained of. These adjectives add nothing to the pleading presented. Facts, and not adjectives, are the essential matters in code pleading.

The defendants Hayne and Fitzgerald are charged with the others in conspiring to have plaintiff disbarred, and accomplished this result in company with the other defendants. The complaint shows that that judgment of the supreme court of California still exists; that it has not been vacated or reversed or set aside. The defendants Hayne

and Fitzgerald have moved the court to dismiss the cause as to them. For the purposes of this motion, the facts stated in the complaint must be considered as true. The court is not concerned at this time, under this motion, as to whether they are true or false. Now, it is not wrong for a man to conspire with others to do a legal and proper act. If the court had jurisdiction to enter the judgment of disbarment, then that judgment is evidence that the conspiracy to disbar the plaintiff was a proper and legal act.

A citation was served upon the plaintiff, requiring him to appear before the supreme court of the state of California to answer to the charge of unprofessional conduct towards that court. The defendant appeared, filed an answer to the charge or charges against him, and the matter was argued and considered for near two days, and submitted to the court. The court rendered its judgment against plaintiff. This would show that the court did have jurisdiction of the plaintiff, and it certainly, under the Code of California, did have jurisdiction of the subject of the disbarment of attorneys for unprofessional conduct such as was named in the citation. It was not necessary that these charges should have been presented with the same particularity and formality as is ordinarily required in criminal actions. The proceedings to disbar an attorney are not criminal proceedings, but civil. In the case of Randall v. Brigham, 7 Wall. 523, the supreme court, speaking through Justice Field, said:

"It is not necessary that proceedings against attorneys for malpractice or any unprofessional conduct should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause, or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit, and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

The supreme court in this case also felt bound by the ruling upon this point by the supreme court of Massachusetts. The case was one similar to the case at bar. The plaintiff had sued one of the justices of the supreme court of Massachusetts because he had participated in disbarring him from practice in the courts of that state. The supreme court of Massachusetts held that the cause was not a criminal one, and the proceeding for disbarment not a criminal proceeding. The supreme court of California entertained the same view, undoubtedly. The matter being considered at bar proves this.

In the case of Ex parte Wall, 107 U. S. 281, 2 Sup. Ct. 569, the supreme court said:

"The causes are quite numerous in which attorneys, for malpractice or other misconduct in their official character, and for other acts showing them to be unfit persons to practice as attorneys, have been struck from the roll upon a summary proceeding, without any previous conviction of a criminal charge."

In this case, also, the court said:

"We have seen that due notice was given to the person disbarred, and a trial and hearing was had before the court in the manner in which such pro-

ceedings against attorneys, when the question is whether they should be struck off the rolls, are always conducted."

The notice or citation was certainly sufficient in this case, because the plaintiff in this case appeared before the court, and made answer to the charges against him.

It seems to be claimed by plaintiff that he was tried upon other charges than those specified in the citation, and found guilty of these. In support of this, he has copied into his pleadings what he calls the judgment of the court in disbarment proceedings. But I apprehend what is copied as the judgment of the court is not such, but the opinion of the court. The opinion of the court is no part of the judgment of the court. This has been decided in several causes by the supreme court of California. The reference in the opinion or opinions to other offenses against the court was made with the view of guiding the discretion of the court in fixing the punishment to be meted to the plaintiff. If there were a number of charges against the plaintiff, and the court had jurisdiction to hear and determine only one, and that one was sufficient to support the judgment, that would make the judgment valid. In an indictment containing a number of counts, this has been held to be the rule. A verdict and judgment will be sustained if any count is good. Claassen v. U. S., 142 U. S. 140, 12 Sup. Ct. 169; U. S. v. Pirates, 5 Wheat. 184. This is certainly the rule in civil cases. If there is one cause of action stated in the complaint that, if proven, will support the verdict and judgment rendered, that is sufficient.

It is urged that the court had no right to enter the judgment it did, namely, the disbarment of the plaintiff for three years, and until the further order of the court. If the court had no authority to add, in its judgment, "until the further order of the court," this may be considered as surplusage, and disregarded. There is no difficulty in separating this last clause in the judgment of the court from the former, and hence it could not invalidate the former clause. But I do not wish to be considered as expressing any opinion as to whether this last clause was valid or not. This will not invalidate, in a collateral proceeding, that part of the judgment which is valid. We then have a valid judgment disbarring the plaintiff for three years. That judgment cannot be reviewed by this court in this proceeding. This court cannot determine whether the same was a correct judgment. This judgment estops the plaintiff, in any court, from alleging that it is incorrect. As to this case, then, this court is confronted with the fact that the conspiracy charged is to procure a judgment which is valid, and which this court cannot question. This court cannot award any damages, then, for procuring it. This court cannot determine whether it was rightfully or wrongfully procured, as the court had jurisdiction to enter the same. The judgment proves its own correctness. It is claimed, however, that there is a statute of the United States which gives the court the right to examine this judgment. This statute is as follows:

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the

deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

I cannot think that the United States, by this statute, intended to confer upon the federal courts the right to review every judgment of a state court in a collateral action, and determine whether or not, as a citizen of the United States, any person had been deprived of any rights, privileges, or immunities secured by the constitution or laws of the United States by the operation of the same. If a court has jurisdiction of the subject-matter and the parties to an action, it would seem that the same ought to import in the federal courts the same verity as in courts of every state in this Union. The statute, however, refers to the rights, privileges, or immunities secured by the constitution and laws of the United States. In the case of Bradwell v. Illinois, 16 Wall. 130, the supreme court, speaking through Justice Miller, said:

"But the right to the admission to practice in the courts of a state is not one of them. This right in no sense depends on citizenship of the United States."

In the case of In re Lockwood, 154 U. S. 116, 14 Sup. Ct. 1082, the supreme court again said:

"In Bradwell v. Illinois, 16 Wall. 130, it was held the right to practice law in the state courts was not a privilege or immunity of a citizen of the United States; that the right to control and regulate the granting of a license to practice law in the courts of a state is one of those powers that was not transferred, for its protection, to the federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license."

In considering the fourteenth amendment to the constitution of the United States, the supreme court, in what are termed "The Slaughter-House Cases," 16 Wall. 74, 75, pointed out that there were certain privileges and immunities which pertained to citizens of the United States and to citizens of a state, and says:

"If, then, there is any difference between the privileges and immunities belonging to a citizen of the United States, as such, and those belonging to the citizen of the state, as such, the latter must rest for their security and protection where they have heretofore rested, for they are not embraced by this paragraph of the amendment."

The court in this case proceeds to point out that if congress should have the power to regulate the immunities and privileges of the citizens of a state, as such, the effect would be to fetter and degrade the state governments by subjecting them to the control of congress, and would radically change the whole theory of the relations of the state and national governments. In the case of U. S. v. Cruikshank, 92 U. S. 551, the supreme court said:

"No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure."

In the case of Duncan v. Missouri, 152 U. S. 382, 14 Sup. Ct. 571, the supreme court again says:

"But the privileges and immunities of citizens of the United States protected by the fourteenth amendment are privileges and immunities arising out of

the nature and essential character of the federal government, and granted or secured by the constitution."

Plaintiff received the right to practice law in the courts of California in pursuance of the laws of California, and not by virtue of any provision of the laws or the constitution of the United States. He was disbarred under the provisions of the law of California, and not those of the national government. I think it may be safely asserted, therefore, that the statute under which plaintiff claims the right to bring this action does not apply to this case. In the proceedings to disbar him, he was not deprived of any right, privilege, or immunity secured to him by the constitution or laws of the United States. And it may be said the judgment against him was not entered as a punishment, but for the protection of the court. But plaintiff asserts that he was deprived of his rights without due process of law. I have already partly discussed this question, in considering the jurisdiction of the supreme court of the state in the disbarment proceedings. In the case of Duncan v. Missouri, supra, the supreme court said:

"Due process of law and the equal protection of the law are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

The supreme court, in many other decisions, has announced the same doctrine. It is not claimed but that the proceedings to disbar the plaintiff from the practice of the law were the same usually resorted to, not only by the supreme court of California, but all other courts in like cases. The plaintiff, however, claims that the proceedings were arbitrary because he was not cited to answer some of the charges of which he was found guilty. I have answered this by saying, if the charge named in the citation which he was called upon to answer, and which he did answer, was, if found true, sufficient to justify the judgment pronounced, that was sufficient. I cannot see wherein there was any discrimination against the plaintiff, in the proceedings to disbar him, that would show he was not subject to the same rule as any other attorney or counselor at law in like cases within the state of California. It may be said that while the complaint, with many accompanying adjectives, charges that he was disbarred without due process of law, and was not accorded the equal protection of the law, I do not recall the statement of any facts showing this to be true. As I have stated, the statement, in the opinion of the court, of other offenses, was, in my judgment, a statement only of matters which guided its discretion in rendering the judgment it did. The plaintiff charges that the words used in his brief would not bear the construction placed upon them by the supreme court. It is evident this court cannot review the action of the supreme court of California in this particular. This is not a court for the revising of the errors of that court. I will say, however, that the language used in the brief of plaintiff, and of which the supreme court of California complained, would be considered most objectionable and insulting by any court with which I ever had any connection, and it is difficult for me to comprehend how a man of the intelligence and education of the plaintiff could come to any other conclusion. It may safely be said, therefore, that plaintiff was not disbarred without any charges against him.

There was certainly one charge specified in the citation served upon him.

We come back to the proposition first stated, that, as long as that judgment of disbarment stands, there could be no action maintained against the defendants named in the motion for procuring the same, because it must be held that that judgment was right and proper. In regard to the other point, it affects only the defendant Fitzgerald. The supreme court of the United States, in the cases of Randall v. Brigham, 7 Wall. 523, and Bradley v. Fisher, 13 Wall. 335, established the rule that a judge of a court of general jurisdiction could not be sued or made liable in a civil action for any judicial act done within the jurisdiction of the court over which he presided. The language of the decisions is full and complete on this point. The decisions were rendered by Justice Field, whose own experiences made him most sensitive to the rights of attorneys, as the decisions of the supreme court where such rights are considered will indicate. In the case of Randall v. Brigham, supra, he said:

"Now, it is a general principle, applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless, perhaps, where the acts in excess of jurisdiction are done maliciously or corruptly. This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necessarily lead to the degradation of the judicial authority, and the destruction of its usefulness. Unless judges, in administering justice, are uninfluenced by considerations personal to themselves, they can afford little protection to the citizen in his person or property. And, uninfluenced by such considerations, they cannot be, if, whenever they err in judgment as to their jurisdiction upon the nature and extent of which they are constantly required to pass, they may be subjected to prosecution at the instance of every party imagining himself aggrieved, and be called upon, in a civil action in another tribunal, and perhaps before an inferior judge, to vindicate their acts. This exemption from civil action is for the sake of the public, and not merely for the protection of the judge, and has been maintained by a uniform course of decisions in England for centuries, and in this country ever since its settlement."

It will be observed in this decision there appears to be an exception. It is intimated, if the judicial act is done outside of the jurisdiction of the court, and is done maliciously or corruptly, the judge might be rendered liable in a civil action. In the case of Bradley v. Fisher, supra, however, this matter came up again for consideration in the supreme court; and the court held that a judge of a court of general jurisdiction, or of a superior court, would not be liable in a civil action for damages, even if he exceeded the jurisdiction of his court, and acted corruptly or maliciously. The court, again speaking through Justice Field, said:

"In the present case we have looked into the authorities, and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly."

I do not see, under these authorities, how this action can be maintained against Judge Fitzgerald. The case of Ex parte Virginia, 100 U. S. 339, establishes no different rule than above expressed. In fact, impliedly it supports it. In the opinion of the court, it is maintained that the act complained of was not a judicial act, and that, therefore, the judge who performed the same could he made liable criminally. Justice Field, who dissented from the views of the majority of the court, held that the act was judicial, and therefore the defendant could not be punished for the same. This dissenting opinion explains the opinion of the majority of the court, and shows upon what view it rested. There is some claim that the action could be maintained on account of the publication of the disbarment proceedings in a California Report. But that is not this action. The charge is that all the damages the plaintiff has sustained have resulted from his disbarment. But such an action as plaintiff names could not be sustained against the judges of the supreme court of California; much less, then, against the other defendants, who are not charged with having had any complicity in such publication. The motion is sustained.

In re MASON.

(Circuit Court, S. D. Iowa. February 21, 1898.)

1. CLERKS OF COURTS—CHANGE IN JUDICIAL DISTRICT—REPEAL OF STATUTE.
   Act July 20, 1882, creating out of certain counties a new judicial district, to be known as the "Northern District of Iowa," and providing that the remaining counties shall constitute the Southern district of Iowa, and that the judge, district attorney, marshal, and clerks of the district of Iowa shall be, respectively, the judge, district attorney, marshal, and clerks of the Southern district of Iowa, does not, by implication, repeal Act June 4, 1880, § 4, which provides "that the clerk of the district court shall be clerk of the circuit court at all the places where the same is held in said district except at Des Moines."
2. COURTS—CHANGE OF TERRITORIAL JURISDICTION—CREATION OF NEW JUDICIAL DISTRICT.
   Act July 20, 1882, dividing the state of Iowa into two judicial districts, did not abolish the district of Iowa. It simply detached certain counties from the district, and made a new district, to be known as the "Northern District of Iowa." The organization of the original district was not changed. Its officers were continued in office, charged with the same duties. Its name and territorial jurisdiction alone were affected.
3. OFFICERS—LEGISLATIVE APPOINTMENT—CONSTRUCTION OF STATUTE.
   The provision of Act July 20, 1882, that "the persons now acting as clerks for the district of Iowa shall be the clerks for the Southern district of Iowa," does not constitute a legislative appointment of such persons to their respective offices, but simply gives them, under existing laws, the same status in the Southern district that they had in the original district, without the necessity of further appointment.
4. EX OFFICIO CLERK OF CIRCUIT COURT BY SPECIAL LAW—APPOINTMENT AS CLERK OF DISTRICT COURT ONLY.
   Under Act June 4, 1880, § 4, making the clerk of the district court for the district of Iowa ex officio clerk of the circuit court of such district at all places other than Des Moines, one duly appointed, qualified, and acting as clerk of the district court for the Southern district of Iowa since the creation of the Northern district of Iowa must be regarded as the de facto, if not de jure, clerk of the circuit court for such district at places other than Des Moines, though not appointed thereto in the manner provided by the general law (Act Feb. 6, 1889). His right to act as such cannot be collaterally attacked.

A. B. Cummins, for E. R. Mason.
W. C. Howell and James C. Davis, for J. J. Steadman.

WOOLSON, District Judge. On December 20, 1875, Edward R. Mason was by Circuit Judge Dillon appointed "clerk of the United States circuit court for the district of Iowa." He duly qualified in January, 1876. At that date the district of Iowa comprised the entire state of Iowa, with four divisions therein,—the Northern, Southern, Western, and Central. Rev. St. § 537. The district court was held in each of these divisions, but (section 658, Rev. St.) the circuit court was held only at Des Moines, in the Central division. By act approved June 4, 1880 (21 Stat. 155; 1 Supp. Rev. St. p. 290), the circuit court was ordered thereafter to be held in each division "at the times and places by law provided for holding the United States district court in and for said district." At that date E. R. Mason was clerk of the circuit court of the district, and H. K. Love the clerk of the district court. Section 4 of this act provided "that the clerk of the district court shall be clerk of the circuit court at all the places where the same is held in said district, except at Des Moines." It is conceded that thereby Mr. Mason was clerk of the circuit court for the district at Des Moines, and Mr. Love (in addition to being the clerk of the district court for the district) was the clerk of the circuit court at Dubuque, Council Bluffs, and Keokuk, in the Northern, Western, and Eastern divisions, respectively, of the district. By act approved July 20, 1882 (22 Stat. 172; 1 Supp. Rev. St. p. 358), the state of Iowa was "divided into two judicial districts," a portion of the counties of the state designated in such act constituting "a new district to be known as the Northern District of Iowa." This act also provides that "the remaining counties of the state shall constitute the Southern district of Iowa: and the present district court of Iowa from and after the passage of this act, shall be known as the district court for the Southern district of Iowa." Section 2 provides that "the present judge of the district of Iowa is hereby declared to be the district judge for the Southern district of Iowa," and authority is granted for the appointment of a district judge for the Northern district of Iowa. Section 3 provides that "the district attorney and United States marshal for the district of Iowa shall be the district attorney and marshal of the Southern district of Iowa," and authority is granted for the appointment of district attorney and marshal for said Northern district. Section 4 relates to clerks of these districts. After providing for appointment of a clerk for the circuit and district courts in said Northern district, the section further provides that "the persons now acting as clerks for the district of Iowa shall be the clerks for the Southern district of Iowa." Section 6 of this act divided the Southern district into three divisions, viz. Central (court to be held at Des Moines), Eastern (at Keokuk), and Western (at Council Bluffs). After the passage of this act, and the institution of the (new) Northern district of Iowa, the situation in this (Southern) district, so far as the clerks of the circuit and district courts were concerned, remained the same; that is, Mr. Mason continued to act as clerk of the circuit court at Des Moines only, while Mr. Love continued to act as clerk of the district court throughout this district, and also as clerk of the circuit court in the

Eastern division (at Keokuk) and in the Western division (at Council Bluffs). Mr. Love died in 1891, and in January, 1892, J. J. Steadman was appointed successor, the appointment being as follows:

Mt. Pleasant, Iowa, February 15, 1892.

I hereby appoint John J. Steadman, of Council Bluffs, Iowa, clerk of the U. S. district court in and for the Southern district of Iowa.

Jno. S. Woolson, District Judge.

Since said appointment Mr. Steadman has acted as clerk of the district court, and also as "clerk of the circuit court at all places where the same is held in said district, except at Des Moines." Mr. Mason now claims that he is legally the clerk of the circuit court at all places where such court is held in this district, and that the provision, above quoted, from the act of June 4, 1880, relating to clerks is not in force.

If this question is to be solved by the construction placed upon said act of June 4, 1880, by the officials in this district at the time of the passage of said act and continually since, the decision must be adverse to the claim now made. During the lifetime of Judge Love, who was judge of this district when all the legislation above quoted was enacted, no such claim was presented. Judge Love died in July, 1891. Mr. Love, clerk of the district court, died later in the same year. For the (about) nine years succeeding the passage of the act of 1882, Mr. Love continued, without adverse claims thereto, to act as clerk of the circuit court "at all places except at Des Moines," at which that court was held in this district. It is now claimed that the act of 1882 repealed the said act of 1880 so far as relates to clerks within this district. I quote from the brief of Mr. Mason:

"The undersigned claims that the act of June 4, 1880, related to the district of Iowa, and has no effect whatever upon the Southern district of Iowa; that when the district of Iowa was abolished by the division into two judicial districts, that the laws which had special effect in that district were thereby abolished, and had no force nor effect whatever upon either of the districts into which the district [of Iowa] had been divided."

Aside from the contemporaneous construction, in this respect, placed on the act of 1882 by those specially interested therein, to which I have above adverted, and which is against the claim now made, it may further be said that the act of 1882 contains no terms expressly "abolishing" the district of Iowa. That act does create a new district, by setting off a portion of the territory theretofore lying within the "district of Iowa," and giving to such portion the name of a new district. But the act, after giving to the territory not thus set off the name of Southern district of Iowa, declares that "the present district court of Iowa * * * shall be known as the district court for the Southern district of Iowa." Had the act not changed the name from "the district" to "the Southern district," I take it, from the arguments presented, that no claim would be made that the district had been abolished. There would have been but a restriction or diminution of the territory within it. In a subsequent brief, counsel for Mr. Mason present the same contention in these words: "The act of 1882 abolished the district of Iowa. It abolished both the circuit and district courts for the district of Iowa." The phraseology of the act, as just above quoted, does not sustain this contention. In U. S. v. Benson, 31 Fed. 896, 898, though considering

the matter from a different standpoint, the circuit court for the district of California speaks of an act of congress, with reference to the district of California, which "detached certain counties from the district, and made a separate judicial district, called the Southern district of California." The phraseology of the act (24 Stat. 308; 1 Supp. Rev. St. p. 513) is almost identical with the said act of 1882, in this respect. "The district of California shall * * * hereafter be called the Northern District of California." Justice Field says of this act and its effect on the original district (page 898): "The organization of the original district was not changed. Its officers were continued in office as before, and were charged with the same duties, and they retained the custody of its records. Its territorial jurisdiction alone was affected," etc. So in this district. No new appointments were made, nor deemed necessary, because of the carving out of a new district, and the change (restriction) in territorial jurisdiction and change in name of the present district. The judge, marshal, district attorney, and clerks which had been appointed for the original district remained for "the Southern district" as they had been in "the district" of Iowa, and there appears to have been no suggestion or thought that any change had occurred in their relations to the district in which they remained, or that their duties were in any wise affected by the new legislation, within the boundaries established by such legislation. I conclude, therefore, that, so far as the act of 1882 is concerned, the relative positions, duties, and rights of the clerks of the circuit and district courts within this district remained unchanged.

It is further claimed that the provision above quoted, in the said act of 1882, relating to clerks of the district of Iowa, "constitutes a legislative appointment of a particular person to a particular office;" that under such provision "congress appointed Mason clerk of the circuit court for the Southern district of Iowa, and appointed Love clerk of the district court for the Southern district of Iowa," and it is contended therefrom that, even though it be held that Mr. Love, under such appointment, in connection with the act of 1880, continued to be the clerk of the circuit court at other places than Des Moines, yet such conferring of power was personal to him, and ceased with his termination of office of clerk. This contention cannot be sustained. Without now attempting to consider whether congress might, under the constitution, thus "legislatively appoint" a specific person to such designated position, it may be stated that such does not appear to have been the practice of congress. The opposite appears to be the fact. It would require strong and unmistakable language in the act to justify the conclusion that congress had attempted such "legislative appointment." The phrase in the act of 1882 that "the persons now acting as clerks for the district shall be the clerks for the Southern district" must be construed as giving to such persons—subject to then existing legislation as to clerks of United States courts—the same authority and right, and subjecting them to the same duties and responsibilities, in the Southern district, which they had held and experienced in the original district, without the necessity of further appointment thereto. If the contention of counsel is correct, then, in the absence of subsequent legislative authority or action, the clerks named were given life positions, and

could not have been removed from their office. This will scarcely be claimed. If there remained in force the general statutory provisions, conferring on the judges the same right to remove these clerks which then existed in other districts, and had existed in the district of Iowa, then the contention of "legislative appointment" falls, for the act of 1882 does not attempt to confer on the judges any such power. We may not lightly assume that congress intended to vest in any such clerks any right to official position otherwise than existed generally to persons holding like positions, save as then existing legislation conferred such right. And we have seen that under this act the right of the clerk of the district court to act as clerk of the circuit court at places other than Des Moines remained.

The foregoing disposes of the other branch of the contention above stated, viz. that the force of section 4 of the act of 1882, so far as it relates to the clerk of the district court, terminated when he terminated his office, and did not pass to his successor; for, if said section was not a legislative appointment to a designated office, then the act did not confer on Mr. Love such a personal right in or to the office of clerk as that the duties and powers which he exercised as clerk of the circuit court ceased with the termination of his holding the office. Since he was such clerk, with the same general duties within his district as belonged to like clerks in other districts, with the addition of certain powers of circuit clerk, when he ceased to be clerk his successor succeeded to all the official powers and duties which Mr. Love had possessed; for it is not contended that the act of 1880, in conferring on the clerk of the district court certain powers which otherwise would have been possessed by the clerk of the circuit court, did in any manner confer on Mr. Love (the then district clerk) personal powers which would not have passed to his successor had such successor been appointed before the enactment of the act of 1882.

It is further contended that by section 3 of the act of February 6, 1889 (25 Stat. 655; 1 Supp. Rev. St. p. 638), Mr. Steadman does not possess the authority to act as clerk of the circuit court in this district at places other than Des Moines, because he has never been appointed clerk of the circuit court in the manner provided in that section. This section is general in its terms. Authority need not be cited to prove that a general statute will not, by implication, repeal an earlier special statute, whose provisions may touch the subject-matter embraced in the general statute, unless the two statutes cannot properly co-exist. If by a fair and reasonable construction the two statutes can be reconciled, then both will remain in force; in other words, effect is to be given to both statutes if that be practicable. And unless it plainly appears that the later act was intended to repeal—to be a substitute for—the former act, the courts will not hold that the later, by implication, repeals the earlier statute. In my judgment, section 4 of said act of 1880, and section 3 of the act of 1889, so far as herein under consideration, are not in conflict, and are both in force. Mr. Steadman has been duly appointed clerk of the district court for this district. He has taken the oath required, and has executed his bond as such clerk, which has been duly approved and is on file at the department. For about six years he has been acting as such clerk. In my judgment,

and for reasons to me deemed entirely satisfactory, and which have been in part hereinbefore stated, he is "the clerk of the circuit court at all the places where the same is held in this district except at Des Moines," and is authorized to perform all the duties of such clerk at said places. If Mr. Mason, as hereinbefore determined, is entitled, under existing statutes and by virtue of his said appointment of December, 1875, to now act as clerk of the circuit court of this district only at Des Moines, then it is not material, so far as the claim now presented is concerned, whether or not Mr. Steadman has been duly and regularly appointed to perform the duties of said clerk of the circuit court at places other than Des Moines. He is acting as such. He has been and is by the court recognized as such. Under the requirements of the department of justice, he has given, in addition to the bond executed by him as clerk of the district court, a bond for due and proper performance of his duties as clerk of the circuit court of this district at places other than Des Moines. His acts as such circuit clerk are, therefore, binding, and of full validity, as de facto, if he were not de jure, such clerk of circuit court; and a bond exists in favor of any persons financially interested, if, indeed, two bonds do not so exist. His right to fill the office of said clerk cannot be collaterally attacked by the claim now pending. If any right exists therefor, the attack must be directly made, in a proper proceeding. The claim presented by Mr. Mason that he is entitled to act as clerk of the circuit court of this district at other places than Des Moines must therefore be denied.

CHARLOTTE OIL & FERTILIZER CO. v. HARTOG et al.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1898.)

No. 234.

1. FACTORS—HOLDING CONSIGNMENT—FAILURE TO USE DILIGENCE.
   A factor who has advised the sale of a consignment of meal, and has informed the consignor of the weak condition of the market, by holding the consignment in accordance with the directions of the consignor, does not become liable for failure to use diligence, merely because he afterwards sells the same on a low market.
2. CUSTOMS AND USAGES—FACTORS—DISAFFIRMANCE OF CONTRACT.
   One who consigns merchandise to a factor at a foreign port cannot hold the factor responsible for the cancellation of a contract of sale by a purchaser as permitted by the custom of that port, even though the custom seems unreasonable.
3. ACCOUNT STATED—ESTOPPEL.
   The silence of one to whom an account has been rendered does not estop him from attacking it by showing fraud, omission, or mistake.
4. ACCOUNT STATED—FACTOR.
   When an account sales of a consignment was rendered by a factor, and the consignor thereupon drew on the factor for "balance due on account sales," and the draft was honored, in the absence of fraud, omission, or mistake, the account becomes stated and settled.

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