common law deals with the subject is evidenced in the ancient maxim, "In jure, causa proxima, non remota, spectatur." No cases other than those referred to have been cited by counsel for plaintiff in his able and ingenious argument, and none others have been found that have any bearing on the question here considered. Some of these cases, as has been pointed out, deal with circumstances which deprive them of the weight claimed for them as authority for the proposition that the bald fact of becoming surety on a bond of indemnity, without more, makes such surety a co-trespasser. The one or two others which seem to support this proposition must be disregarded, in the view taken by this court of the law. If, then, the surety, under the circumstances supposed, is not to be held liable as a co-trespasser, then it follows that one who merely advises or requests such surety to execute the bond of indemnity cannot be held. But, even if the proposition referred to, as to the liability of the surety, were conceded, and the reasoning of the New York courts in that regard adopted, it would not follow that one in the position of the Independence National Bank, the demurrant in this case, under the circumstances disclosed in the statement of claim, would be liable as a co-trespasser. The conduct of the bank, as a cause of the sheriff's action, is too remote to be considered. No case has been cited or found that holds one in the position of the demurrant in this case liable. The court is constrained, therefore, to sustain the demurrer. Let judgment be entered accordingly.

PATTON v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. March 21, 1899.)

No. 724.

1. SECOND APPEAL—LAW OF CASE.

   Where a judgment is reversed, and the case remanded, the opinion of the court on the former writ of error is the law of the case, and controlling on second appeal, unless the evidence on the second trial was materially different from that on the first trial.

2. INJURY TO EMPLOYE—DEFECTIVE APPLIANCES.

   While a locomotive fireman was descending from a moving engine in a careful manner, the step turned, owing to its being loose, and he was thrown to the ground and injured. The locomotive had just come in from a run, during which the step had been safely used several times. The roundhouse foreman at a certain point testified that he removed the step at that place, but he replaced it, or caused it to be replaced, properly, and that he was sure that the nut fastening the step was screwed up tight. *Held* insufficient to warrant a verdict against defendant railroad company for negligence.

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

This cause has once previously been before this court on writ of error. It was then very fully stated. 23 U. S. App. 319, 9 C. C. A. 487, and 61 Fed. 259. The only differences which are claimed to exist between the evidence in the cause on the former writ of error and the evidence as now brought up on the present writ of error are to be found, on the one hand, in the testimony of A. Stiner, a witness in behalf of the defendant below, which is now claimed by

the defendant in error to be more strongly in its favor than on the first trial; and, on the other hand, in the testimony of Alexander Mitchell, a witness for the defendant below, who is now claimed by the plaintiff in error to have testified on the second trial in a different manner from that in which he had testified on the first. The testimony of Stiner, delivered on the second trial and found in the record of this cause, is as follows:

"A. Stiner, a witness in behalf of defendant, testified: 'I was the engineer in charge of engine No. 90 at the time plaintiff, Patton, was hurt, and was the engineer running that engine for some time before. Alexander Mitchell was a competent man to inspect engines. His employment at the time the accident happened was that of foreman at Toyah. The machinist at Toyah was a man named Young. There was no special inspector or repairer at Toyah at that time,—any more than the foreman and machinist. It was the duty of anybody who was controlling the engine to see if anything was wrong. The machinist should do the work of grinding in the blower. The Chinamen did the work of putting in the gasket and changing water. The machinist should do the work of raising the pilot. It is the foreman's business to see that the machinist did it. When the engine went into Toyah, it was my duty, as engineer, to report defects in the engine, and repairs to be made. It was my duty to examine the engine again before it left Toyah, and see whether or not the repairs called for had been made, and there was no other inspection upon my part to be made at Toyah before we left there.'

"The witness was asked the following questions: 'Q. The attorney for the plaintiff has asked you the question whether it was not a part of the duty of the foreman or machinist not simply to do the repairs pointed out, but to inspect the engine itself, generally, and see whether it was in good condition? A. Yes, sir; it was their duty to look around. Q. If the engineer overlooks anything, they might find it? A. There is times an engineer overlooks something. They might find it. Q. It is their business to look for it? A. Oh, yes; it is their business to look. Q. Do you know, as a matter of fact, whether the step was loose when the engine left Toyah? A. No, sir. Q. Did you examine the step at Toyah? A. I don't know as I examined it. I got off and on. Q. Did you examine the step, to find out whether or not it was loose? A. No, sir; I did not pull on it, or anything like that. Q. You don't know whether it was loose when it left Toyah or not? A. It was not loose when I got on it. The step was not loose when I got on it. Q. Did you examine it to see whether or not it was loose? A. I examined it with my foot. Down at Toyah I simply put my foot on the step, and got up on the engine. I don't remember the run, exactly, now. I used the step at the San Martine tank, or at Prairie, and Van Horn; then again at Blanco and at Hancock; and whether I used it again between Hancock and El Paso, I can't remember.'

"He also testified that the step was not loose when the engine left Toyah,—that he examined it with his foot,—and explained that he ascertained that it was not loose, because he got up on the engine, using this step, several times, as stated above, between Toyah and El Paso, and, while one might get down from the engine, and not discover it, that, in mounting the engine after oiling, he came from front of the engine, and grabbed the hand-hold, put his left foot on this step, and swung his body round to place the right foot in the loop on the tender."

The testimony of Alexander Mitchell, a witness in behalf of the defendant below, was, on the second trial, as follows:

"On the 29th and 30th days of November, 1892, I was the roundhouse foreman of the Texas & Pacific Railway Company at Toyah. The company had a machinist at Toyah at that time. He was not at the roundhouse on Sunday. His name was Charley Young. When he was not there, it was my duty to do the work, to a certain extent,—little jobs. I remember the engine No. 90, on which the plaintiff Patton was employed, coming in."

"The attorney for the defendant here called the witness' attention to the report made by the engineer when the engine reached Toyah on the night of November 29th, viz.: 'Change water, grind in blower, put gasket in front of blower pipe; and raise pilot, also.' The witness was asked the following questions: 'Q. What did you do to that engine? A. I raised the engine in front, without raising the pilot. Q. I mean, did you make the other repairs?

A. No, sir; I did not. Q. The small repairs? A. No, sir; I did not. Q. State what you did. A. I put some clips or gibs under the springs to raise the pilot up. Q. Did you complete the job? A. I did. Q. Did you do anything with the part of the engine near the engine step, on the right side? A. In order to do that, I had the step off, and jacks under it. Q. On the right side of the engine? A. Under that side, to hold her up. I had to jack the front end up in order to do the work, and hold the back end up off the springs. Q. That is what you did? A. Yes. Q. Did you have anything to do with the step? A. I had it off. Q. Did you put it back there? A. Yes, sir. Q. Did you put it back properly? A. Yes, sir; I had men working with me to do it. Q. Did you see it done? A. I seen it being done. I went into the office and came out again. Q. Did you examine the nut, to see if it was put on right or not? A. The nut was screwed up tight. Q. The step was screwed up tight? A. Yes, sir; I am sure it was screwed up tight. It made two hundred miles. Q. What was the condition of the engine— Was that step in good condition when it left Toyah? A. It left in the morning. Q. When you got through with it? A. When I left the roundhouse the engine was all right.'

"Cross-examination: 'Q. Did you put that jackscrew under the end of the engine? A. I had it put under. Q. You did? A. Yes, sir. Q. Did you take the step off? A. I had to have it taken off. Q. You saw it taken off? A. Yes, sir. Q. You could not take the step off without moving that nut at the top? A. No; I would have to take that off to take the step off. Q. Did you raise the pilot, or not? A. I raised the front end of the engine, and, of course, that raised the pilot. Q. That is the way you raised it? A. That is the way I raised it. Q. Were you there during the whole time the work was being done about the engine? A. I think I was all the time that the work was being done on the engine,—in and about the office, and about the roundhouse.'

"The witness Mitchell also testified that he had the step put back after taking out the jackscrew, and that the nut was screwed back properly, and that the nut was tight when the engine left the roundhouse at Toyah. The witness Mitchell was here asked, by counsel for plaintiff, if he did not testify on the former trial of this case, in October, 1893, that the step was not moved for the purpose of putting the jackscrews under the end of the engine, and that the nut on the step was not moved while the engine was at Toyah on the trip mentioned, and that Mr. Young was a machinist at Toyah at that time; that it was Sunday, the 30th day of November, 1892, and he (Mitchell), believing that he was competent to do so, undertook to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot, and, finding that he could not accomplish the task of raising the pilot with the force at hand by himself, he did not do the work necessary to raise the pilot or cowcatcher. The witness replied that he had no recollection of so testifying. He was then asked if he did not testify on the former trial of this case that the step mentioned in the evidence, which turned with the plaintiff, Patton, was not moved at all while the engine was at Toyah on the 30th day of November, 1892, and if he did not testify that the nut by which this step was fastened was not moved at all on that trip. He said he had no recollection of so testifying. The witness was then asked the following questions: 'Q. Did you put the gasket in the pipe? A. I did not. Q. Did you grind the blower? A. No, sir; I did not. Q. Why did you put the jackscrew under that end of the engine? A. I could not raise the engine and fix the engine without doing it. Q. You could not do what you did about the pilot unless you raised the engine? A. Unless I held the back part of the engine up. Q. So, in doing what you did about the pilot, and in raising the pilot as you did raise it, you put these jackscrews under the end of the engine where the step was? A. I had it done. I was there to see it was done. Q. Were you a machinist then, Mr. Mitchell? A. No, sir; I ain't no machinist; that is, I never learned the trade. Q. That was a machinist's work you were trying to do, wasn't it? A. Well, yes; it was a machinist's work, although I can do it.'

"The witness was here asked if he did not testify on the former trial, in October, 1893, that to grind in the blower was a small job, and that he did it, and that to put gasket in front joint of blower pipe was a very light job, and he did it. He answered by saying that he had no recollection of so testifying.

The plaintiff then introduced in evidence the stenographic report of the testimony of Alexander Mitchell, taken upon the first trial of this cause, which was as follows: That he told the Chinamen to get the jackscrews, and under his direction they placed two jackscrews, one on each side of the front of the engine, and that without any instructions from him they brought and put another jackscrew on the ground near the step; that he was out of the roundhouse five or ten minutes, while the Chinamen were there, and that this jackscrew near the step was not placed under the engine in a position to elevate it, and that the step was not moved for the purpose of putting the jackscrews there, and that the nut on the step was not moved while the engine was at Toyah on that trip; that Mr. Young was the machinist at Toyah at that time, and that this was Sunday, the 30th day of November, 1892, and that he (Mitchell), believing that he was competent to do so, undertook to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot, and finding that he could not accomplish the task of raising the pilot, with the force at hand, by himself, he did not do the work necessary to raise the pilot or cowcatcher; that to grind in the blower was a small job, and the witness did this; that to put gasket in front joint of blower pipe was a very light job, and that this work was also done by the witness; that to raise the pilot required the witness to jack up the engine, and put gibs under the spring ends of the engine truck; the engine truck is near the front end of the engine; that the witness did not do this, because it was a pretty big job, and he was doing the work by himself, with the help of only two Chinamen; that the engine was all right, and ran as well as if it had been done, except the pilot was a little low."

After the close of the evidence heard upon the second trial of the cause, the trial judge instructed the jury to return a verdict for the defendant below, "because there is not sufficient testimony to entitle the plaintiff to recover, and no evidence showing any negligence on the part of the defendant," to which instruction the plaintiff below duly excepted; insisting that the court should submit the cause to the jury upon the question of negligence raised by the pleadings and the evidence. The jury thereupon returned their verdict in favor of the defendant, the Texas & Pacific Railway Company. E. M. Patton, the plaintiff below, sued out the present writ of error. The assignment of error complains that the court directed a verdict as stated above. He contends that the evidence on the second trial was materially different from the evidence upon the former trial, and that the evidence tends strongly to show that the plaintiff's injuries were received through the negligence of the defendant's employés at Toyah, in leaving the step attached to the engine in a loose and unsafe condition, and that said employés were charged with the duty imposed by law upon the defendant railway company, of inspecting the engine, and keeping the various parts of the same in a reasonably safe and good condition, and that they negligently failed to perform such duty; that the evidence tends strongly to show that the step which turned with the plaintiff, and caused the injuries he received, was in a loose condition when the engine left Toyah, and that the engine was not inspected by defendant's machinist at Toyah; and that, after repairs were made upon the engine at Toyah, the step was negligently left in a loose and unsafe condition.

Millard Patterson and C. N. Buckler, for plaintiff in error.

P. F. Edwards, P. J. Edwards, and T. J. Freeman, for defendant in error.

Before McCORMICK, Circuit Judge, and BOARMAN and PARLANGE, District Judges.

PARLANGE, District Judge, after stating the facts, delivered the opinion of the court.

When this cause was before this court during the November term of 1893 (23 U. S. App. 319, 9 C. C. A. 487, and 61 Fed. 259), this court said, upon a careful examination of the entire evidence:

"It seems to us that to state the case is sufficient to show that the defendant had not been negligent, and could not justly be held liable. The exception to the charge of the court, and to the refusal of the requested charge, having served to bring up, in the bill of exceptions, a full statement of all the evidence given on the trial, it appears from the face of the record that there was no evidence to sustain the judgment of the circuit court. It is thus manifestly erroneous, and must be reversed."

The cause was remanded to the lower court for further proceedings in conformity with the opinion of this court. At the close of the second trial below, the judge directed a verdict in favor of the Texas & Pacific Railway Company, defendant below. The plaintiff below duly excepted to that action of the trial judge, and he has brought up all the evidence in the bill of exceptions.

It is clear that the opinion of this court on the former writ of error is the law of this cause, and is still controlling therein, unless the evidence on the second trial was materially different from the evidence on the first trial. This court on the former writ of error found, substantially, that by uncontradicted evidence the following facts, among others, were established, viz.: On November 29, 1892, it became necessary to remove and replace the step in question. This was done by the engineer and the plaintiff himself. The nut which fastened the step was made tight. It was properly screwed on, and would not have become loose in a trip from El Paso to Toyah and return. The step was not removed at Toyah. The engine left Toyah at 2 a. m. on the morning of December 1, 1892. During the return trip to El Paso, the plaintiff below and the engineer got off the engine several times, on the right side, while it was standing, and neither of them noticed any disturbance of the step. When they reached El Paso on the return trip, at about 10:30 a. m. on December 1, 1892, they left the engine attached to the train at the depot, both of them getting off the engine on the right side, and using the very step in question. Neither of them noticed that anything was wrong with the step. They went to their homes. A few hours afterwards the plaintiff returned to the engine. It was then in charge of the employés of the railway company for the purpose of being coaled, sanded, and cleaned by others than the fireman, and it was thereafter to be inspected by the machinist. The purpose of the plaintiff in then returning to the engine was to wipe off parts of the engine, and to fill the oil cans and lubricators. He was not required to, but permitted, if he chose, to do that work at the time he did it. It was more convenient to do it while the engine and the oil were still hot. He would have had ample time after the engine had been placed in the roundhouse to do his work. While, as already stated, the engine was in the hands of other employés for the purposes stated, the plaintiff undertook to do, and proceeded with, his work of cleaning parts of the engine, and filling the cans and lubricators. The engine was in motion,—running at the rate of about three or four miles an hour. It was about to stop, when the plaintiff, in order to get out of the way of other employés, and also for the purpose of getting off at the place where the engine was about to stop, stepped down backwards off the engine, using the step in question. The step turned, causing his right foot to fall under the driving wheel

of the engine, and to be crushed by it. The only change in the evidence upon which the plaintiff in error relies for relief from the former decision of this court in this cause, and in fact the only difference in the evidence as heard on the first and on the second trials,—except the evidence of the engineer, Stiner, which is claimed by the defendant in error to be much stronger in its favor now than on the previous occasion,—is that Mitchell, the roundhouse foreman at Toyah, testified on the first trial that he did not remove the step at Toyah, but that all repairs called for by the engineer were made, and, in a general way, that the engine, on leaving Toyah, was in good condition, whereas he testified on the second trial that he did remove the step at Toyah, but that he replaced it, or caused it to be replaced, properly, and that he is sure that the nut "was screwed up tight." In our opinion, this change in the testimony of Mitchell cannot affect what was adjudicated by this court on the former writ of error. This court then found that there was no evidence of negligence on the part of the defendant railway company for which it could be made liable. Under the views then expressed by this court, what evidence of such negligence is there now to be found in the record? If either one of Mitchell's statements be true, the plaintiff in error can derive no benefit from it; for, whether Mitchell did not take off the step at Toyah, or took it off and replaced it properly, the case must go against the plaintiff in error, under the views heretofore expressed by this court. If Mitchell, because of his contradictory statements, is unworthy of belief, his evidence should be disregarded and eliminated. But the fact that Mitchell made two contradictory statements—both of which are favorable to the railway company—cannot be held to be equivalent to, or to supply the place of, proof of negligence on the part of the railway company, directly the reverse of either of the contradictory statements. A bare suspicion that Mitchell did not properly fasten the step at Toyah, arising merely from the fact that he made two contradictory statements, would not have warranted the jury in finding against the railway company. The uncontradicted facts remain established that the plaintiff himself assisted in fastening the step at El Paso; that this was sufficient to secure the nut for the round trip to Toyah and back; that the step was used, and was not loose, while going and returning; that after the arrival at El Paso on the return trip the step was used by the plaintiff himself, and was only found loose a few hours afterwards, while the engine was under the control of other employés of the railway, whose duty it was to coal it, sand it, and do such other necessary things as might be required, except repairing, and when the engine was to be taken immediately thereafter to the roundhouse, where it was to be inspected, and where it would, if necessary, have been repaired. On such facts, and under the views of this court expressed on the first writ of error, the plaintiff below could not recover. The judgment of the lower court is affirmed.

EAST MOLINE CO. v. WEIR PLOW CO.

(Circuit Court of Appeals, Seventh Circuit. June 6, 1899.)

No. 551.

1. REVIEW—FAILURE TO AWARD NOMINAL DAMAGES.
A judgment will not be reversed because of an error in failing to award nominal damages, where the question of costs is not dependent thereon.
2. BREACH OF CONTRACT—LIQUIDATED DAMAGES—PENALTY.
Where a contract contains a large number of stipulations to be performed, of varying degrees of importance, and for the breach of some of which the damages are readily ascertainable, while as to others they are not, a single sum stipulated as damages for a breach, and applicable alike to each of the covenants, will be treated as a penalty, and in an action for a breach only the actual damages proved are recoverable.

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

This suit was brought by the Weir Plow Company, the defendant in error, upon the written contract hereinafter fully set out in the findings of fact by the court below to recover the sum of $50,000 as damages provided for by the contract for a breach by either party. The defendant answered by counterclaim, alleging performance of the contract on its part, alleging a breach of the contract by the plaintiff (defendant in error), and claiming judgment for the $50,000 as stipulated damages. No proof of damages was offered by either party on the trial, but each party sought to recover from the other the sum of $50,000 as stipulated damages. The finding, as will be seen, is in favor of the plaintiff in error (defendant below) that the contract had been kept by it up to the time plaintiff defaulted, and had been broken by the plaintiff. The error assigned is that the court erred in not giving damages in favor of the plaintiff in error: (1) In not giving nominal damages; (2) in not giving judgment in favor of the defendant for $50,000 as stipulated damages.

The finding of facts and conclusions of law by the court are as follows:

"The court finds: That the defendant, the East Moline Company, was on and prior to July 12, 1895, a land company, owning unimproved lands near the city of Moline, upon which it was proposed to build up a manufacturing town by bringing to the same some important manufacturing establishments. That for this purpose it advertised its willingness to grant a parcel of its lands, with railway and other facilities, and a money bonus, to some well-known and well-established company that would establish its plant at that site. That the Weir Plow Company, then located at Monmouth, Illinois, agreed to accept such offer. A correspondence thereupon took place, which resulted in the making, on the 12th of July, 1895, of the following contract:

"'Exhibit Letter E. No. ——.

"'Newton Woodson, Peoria, Ill.: This agreement, made and entered into this 12th day of July, 1895, by and between the East Moline Co., a corporation organized under the laws of West Virginia, with its principal office at Moline, Ill., party of the first part, and the Weir Plow Co., of Monmouth, Ill., a corporation existing under the laws of the state of Illinois, party of the second part, witnesseth: Party of the first part, for and in consideration of the covenants and agreements on the part of the party of the second part hereinafter mentioned, hereby covenants, promises, and agrees as follows: That it will donate and convey, free of incumbrance, to the party of the second part, that part or parcel of land lying between the C., R. I. & P. and the C., B. & Q. tracks as shown on the working plan of the East Moline Co.'s tract, east of Port Byron Junction, between the Third and Fourth avenues running north and south, said parcel being on the old Davenport farm, and containing nineteen acres, more or less, less a right of way thirty feet wide on the northern boundary of said parcel, and a right of way sixty feet wide on the south boundary of said parcel, the same to be described more fully by metes and bounds in deed hereafter. Said party

of the first part, in addition, agrees to donate as a further consideration for the removal as hereinafter specified, to the party of the second part, fifty thousand dollars in cash, as follows: $5,000.00 November 1st, 1895, $5,000.00 January 1st, 1896, $5,000.00 April 1st, 1896, $5,000.00 June 1st, 1896, $5,000.00 August 1st, 1896, $5,000.00 October 1st, 1896, $5,000.00 November 1st, 1896, $5,000.00 April 1st, 1897, $5,000.00 June 1st, 1897, $5,000.00 August 1st, 1897. It is hereby expressly agreed that none of the above payments shall be due or called for except to pay for 75 % of the cost of labor and material then used in the construction of buildings as shown by certificate of architect, until the buildings are fully completed, when full settlement shall be made as per schedule above. It is hereby agreed that the East Moline Co. shall, not later than Nov. first, 1896, execute its three promissory notes for the last three amounts hereinbefore stated, said notes to bear six per cent. interest from Nov. 1st, 1896, and not to be used nor discounted in any of the banks of Rock Island, Moline, or Davenport.

" 'Steam-Railroad Service.

" 'Said party of the first part further agrees from and after the date of the operation of said second party's factory at East Moline that until street-car service is provided, as hereinafter specified, it will arrange with steam railroads running into East Moline (or Port Byron Junction) to run trains as follows: Leaving Rock Island or Moline so as to arrive at East Moline 5 to 15 minutes before 7 a. m. Leaving Rock Island or Moline so as to arrive at East Moline 5 to 15 minutes before 1 p. m. Leaving East Moline about 12:15 p. m., reaching Rock Island. Leaving East Moline about 6:15 p. m., reaching Rock Island. With such additional trains as may be put on between hours, conditioned that said trains are to be passenger trains with sufficient capacity to transport workmen to and from Moline or Rock Island and East Moline for the factory purpose of the party of the second part, and that the fare for such service, in books of 25 tickets, shall not exceed 5 cents per fare one way between Moline and East Moline, it being agreed and understood that the party of the first part will, at as early a date as practicable, endeavor to arrange that all railroads reaching Port Byron Junction and running passenger trains have such trains stop at Port Byron Junction to let off and put on passengers.

" 'Street-Car Service.

" 'Party of the first part agrees that on or before Nov. 1st, 1897, it will have an electric, or other rapid transit street-car line reaching up to a point opposite Port Byron Junction, and that the fare for such street-car service shall not exceed 5 cents from Moline to Port Byron Junction, either way, and that timely service of said street cars, to correspond and fully equal that of the street cars above enumerated, shall be furnished with intermediate trips of at least once every hour.

" 'Switching Facilities.

" 'Said party of the first part agrees to procure an agreement from the three trunk railroads, namely, the C., R. I. & P., the C., B. & Q., and the C., M. & St. P., that such railroads shall put in main switching tracks to and on the boundary of the land occupied by the said second party, and that the said three railroads shall each agree to use such switch tracks for in and out bound freight on an equal basis, said main switch to be put in immediately on said second party being ready to commence erecting its buildings.

" 'Water Supply.

" 'The party of the first part agrees that it will provide a temporary and sufficient supply of water for the use of the party of the second part for putting up and operating said plant and supplying boilers and other machinery, and that within one year from the first day of July, 1896, said party of the first part agrees to lay an eight-inch main from the boundary of said second party's land to the Mississippi river, and to erect a pumping station to furnish a permanent supply of water to the party of the second part for its manufacturing purposes, at a price not exceeding the ruling price of water at Moline or Rock Island, and will also permit said second party the free use of said first party's mains until said pumping station is in operation. Said first party also agrees to deed to

said second party perpetual easement for a water pipe from factory of said second party to the Mississippi river.

" 'Lighting Station.

" 'It is further agreed that, as soon as the buildings hereinbefore proposed are erected, that party of the first part will arrange to supply a sufficient amount of electric light, or other satisfactory illuminant, at ruling rates as furnished by other companies, for the wants of the party of the second part for streets and private lighting.

" 'In consideration of the covenants and agreements hereinbefore mentioned by the party of the first part, the party of the second part hereby agrees at once to prepare plans and specifications for a complete, new, and improved, and up to date plant, which plans and specifications shall be ready not later than October 1, 1895, and that contract shall be let and work upon the buildings commenced as soon as possible thereafter, and that it will remove its business of manufacturing agricultural implements from Monmouth, Illinois, to East Moline, Illinois, and will erect upon said ground hereinbefore mentioned and designated substantial brick buildings to cost not less than fifty thousand dollars, said buildings to be completed and erected January 1, 1897, unless deterred by fires, strikes, or unavoidable accidents. Foundations and buildings to the extent of ten thousand dollars to be put up in the fall of 1895, so as to commence active building operations on March 1, 1896. In addition to the erection of the buildings as above stated, party of the second part agrees to remove its machinery now at its factory in Monmouth, Illinois, or such portion as it may wish to use in its new plant, and to add thereto such new machines as its requirements may demand, for the employment of 300 to 500 employés, it being agreed and understood that it is the intention of the party of the second part, and said second party hereby agrees, to remove its manufacturing business from its present location in Monmouth, Illinois, to East Moline, Illinois, and thereafter conduct such manufacturing business with such enlargements and additions as the business of said second party properly pushed may demand.

" 'It is made a part of this agreement that said second party shall keep the grade of the product of its factory up to the high standard recently attained under the Kingman management, and that this shall be done by employing first-class labor and using first-class material, and by adopting modern processes of manufacture, so that the goods turned out shall be equal to those of any first-class factory of like kind in the market; also that the name "East Moline, Ill.," shall be prominently branded on all of the goods made by said second party; also that the corporate title of the Weir Plow Co. shall be changed to the "Kingman Plow Co."; also that advertising matter shall be printed and the new concern known as the "Kingman Plow Co., late the Weir Plow Co.," so as to get the benefit of both names, and cement the alliance between the factory and the Kingman jobbing houses as far as possible. The Weir Plow Co. and Martin Kingman and William Hanna hereby agree and guaranty that the name "Weir Plow Co." shall not be used by any other corporation, and that no other plow factory under that name shall occupy the old and abandoned plant at Monmouth for a term of five years.

" 'Party of the second part agrees that it will at all times give the preference in letting contracts for buildings and in the purchase of machinery to be used in the erection of said buildings to contractors, builders, and furnishers of said machinery in Rock Island county. Said party of the second part hereby agrees that, in consideration of the agreements herein contained on the part of the East Moline Co., that said party of the second part will at all times, in hiring employés, give the preference to competent persons living on the land owned or controlled by the East Moline Co. or its grantees, and that the said party of the second part shall, so far as possible, limit its employment of help to competent persons living upon land owned or controlled by said East Moline Co. or its grantees.

" 'It is further agreed on the part of the party of the second part that in letting its contracts for buildings, it will likewise stipulate with the contractor that he shall give like preference to competent persons living on the land of the said East Moline Co. or its grantees.

" 'It is agreed that the party of the second part shall remove its office to

East Moline from Monmouth, Ill., and locate permanently upon the site and in the buildings hereinbefore mentioned, on or before Nov. 1, 1896.

" 'Said party of the second part further agrees to keep said buildings insured for three-fourths of their insurable value, and, in case the plant is destroyed by fire, to rebuild the same, and to continue said business, as soon as such insurance on said buildings is adjusted.

" 'Said party of the second part further agrees to employ in the transaction of its business upon the premises aforesaid as large a number of employés as the demand for its goods will warrant, it being expected and understood that it shall employ at first about the same number of men as it is now employing at Monmouth, Ill., and to increase the same as the further exigencies of the business may warrant; and it also agrees to enlarge and extend its business as a permanent business in its new location.

" 'It is agreed by and between the parties hereto, that they shall meet in Chicago within the next week for the purpose of agreeing with said railway companies upon the location of their several freight depots and union passenger station at East Moline, and that, if said visit is made, and does not result in satisfactory arrangements, said second party shall be at liberty, up to and including July 20, 1895, to cancel this agreement.

" 'It is hereby mutually agreed by and between the parties hereto that the measure of damages for the default of either party to carry out this agreement shall be fifty thousand dollars, less such sums as may have been paid by either party to the other.

" 'In witness whereof, the said East Moline Company has executed the presents by the signature of its president and secretary, and by its corporate seal, and the party of the second part has also acknowledged these presents by the signature of its president and secretary and its corporate seal.'

"That the location and building of the Weir Plow Company's works in East Moline within the time stipulated in the contract was important to the interests of the East Moline Land Company in its purpose to sell other lots, and procure other manufacturers, and that this was well known to the parties of the contract, and in mind when the contract was entered into; whereby the court finds that in respect to the location, plans of the building, the laying of the foundations of the buildings, and the completion of the same, as provided in the contract, time was an essential consideration of the contract. The court finds that the plaintiff employed to draw up said plans one White, then and afterwards a stockholder in the East Moline Company; that the plans were not prepared as provided for by the contract, namely, October 1st; that the deed presented by the defendant for lands was found to need correction and reforming, which was done within a couple of weeks after the 1st of October, 1895; and that neither party undertook at the time—October 1st—to take advantage of the other on their failure to perform the exact details provided for in the contract. The court finds that the plans in the hands of Mr. White were not finished until about the 1st of November; that bids were then received, which, in the aggregate, amounted to about $100,000; whereupon the plans were revised so that the buildings to be erected according thereto, would not have cost much to exceed, if anything, $50,000. The court finds that the said plaintiff, upon the coming in of the revised plans, took no immediate bids in the carrying out of the same, and, on the 12th day of December, 1895, having suffered fire at its works at Monmouth, concluded not to commence building in the fall of 1895. The court finds that the defendant, having full knowledge of the plaintiff's intention in the premises, elected not to thereupon annul the contract, but waived its performance within the time originally named, upon condition that the plans and the bids for the buildings should be so far advanced during the winter that work might begin early in the spring, not later than March. The court finds that the plaintiff took no diligent steps to complete the plans or obtain bids during the winter, or to get the enterprise in such situation that actual work upon the buildings might begin in March, or the opening of the spring, but, on the contrary, delayed doing anything until May, 1896. The court finds that thereupon, in May, 1896, a conference was had between the plaintiff and the defendant, wherein the plaintiff offered to proceed to erect the buildings, as provided for in the contract, provided the defendant would waive the delay up to that time; but that the defendant refused to make

any such waiver, but expressly stated that the plaintiff might proceed if it pleased, the defendant reserving the right to hold the plaintiff accountable for the delay, according to the letter of the contract. The court finds that the plaintiff, with full knowledge of this expressed purpose of the defendant, proceeded thereafter with the plans and bids, so that in June ground for the buildings was broken upon the land previously deeded to them by the defendant, and proceeded to build until the cost of the structure amounted to about $7,000, whereupon they called upon the defendant to give them the first $5,000 bonus provided for in the contract. The court finds that the defendant refused to advance said bonus, still claiming its right to damage for the delay, whereupon the plaintiff quit work on the buildings, and nothing more, except such as was necessary to close the buildings against the weather, has since been done. The court finds that the defendant, except a few delays in the matter of railway switches, and water (unsubstantial in themselves, and of no effect in causing the plaintiff's delay), performed on its part each and all the stipulations of the contract up to the date when the plaintiff quit work. The court finds that the plaintiff broke the contract as modified as aforesaid, in a substantial way, in not making plans and taking bids during the winter, and in not beginning the work before June, 1896. The court further finds that whatever injury the defendant suffered in the matter of the sale of its lots, as well as injury to other prospects, by reason of the plaintiff's failure to complete plans and take bids in the winter, or lay the foundations for its buildings in March, it is impossible to ascertain; but the greatest injury in that respect was caused by the delays in the autumn of 1895. There is no evidence that any considerable portion of such damage would have been repaired had the plaintiff proceeded to lay its foundations for its buildings in March, 1896. The court finds that on the 19th of August, 1896, the plaintiff wrote to the defendant, among other things, as follows:

"'We therefore give you notice of your default in the carrying out of the agreement, and in consequence of such default we have the right to elect to declare said contract forfeited, and void; and we do elect, and hereby notify you that we shall from this time forth consider said contract forfeited, and void, and have no force or effect, so far as we are concerned. But nevertheless we have the right to recover from you under the guaranty on said contract whatever damages we may have suffered, to wit, the amount of $50,000, and we hereby notify you that we have suffered damages to a large amount, largely in excess of $50,000, and that we shall hold you and your guarantors responsible for such damages. We hereby notify you that we have expended, in constructing buildings upon the real estate at East Moline which you have conveyed to us in the neighborhood of $10,000, and upon repayment to us of the amount so expended we will be willing, and hereby offer, to convey to you the said premises, free and clear from all claim or lien incurred by us. Yours, truly,

"'[Signed] The Weir Plow Co.'

"The court further finds that upon the foregoing facts the plaintiff is not entitled to recover from defendant. The court further finds that upon the foregoing facts the defendant is not entitled to recover on its set-off from the plaintiff. The court finds the issues on the original case brought by the plaintiff against the defendant in favor of the defendant and against the plaintiff."

E. McGinnis, for plaintiff in error.

W. W. Hammond, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge, upon this statement of the case, delivered the opinion of the court.

The principal contention in the case is whether the court erred in not giving judgment for the defendant below for the amount claimed as stipulated damages. The finding of facts being in favor of the defendant and against the plaintiff, it seems evident that nom-

inal damages might have been awarded to the defendant upon its counterclaim. The requirement for nominal damages, however, would be satisfied with a judgment for one cent, and the case might be reversed for not so awarding, if the rendering of a judgment for costs had depended thereon. But, so long as judgment for costs was given in favor of the defendant, we cannot reverse the judgment because one cent or five cents did not go with the judgment for costs, as nominal damages. It is presumable, under the circumstances, that the failure to allow nominal damages with the judgment for costs was the result of inadvertence. Laubenheimer v. Mann, 19 Wis. 519; Eaton v. Lyman, 30 Wis. 41; Hibbard v. Telegraph Co., 33 Wis. 558; Smith v. Machine Co., 26 Ohio St. 562; Mahoney v. Robbins, 49 Ind. 146; Palmer v. Degan, 58 Minn. 505, 60 N. W. 342.

But on the main question, of giving judgment for the $50,000 provided for in the contract, we think there was no error. The case is clearly one coming within the rule long ago laid down by the English and American courts, that where the agreement secures the performance or omission of various acts, together with one or more acts in respect to which the damages on a breach of the covenants are certain and readily ascertainable, and there is a sum stipulated as damages to be paid by each party to the other for a breach of any of the covenants, such sum is a penalty merely. Astley v. Weldon, 2 Bos. & P. 346–353; 3 Pars. Cont. (8th Ed.) 161, and cases cited in footnote; Bagley v. Peddie, 5 Sandf. 192; Trower v. Elder, 77 Ill. 452; Lyman v. Babcock, 40 Wis. 517.

The supreme court of Illinois, in Trower v. Elder, supra, laid down the rule as follows:

"Where there are several covenants or stipulations in an agreement, the damages for the nonperformance of some of which are readily ascertainable by a jury, and the damages for the nonperformance of the others are not measurable by any exact pecuniary standard, and a sum is named as damages for a breach of any of the covenants or stipulations, such a sum is held to be a penalty."

This principle, we think, is fairly applicable to the case at bar. Here are a great number of stipulations upon the part of either party, of varying importance, in regard to some of which the damages for nonperformance are readily ascertainable by a court or jury, while some are clearly of the contrary character, with one general provision for damages, equally applicable to each and all the various covenants. Take the one on plaintiff's part, for instance, providing that the buildings shall be kept insured for three-fourths their insurable value. The damages for a breach of such a stipulation are readily ascertainable by a court or jury. The same rule holds in regard to the provision for employing a certain number of men. Suppose a lesser number than 300 were employed; could it be supposed that the parties intended that the damages for employing only 275 men at the plant, instead of 300, should be $50,000? There are also various provisions on the part of the defendant below, like those in regard to providing street-car service, water supply, lighting station, and switching facilities, where the damage could no doubt be separately assessed in case of a breach, and where it would do violence to suppose that the parties could ever have intended that $50,000 should

be the stipulated sum to be paid for a breach of any one of these minor provisions. Where there are so many and various separate covenants upon either part to be performed, of varying importance, if the parties intend to stipulate the same large sum to be paid upon any breach, without any regard to the degree of importance it may have in the general scheme of the parties, certainly they should be required to make their meaning plain; and, if they do not make it clear that such was the intent, it is the more reasonable construction to construe such provision for damages as a penalty. This leaves each party free to prove the damages actually sustained. Again, if the intention in such a case is to make the agreed damages apply to some particular main provision of the contract, and not to all, this, also, should be made manifest by express terms.

In Taylor v. Sandiford, 7 Wheat. 13, Chief Justice Marshall lays down the rule somewhat more broadly than the subsequent English and American decisions would warrant, as follows:

> "In general, a sum of money in gross, to be paid for the nonperformance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of contract by the opposite party."

While that case was, no doubt, correctly decided, the general doctrine there laid down does not seem to take proper account of the cases where it is evident that the damages for a breach would be uncertain in their nature, and impossible of ascertainment by a jury. In these cases it is entirely proper for the parties to agree upon the amount of damages, and such agreements are upheld by, and are not in disfavor in, the courts. In such cases the rule is properly laid down by the appellate court of Illinois in Burk v. Dunn, 55 Ill. App. 25, as follows:

> "When the damages are considerable, are not capable of exact ascertainment, and rest mainly in estimation, and are based upon matters which are more or less uncertain, and where there is no fraud in procuring the contract, the amount fixed by the parties ought to be the guide for the court."

But we know of no cases recognizing an exception to the rule laid down as above in Parsons and in Bagley v. Peddie and Trower v. Elder, where there are various stipulations, under some of which the damages could be readily estimated, and others not, and where the provision for damages, as in the case at bar, applies to all alike. There can be no doubt, if the provision for damages had by agreement of parties been made to apply only to a main breach on the part of the plaintiff below in not erecting and completing the plant by a day certain, the damages for such a breach being entirely uncertain and speculative in character, that the provision would properly be construed as one for stipulated damages.

The counsel for plaintiff in error has, in his reply brief, contended for an exception to the rule he thinks applicable to the case, and for authority quotes from 1 Suth. Dam. § 294, as follows:

> "Where an agreement contains several stipulations, differing in importance, and a sum is mentioned as liquidated damages to be paid in case of a breach, and of such amount as is apparently appropriate to a total breach, it will be intended to fix the damages only for such a breach; and an intention will not

be imputed to make it payable for breach of minor and unimportant parts, in the absence of language very clearly expressing it."

But, upon examination of this statement in Sutherland, we find it wholly unsupported by any authority. The only case cited by him is Hoagland v. Segur, 38 N. J. Law, 230, which does not hold to such a doctrine. On the contrary, the general rule of the English and American cases, as above given, is distinctly affirmed and followed in that case. The court even lays down the rule quite as strongly as the general line of cases would warrant, where it says:

"While the courts have allowed parties to adjust in advance, and stipulate for damages to be awarded in certain cases for the nonperformance of agreements of this kind, they have adopted certain rules of construction for determining where such an adjustment has taken place. The general rule is that where the agreement contains disconnected stipulations, of various degrees of importance, the sum named will be considered as a penalty, though it is called 'liquidated damages,' unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be conferred. As was said by Lord Coleridge in Magee v. Lavell, L. R. 9 C. P. 115, the courts refuse to hold themselves bound by the mere use of the words 'liquidated damages,' and will look at what was considered, in reason, to have been intended by parties in relation to the subject-matter. The intention must be derived from the whole agreement, and, if it be doubtful upon the whole agreement whether the sum named was intended to be a penalty or liquidated damages, it will be construed to be a penalty."

This doctrine was applied by the New Jersey court to the case then in hand, and the provision in question, so far as it affected the breach, held in that case to be a penalty. It was as though the defendant in this case had sued to recover $50,000 as stipulated damages for a breach of the covenant to keep the buildings insured, or that to keep 300 men in its employ. It was not reasonable to suppose that the parties intended to have the provision for the payment of so large a sum as stipulated damages to apply to a covenant which prevented the defendant from receiving money on deposit, which was a minor stipulation of the contract, and held to be included in and part of the banking business. In that case, upon the sale of a banking house by the defendant, it was provided that defendant, after allowing a reasonable time to close out his business of banking, should not engage in the business again for 10 years, nor receive money on deposit. And it was stipulated that, if he did continue in the business contrary to the agreement, he should pay $10,000 as stipulated damages. He was sued for receiving money on deposit, and it was claimed that the $10,000 provision related to that stipulation. But the court held that receiving deposits was a necessary part of the banking business, which defendant had the right to carry on for a reasonable time until he could close out the business, and that by a true construction of the contract the provision for paying $10,000 as damages only applied to the stipulation against continuing in the banking business, and did not apply to the subordinate provision against receiving money on deposit. And in discussing that question the court used this language, which is Mr. Sutherland's only excuse for the principle he has laid down:

"In every case the parties to such an arrangement are in fact controlled, in fixing the sum which shall be compensation for nonperformance, by the im-

portance of the main object and purpose of the agreement, without regard to minor details. An intention to make the sum so determined on payable on the breach of minor and unimportant parts of the agreement will not be imputed, in the absence of language declaring such intention with precision."

The case is not by any means an authority favorable to the contention of the plaintiff in error. The judgment of the circuit court is affirmed.

In re RICHARDS.

(District Court, W. D. Wisconsin. June 12, 1899.)

No. 55.

1. BANKRUPTCY—PREFERENCES—DISSOLUTION OF LIENS.
   Where the sureties on the official bond of an insolvent and defaulting town treasurer paid the amount of his defalcation, and received from him, with knowledge of his insolvency, a judgment note for the amount so paid, and caused judgment to be entered thereon and execution issued and levied, upon learning that there were other judgment notes of the debtor outstanding, and five days thereafter the debtor filed his voluntary petition, and was adjudged bankrupt, *held*, that the judgment and levy were void, under section 67f of the bankruptcy act of 1898, and that the property levied on, or the proceeds of its sale, should go to the trustee in bankruptcy for the benefit of the general creditors of the estate.

2. SAME—VOLUNTARY AND INVOLUNTARY CASES.
   Bankruptcy Act 1898, § 67f, providing that liens obtained through legal proceedings against an insolvent debtor "at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt," is to be construed as applying to voluntary as well as involuntary cases, inasmuch as section 1, cl. 1, declares that "'a person against whom a petition has been filed' shall include a person who has filed a voluntary petition."

In Bankruptcy.

Reese & Carter, for bankrupt.
J. P. Smelker, for creditors.

BUNN, District Judge. This is an application by John Richards, Thomas Caygill, and Samuel Treloar to have the proceeds of the sale of a stock of goods, amounting to the sum of $1,080.92, paid over to them by the trustee, to be applied upon a judgment obtained in the state court against said bankrupt. The substantial facts are that the bankrupt, Richard T. Richards, having been elected in the spring of 1897 as town treasurer of the town of Linden, in Iowa county, obtained the consent of John Richards and Thomas Caygill to become his sureties upon an official bond which the law required him to give before entering upon the duties of his office. He held the office for one year, and at the end of his term was found to be short in his official accounts, and a defaulter upon his said bond, in the sum of about $1,350. As treasurer he had collected the taxes and had paid over the state and county tax, but not the town tax. Being unable to pay the same himself, he got his said bondsmen and one Samuel Treloar to pay the amount due to the town, and, to secure them, he gave them a judgment note

and certain mortgages upon real estate. The judgment note was for $1,400. There were also turned over, as collateral security, one-half of the book accounts belonging to the bankrupt, and a separate mortgage on the homestead given to Samuel Treloar, whose name was not on the bond, but who paid in cash $450, being one-third of the defalcation. On February 9, 1899, the payees in the note caused judgment to be entered up against the bankrupt for the amount of the note unpaid and interest, amounting to $1,137.10, issued execution thereon, and levied upon his stock of goods. The sale upon the execution was stayed by the injunctional order of this court. The reason one of the petitioners gives for entering up the judgment and issuing execution is that they had heard that Richard T. Richards, the bankrupt, had given other judgment notes, and they desired to get their judgment first, so that execution might be issued and a levy made. At the time of the execution of the note, as well as at the time of entering the judgment, Richard T. Richards was insolvent, and so known to be by the petitioners, and it is clear from the testimony that the judgment was entered and levy made for the purpose of gaining a preference over other creditors. A stipulation has been filed, in order to avoid costs, to the effect that the sheriff who made the levy and the trustee should jointly sell the property levied upon, and pay the proceeds into this court. Five days after the entry of the judgment, to wit, on February 14, 1899, Richard T. Richards filed his voluntary petition in bankruptcy, and was duly adjudged a bankrupt. The question is whether the petitioners gained a lawful preference by the lien of this execution which entitled them to the proceeds of the sale, or whether the money should go in equal proportions to the general creditors. Upon this question I entertain no doubt that the judgment and levy are void under the provisions of the bankrupt law, and that the money should go ratably to the creditors.

Section 67f of the bankruptcy act of 1898 provides as follows:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt."

Without aid derived from other parts of the law, it would be a question whether this provision applies to any but involuntary cases, as it would be awkward to say that in voluntary cases the petitioner files a petition against himself. Still it is difficult to see why congress should make any such distinction between voluntary and involuntary cases. The reason for declaring the judgment and levy void would be as cogent in the one case as the other. But, as it happens, congress has not left this provision open to construction, as it expressly provides in the very first sentence of the act that the words, "a person against whom a petition has been filed," shall include a person who has filed a voluntary petition. This would seem to leave no room for doubt about the validity of the petitioners' claim to precedence. The contention of counsel

for the petitioners, put in interrogative form in the brief, is as follows:

"Assuming, then, both that Richards was insolvent and that the petitioners knew it, the question is, can an insolvent borrow money and give a valid security? Shall advances in good faith to pay debts be protected? Will the court support securities given by an insolvent upon a bona fide advance of money to pay debts, where the transaction does not in any way injure the bankrupt or lessen his estate?"

These questions might perhaps be answered by asking another: What is a bankrupt law good for, one leading object of which is to divide the insolvent's estate equally between creditors, if one creditor, seven months after the law has gone into effect, can obtain a judgment against the debtor, levy upon and sell his entire stock of goods, and leave the other creditors helpless? Upon equitable principles, it is difficult to see what advantage these petitioners should have over other creditors. They have never sold him any goods or put a dollar into his business, and two of them, John Richards and Thomas Caygill, in paying the bankrupt's debt, discharged their own obligations. They were held as surety upon his official bond, and, with Samuel Treloar, paid each one-third the amount of the defalcation to discharge the claim of the town against them and the bankrupt jointly and severally. Treloar's name was not on the bond, and a separate mortgage of the bankrupt's homestead was given to him to secure the $450 which he advanced to pay one-third of the indebtedness to the town. What superior equity, then, have John Richards and Thomas Caygill over the other creditors who sold Richard T. Richards the goods that enabled him to carry on his business,—perhaps the very goods which were seized under the execution, and which would have been sold to pay the petitioners' debt had it not been for the injunctional order issued by this court? If it were a question of superior equities, I cannot see that the petitioners have any better or stronger footing than the other creditors. But it seems quite clear to me that, under the bankrupt law, these creditors, so far as they are unsecured, should share pro rata with the other unsecured creditors. The prayer of the petitioners is therefore denied.

In re WOODARD.

(District Court, E. D. North Carolina. June 28, 1899.)

1. BANKRUPTCY—EXEMPTIONS—HOMESTEAD.
   Under Bankruptcy Act 1898, § 6, providing that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition," the extent and the duration of a homestead allotment made in a court of bankruptcy are the same as prescribed by the law of the state. The bankruptcy act neither enlarges nor diminishes the exemption under the laws of the state.

2. SAME—ASSETS OF ESTATE—REVERSIONARY INTEREST IN HOMESTEAD.
   Where the exemption law of the state (Const. N. C. art. 10, §§ 2, 3) provides that every homestead, not exceeding a certain value, shall be exempt from sale on execution or other final process, and shall continue exempt