

The third proposition, as worded, calls for the weighing of evidence in order to determine a question of fact. It is well settled that no such question can be considered on a writ of error. *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. 837; *Dooley v. Pease*, 88 Fed. 446. The discussion which follows the proposition is upon the quite different question, whether "the evidence of the plaintiff tended to prove a waiver of the provisions and conditions precedent to recovery contained in the written contract dated December 3, 1892." Without entering into a rehearsal, it is enough to say that, in our judgment, there was abundant evidence in that direction.

The fourth proposition as worded also presents a question of fact which cannot be considered, and that there was evidence tending to prove the fact is sufficiently clear.

It follows from what has been said that no substantial error was committed in admitting evidence or in giving or refusing instructions. An admission made at the trial eliminated every important question but one. "We do not dispute that the work was eventually completed," said counsel; "there is no dispute about the work; the question is whether the work was done at the time in the contract provided for." There is therefore no merit in the question whether the architects had given a certificate of satisfaction with the work; and, if in itself that question might have been of significance, there is evidence to warrant the conclusion that the stipulation for that certificate was waived. Burke did the work by his own plans and according to his own competent judgment, as it was intended he should do. Whether there was such delay in finishing the work as to justify the assertion of a claim for the liquidated damages stipulated was a question, under the special pleas, of which the burden of proof was upon the plaintiff in error. It was not a narrow question of pleading, but involved the inquiry, not only whether the delay was attributable, in whole or part, to any of the causes provided for in the contract, but whether the provision for completion of the work by the date named was waived by the parties. Touching that question, the entire conduct of the parties in reference to the work, changes in the work originally contemplated, contracts for additional work, all that they did, and all that they said to each other, however remote the bearing, was admissible in evidence. There is certainly no substantial error manifest in the record. The judgment is therefore affirmed.

GRAND TRUNK RY. CO. v. CENTRAL VT. R. CO.

(Circuit Court, D. Vermont. July 15, 1898.)

RAILROADS—RECEIVERSHIP—OPERATING EXPENSES.

Cars furnished to a railroad by other roads in the course of business are materials furnished for the operation of the road, and claims for their loss when destroyed and not returned are properly payable by receivers under an order for the payment of claims for expenses of operation.

Henry G. Newton, for claimants.

Charles M. Wilds, for Grand Trunk Ry. Co.

Elmer P. Howe, for American Loan & Trust Co.

WHEELER, District Judge. This cause has now been heard upon the objections of the American Loan & Trust Company, trustee in the mortgages, to specific six months' claims for materials and supplies shown by the report of the receivers in classification. The first of these objections is to "all claims for supplies furnished prior to September 20, 1895." The second and third are waived. The fourth is to a specific list, by name of claimant, number of voucher, and amount, referring to Schedule No. 1, A, filed as a part of the report March 8, 1898, the most numerous and important of which are claims for cars destroyed, belonging to other roads and companies, in the operation of these roads during the six months in question. Upon the appointment of the receivers, March 20, 1896, they were directed to:

"Third. Pay all just claims and accounts for labor, supplies, professional services, salaries of officers and employes, remaining unpaid, and that have been earned or have matured within six months prior to this order. Fourth. All loss and damage claims arising from the operation of said property as in their judgment, on examination, are proper to be paid, as expenses of operation."

This order is the basis of all others upon this subject; and it has not been changed or modified in any manner, except that payment under it was, on motion of this mortgage trustee, restrained by the order of May 29, 1896, until a detailed and classified statement should be filed by the receivers, and further order of the court. All subsequent orders have been in modification of, and operative only upon, this restraining order. A list of the claims on that schedule (No. 1, A) that accrued prior to September 20, 1895, and matured subsequently, was filed by the receivers July 5, 1898, by order of court, as an addition to their former report. In decisions and orders subsequent to May 29, 1896, the expression, "furnished within six months" prior to the receivership, and perhaps others similar, have been used, without carrying out the full expression, "or have matured within six months," of the original order, for brevity, and without any intention of affecting in any way the scope of that order. This hearing has been had upon continuation of a motion to modify the restraining order, and the modification should be adapted to fit, and not to narrow, the descriptions of claims in the original order, which are not now, and have not been since it was made, the subjects of consideration. The six months was fixed upon as a time that would probably fairly cover claims for current operating expenses for keeping the property a-going, and preserving its value, up to the time of the receivership, and to leave out those which had been allowed to become mere debts. The claims on this list of July 5th appear to come fully within the terms of the original order, except that some—like, for example, those specified as in vouchers Nos. 1,184, 1,905, and 2,401, which, from the dates and nature of the services, would not be likely to mature within the six months—probably came into the list by mistake. The restraining order should, in this view, be so modified as to allow the payment of the same per cent. of such of the claims on this list of July 8th as, upon review by the receivers, shall appear, by the terms upon which they were furnished, not to have matured till within the six months, as upon those furnished within that time. The specific claims

for cars destroyed would fall within the description of those for damages in the original order, which remains in force as to these, except as stayed for the reasons already mentioned. The cars destroyed in the operation of the roads were materials furnished for the purpose of operating them, and they come within the description of materials furnished, and paying for them appears to be paying operating expenses. The payment for detectives to prevent loss is of the same nature as payment for insurance to recover for loss, objection to which is waived. As to the claims in vouchers Nos. 1,805, 3,516, and 3,987, to which there appear to be offsets of about the same or greater amounts, the set-offs should apparently be allowed to be made, and the balances be collected. The money in vouchers Nos. 3,892 and 3,894, paid by a station agent for overcharges on freight, should have been taken out when he turned over the money in his hands, and should be returned now. The money in No. 3,910, received for corn sold, would seem to be held in trust, and it should be restored.

Many objections have been, with much fairness, waived by counsel, on explanation, and these considerations appear to cover all the rest, except No. 3, for a retainer of counsel in matters not appearing to be connected with the operation of the roads, and Nos. 4,346 and 7,107, for the assessments of a railroad association, which do not appear to fall within the description of operating or preserving expenses of the property.

Objections overruled, except as to claims for supplies that matured before September 20, 1895, and those specified in vouchers Nos. 3, 4,346, and 7,107.

**GREENBRIER DISTILLERY CO. v. JOHNSON, Internal Revenue Collector,
et al.**

(Circuit Court of Appeals, Sixth Circuit. July 5, 1898.)

No. 516.

1. INTERNAL REVENUE—REMISSION OF WHISKY TAX.

Under the internal revenue laws, the tax on spirits attaches as soon as they come into existence, and must be paid by the manufacturer, even in case of their destruction, unless the circumstances on which he relies for exemption come within the particular description in some one of the remedial statutes.

2. SAME—SPIRITS DESTROYED IN TRANSIT.

Under section 56 of the act of August 23, 1894, providing for the establishment of general bonded warehouses, the provisions for allowance for loss by fire or other unavoidable accident do not extend to the case of such a loss while spirits are in transit from a distillery warehouse to a general bonded warehouse.

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

This was an action by the Greenbrier Distillery Company against Ben Johnson, collector of internal revenue for the Fifth district of Kentucky, and the Fidelity & Deposit Company of Maryland, the surety on Johnson's official bond, to recover the amount of internal

revenue taxes exacted upon certain spirits destroyed in a railroad collision. In the circuit court a demurrer to the amended petition was sustained, and judgment entered for defendant, to review which the plaintiff sued out this writ of error.

Helm & Bruce, for plaintiff in error.

W. M. Smith, for defendants in error.

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

TAFT, Circuit Judge. The plaintiff, the Greenbrier Distilling Company, is a distiller of whisky in Nelson county, Ky. Under an act of congress approved August 28, 1894, providing for general bonded warehouses, it transported from its distillery warehouse in that county to the general bonded warehouse in California 65 barrels of whisky. In the course of the transportation, the whisky was totally destroyed by an accidental railway collision in the state of Alabama. Ben Johnson, the collector of internal revenue for the Fifth district of Kentucky, demanded and collected from the plaintiff \$3,259.08 as the internal revenue tax upon these 65 barrels of whisky that were destroyed. The payment was made under protest, because of a threat by the collector to seize plaintiff's distillery. The plaintiff appealed from the collector to the commissioner of internal revenue, who held that there was no provision of law for the refunding of tax legally collected on spirits in transportation from a distillery warehouse to a general bonded warehouse.

Section 51 of the act to reduce taxation, to provide revenue for the government, and for other purposes, passed August 27, 1894 (28 Stat. 564), authorizes the commissioner of internal revenue to establish one or more warehouses, not exceeding ten in any district, to be known and designated as "general bonded warehouses," and to be used exclusively for the storage of spirits distilled from material other than fruit.

Section 52 provides that any distilled spirits made from materials other than fruit, and lawfully deposited in a distillery warehouse, may, upon application of the distiller thereof, be removed from such distillery warehouse to any general bonded warehouse established under the provisions of the preceding section; and the removal of said spirits to said general bonded warehouse shall be under such regulations, and after making such entries, and executing and filing with the collector of the district in which the spirits were manufactured such bonds and bills of lading, and the giving of such other additional security, as may be prescribed by the commissioner of internal revenue and approved by the secretary of the treasury.

Section 54 provides that any spirits removed in bond as aforesaid may, upon their arrival at a general bonded warehouse, be deposited therein upon making such entries, filing such bonds and other securities, and under such regulations as shall be prescribed by the commissioner of internal revenue, with the approval of the secretary of the treasury. It further provides that one of the conditions of the

warehousing bond shall be that the principal named in the bond shall pay the tax on the spirits.

Section 55 provides that any spirits may be withdrawn once, and no more, from one general bonded warehouse for transportation to another general bonded warehouse, and, when intended to be so withdrawn, shall have affixed thereto another general bonded warehouse stamp indicative of such intention; and the withdrawal of such spirits, and their transfer to and entry into such general bonded warehouse, shall be under such regulations and upon the filing of such notices, entries, etc., as the commissioner of internal revenue, with the approval of the secretary of the treasury, may from time to time prescribe.

Section 56, which is the section whose construction is here in controversy, provides as follows:

"That the provisions of existing law in regard to the withdrawal of distilled spirits from warehouses upon payment of tax or for exportation, or for transfer to a manufacturing warehouse, and as to the gauging, marking, branding and stamping of the spirits upon such withdrawals, and in regard to withdrawals for the use of the United States or scientific institutions or colleges of learning, including the provisions for allowance for loss by accidental fire or other unavoidable accident, are hereby extended and made applicable to spirits deposited in general bonded warehouses under this act."

The provisions for allowance for loss by accidental fire or other unavoidable accident are:

First. Section 8 of the act of May 28, 1880 (1 Supp. Rev. St. p. 287), releases the distiller from the payment of tax upon spirits destroyed by accident while in the process of manufacture.

Second. Whenever the manufacture of spirits has been completed, it is drawn off into cisterns, where it is allowed to stand not exceeding three days before being carried into the distillery; but if it is destroyed before being drawn off and carried into the distillery warehouse, the tax is remitted by the act of March 1, 1879, amending section 3221, Rev. St. (1 Supp. Rev. St. p. 235).

Third. When the whisky is destroyed in the distillery warehouse, section 3309 provides for the remission of the tax.

Fourth. If the spirits are removed from a distillery warehouse to a manufacturer's warehouse, and are lost in the course of such removal, section 15 of the act of May 28, 1880, provides for the remission of the tax as follows:

"That where spirits are withdrawn from distillery warehouses for transfer to manufacturing warehouses under the provisions of this act, it shall be lawful under such rules and regulations and limitations as shall be prescribed by the commissioner of internal revenue, with the approval of the secretary of the treasury, for an allowance to be made for leakage or loss by any unavoidable accident and without any fraud or negligence of the distiller, owner, exporter, carrier or their agents or employes, occurring during transportation from a distillery warehouse to a manufacturing warehouse."

Fifth. A similar provision is made where the spirits are removed from a distillery warehouse for the purpose of export by the act of December 20, 1879, amending section 3330 of the Revised Statutes, as follows:

"That where spirits are withdrawn from distillery warehouses for exportation according to law, it shall be lawful, under such rules and regulations and limitations as shall be prescribed by the commissioner of internal revenue, with the approval of the secretary of the treasury, for an allowance to be made for leakage or loss by any unavoidable accident, and without any fraud or negligence of the distiller, owner, exporter, carrier or their agents or employes, occurring during transportation from a distillery warehouse to the port of export."

It is pressed upon the court that these various equitable provisions for relieving the distiller from the payment of tax upon whisky destroyed, whether it be in process of manufacture or in the cistern, in the distillery warehouse or in transportation to the manufacturing warehouse, or for export, require the court to construe section 54 of the act of August 28, 1894, liberally, so as to grant the same relief for whisky which is destroyed while in transit to a general bonded warehouse from a distillery warehouse. It is conceded that the tax attaches to the spirits as soon as they come into existence (Rev. St. § 3248); and it must be further conceded that the tax is to be paid by the manufacturer unless he can put his finger upon some clause which relieves him from its payment. The particularity with which congress specifies the circumstances under which the tax can be remitted is itself significant of the legislative intention that, unless the claim of exemption from the payment of the tax comes within the particular description in some one of the remedial statutes, it shall not be allowed. Congress might easily have adopted a general law authorizing a remission of the tax entitling the distiller to relief in respect to whisky destroyed before the tax is paid, and while it remains in the custody of the officers of the government, but it has not done so. It has specified each case, and, unless the plaintiff's case comes within one of them, he is without remedy.

Section 56 applies to spirits after they have been in general bonded warehouses under the act. It applies to their withdrawal from such warehouses upon payment of tax or for exportation or for transfer to the manufacturing warehouse or for use of the United States or scientific institutions or colleges of learning. It refers to the gauging, marking, branding, and stamping of the spirits upon such withdrawal. Sections 52, 53, and 54 contain the provisions as to the removal from the distillery warehouse to the general bonded warehouse. Sections 55 and 56 refer to the conditions under which spirits deposited in the general warehouses may be either kept there or may be removed. It is clear, therefore, that the provisions for allowance for loss by accidental fire or other unavoidable accident refer to such spirits after they have been deposited in the general bonded warehouse, and not to spirits in course of transportation to it. There may be the same equitable ground for the remission of tax on whisky which is being removed from the distillery warehouse to the general bonded warehouse as there is for its remission when in transit from the distillery warehouse to the manufacturing warehouse or for exportation. But it is a complete answer to this suggestion to say that congress has not provided a remission in such a case. By no natural construction of the words used in section 56 can they be extended to cover a case of spirits before they have reached the general

bonded warehouse. This was the view which was taken by the court below. The issue was made by demurrer to the amended petition, the demurrer was sustained, and a judgment entered for the defendant. The judgment of the circuit court is affirmed.

ATWATER et al. v. CASTNER et al.

(Circuit Court of Appeals, First Circuit. June 1, 1898.)

No. 239.

1. TRADE-NAMES—PRELIMINARY INJUNCTION—PUBLIC ACQUIESCENCE.

The word "Pocahontas" having been used by complainant as a trade-name for coal for fully 20 years, with unbroken public acquiescence, and such trade-name having been sustained and its infringement enjoined by the circuit court of another circuit, *held*, that a preliminary injunction was properly granted in the present case.

2. SAME—GEOGRAPHICAL NAMES.

It seems that if a manufacturer, producer, or dealer furnishes goods of such excellent quality, and builds up so extensive a trade, that his trade-name becomes a distinctive appellation of the locality where his business is pursued, he is not thereby prevented from having a trade-mark right in the name.

3. SAME—PUBLIC ACQUIESCENCE.

That one person, other than complainant, shipped coal marked "Pocahontas Coal, from the Browning Mines," does not show an interruption of public acquiescence in complainant's use of the name "Pocahontas," but rather, from the use of the qualifying words, supports complainant's exclusive use of the unqualified words.

4. SAME—PRELIMINARY INJUNCTION—APPEAL.

When an order granting a preliminary injunction was clearly proper when made, it will not be reversed merely because the circuit court of appeals for another circuit, in a case in which the same party was complainant, has since held that the trade-mark cannot be sustained.

5. PRELIMINARY INJUNCTION—AFFIRMANCE ON APPEAL.

The rule as to the effect of a judgment on appeal, affirming an order for a temporary injunction, as stated in *Davis Electrical Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 621, 60 Fed. 276, 282, repeated.

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

Causten Browne and James M. Morton, Jr., for appellants.

Arthur v. Briesen and Henry E. Everding, for appellees.

Before PUTNAM, Circuit Judge, and WEBB and BROWN, District Judges.

PUTNAM, Circuit Judge. This is an appeal from an order granting a temporary injunction, and relates to an alleged trade-mark or trade-name, "Pocahontas," used in the coal traffic. This has been used for fully 20 years by the complainants below, and their predecessors in title, in a very extensive trade, with unbroken public acquiescence, until the controversy out of which this litigation arose in this circuit and in the Fourth circuit. It does not indicate merely that the complainants below are the producers of the coal sold, but quite as much that it is sorted and put on the market under their