

course of time, presented for \$356; so that the purchaser found the cost of the vessel to be \$656, not much less than double what he expected it to be when he made his investment in that piece of property. Now, a property which might be desirable and profitable at a cost of \$450 might be very undesirable and very unprofitable at a cost of nearly double that amount; and Mr. Seed, an expert in the building and repairing of vessels, has probably subjected Mr. Parker to serious pecuniary inconvenience and loss, either in first misleading him by a false estimate of the cost of repairing his vessel, or else in charging him more than double the amount which the repairs ought to have cost. It seems to me that this is a claim contrary to equity and good conscience. If it is not a case in every technical particular of estoppel in equity, or estoppel in pais, which I think it is, it is a case presenting too strong an equity in behalf of the owner of the vessel to be disregarded by the court. If any reasonable explanation had been given by the libelants of the excess of their present claim over their previous estimate, the duty of the court to allow the claim might have been made clear, but none is given or attempted. The court is reduced to the dilemma of treating the estimate as the result of gross and injurious negligence or misrepresentation, or else of treating the claim exhibited with the libel as grossly excessive. I feel bound to hold the libelants to their estimate, with a liberal allowance for the extra work, which I will put at \$60. A decree may be taken for \$210, less the \$56.45 before mentioned; each party to pay his own costs.

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In re WESSON.<sup>1</sup>

(District Court, E. D. Virginia. May, 1881.)

**BANKRUPTCY—DISCHARGE—FAILURE TO PLEAD.**

A discharge in bankruptcy must be pleaded affirmatively in a proceeding by scire facias to revive a judgment as well as in an original suit, and the failure of the bankrupt to appear and set up his discharge in such a proceeding deprives him of the benefit thereof.

**In Bankruptcy.**

This was a petition filed by a discharged bankrupt to enjoin the sheriff from proceeding under an execution issued on a judgment recovered in a state court just prior to the filing of the petition in bankruptcy, and which, after becoming dormant, was revived by scire facias. The writ of scire facias had been served on the defendant, but he entered no appearance or defense.

**HUGHES**, District Judge. A discharge in bankruptcy must be pleaded affirmatively, just as infancy, coverture, or any other special defense to a debt must be pleaded. This is not only so, as to an original suit on a bond or other obligation, but it is so as to any subsequent proceeding to revive a judgment. The bankrupt in this case,

<sup>1</sup> This case has been heretofore reported in 4 Hughes, 522, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

having neglected and failed to enter the plea of bankruptcy in the proceeding for revival, or to suggest his bankruptcy in the original suit, has, as to King's judgment against him, lost by his own laches the benefit of his discharge in bankruptcy, and the judgment on scire facias, as well as the lien of the fieri facias, is good against him. Courts cannot be expected to help those who sleep on their rights. The injunction must be denied.

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UNITED STATES v. ONE PACKAGE OF DISTILLED SPIRITS.

(District Court, S. D. Illinois. April 4, 1898.)

1. INTERNAL REVENUE—POWER OF COMMISSIONER.

Rev. St. § 3249, which provides that the commissioner of internal revenue may prescribe rules and regulations to secure a uniform and correct system of inspection, weighing, marking, and gauging of spirits, does not empower the commissioner to require an additional mark upon a package of distilled spirits in the event of a reduction in proof or volume, so as to make the absence of it a forfeitable offense under Rev. St. § 3289, as not "having thereon such mark and stamp required therefor by law," where the statutes neither prohibit such reduction nor provide for any additional marks in the event it is so reduced.

2. SAME—EVIDENCE.

Mere evidence that the contents as to volume and proof does not conform to the volume and proof as marked on the package, without more, fails to make a prima facie case for seizure or forfeiture.

J. Otis Humphrey, U. S. Dist. Atty.

W. M. Hough, Stuart Brown, and Logan Hay, for claimant.

ALLEN, District Judge. A proceeding to forfeit a package of distilled spirits, under section 3289, Rev. St. U. S., as not "having thereon each mark and stamp required therefor by law." The package in question bore stamps and marks indicating that it was entered into bond December 23, 1891, containing 48 wine gallons of 100 per cent. proof; was withdrawn, and tax paid, April 2, 1896, containing 36½ wine gallons of 107 proof; and, being gauged by a revenue officer at Cairo, Ill., in December, 1896, and found to contain 33½ wine gallons of 101 per cent. proof, was seized for forfeiture. The plaintiff proved these facts, and introduced evidence tending further to show that the change between the condition of the spirits at the time of tax payment and its condition at the time of seizure could not have occurred from natural causes alone, but witnesses for the plaintiff testified on cross-examination that the change could have been occasioned by the addition of about two gallons of water, after allowing for an evaporation of about three gallons of spirits and a loss of a gallon and a half by leakage or removal. Plaintiff further introduced in evidence a regulation of the commissioner of internal revenue to the effect that distillers or wholesale liquor dealers may reduce to their original proof, by the addition of distilled water, such distilled spirits as have increased in proof in the distillery warehouse, provided they do so in the presence of a United States gauger, and put a mark upon the stamp head of the package, indicating that it had been so reduced. With the further evidence that no such mark appeared upon the cask in question, the plaintiff rested. Thereupon the claim-